THE COMMONWEALTH LAWYER

Journal of the Commonwealth Lawyers' Association

April 2011 Vol 20, No 1

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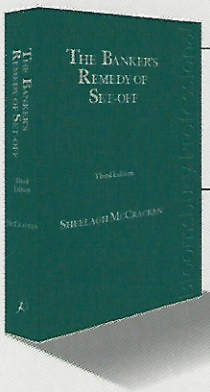

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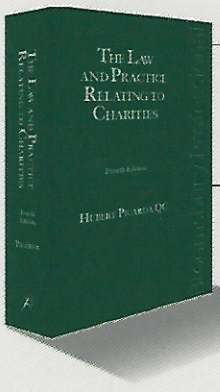

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The Commonwealth Lawyers' Association exists to maintain and promote the rule of law throughout the Commonwealth by ensuring that the people of the Commonwealth are served by an independent and efficient legal profession.
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April 2011

[Cover photo: The Prime Minister of India, Mr Manmohan Singh, in conversation with the Chief Justice of India, Mr Sarosh Kapadia, at the inaugural ceremony of the 17th Commonwealth Law Conference, Hyderabad, 5-9 February 2011. Also seen in the picture is the Governor of Andhra Pradesh, Mr ESL Narasimhan, and the Law Minister of India, Mr Veerappa Moily.]

Message from the President

I am delighted to write this message in this the very first issue of *The Commonwealth Lawyer* since the change of baton at the 17th Commonwealth Law Conference in Hyderabad, India, last February.

Visiting Hyderabad was, in a sense, a homecoming for me, as it was evocative of the vibrant and bustling city of Lagos, Nigeria, where I currently reside. Hyderabad, like Lagos, is a heady mix of the ancient and modern. Tradition walked in hand with the latest technology the 21st century had to offer in this historic city, which also hosts the Silicon Valley of India. The conference was a great success and a credit to the indefatigable local organising committee who worked tirelessly to ensure that the event was truly memorable. Soli Sorabjee and R Santhanakrishnan in particular deserve commendation as "Commonwealth champions".

The CLA held its General Meeting in the wings of the conference and members elected a new Council to serve for 2011-13. I would like to thank those Council members who stood for re-election and welcome the following new members: Yusuf Ali (Nigeria), Jeffrey Forest (England & Wales), Christina Ioannidou (Cyprus), Jamie Millar (Scotland), Vimbai Nyemba (Zimbabwe). I look forward to working with you all in the years ahead and in what will no doubt be both a challenging and an exciting time for the CLA.

The CLA has continued to fulfil its mandate in monitoring the rule of law across the Commonwealth and has issued a number of statements of interest as follows:

- In February, the CLA released a statement calling for the release of Al Amin Kimathi, a Kenyan human rights defender who was subject to arbitrary detention by the Government of Uganda;
- In April, the CLA published a statement commending the Senate and the House of Representatives in the Federal Republic of Nigeria for passing their respective versions of the Freedom of Information Bill (the Bill). The CLA urged the Senate and House of Representatives to harmonise the two versions of the Bill and promptly transmit the final version to the office of the Clerk of the National Assembly for signature by the President;
- In April, the CLA, together with the Bar Human Rights Committee (BHRC), also issued a statement expressing concern about the current atmosphere of fear and intimidation surrounding the blasphemy laws in Pakistan. The CLA urged the Government of Pakistan to, inter alia, carefully scrutinise the operation of those laws and to undertake a detailed assessment of the case for their abolition or reform.

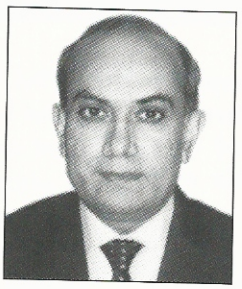
The CLA continues to work on a number of long-term projects such as the *Commonwealth (Latimer House) Principles on the Accountability of and the Relationship between the Three Branches of Government* (the Principles). In March, the Working Group, of which the CLA is a founder member, made a detailed submission on the implementation of the Principles to the Commonwealth Expert Group meeting on the Rule of Law that was held in Ottawa, Canada. The Hon Life President of the CLA, Colin Nicholls QC, was invited to participate, and he attended the meeting. He presented the submission and we await the outcome and recommendations which will be published in July.

In April, the CLA submitted an updated Information Paper on the death penalty in the Commonwealth for consideration by the Senior Officials of Law Ministries of the Commonwealth at their next meeting in July. The paper set out the position in relation to the death penalty in every Commonwealth country, and noted the trend towards abolition. This is just a snapshot of the work that the CLA has undertaken in recent months and further information on all our activities is available at *www.commonwealthlawyers.com*.

The CLA will be busy in the coming months with ongoing work in relation to the decriminalisation of sexual orientation legislation and research into judicial appointments and blasphemy legislation in the Commonwealth. The CLA Executive Committee and Council will also be undertaking a strategic review of the organisation and its achievements over the last 28 years with a view to modernising and increasing the impact of the CLA in the future. I would like to take this opportunity to encourage all members to send your views and any suggestions you may have in relation to all aspects of the CLA in order to enable these to be included within the review. Please send any comments and/or suggestions to the Secretary General at *cla@sas.ac.uk*.

– Boma Ozobia

Editor's Note



This issue brings a selection of articles from the 17th Commonwealth Law Conference which successfully concluded on 9 February in Hyderabad, India. Many of our readers were, of course, present on the occasion, but those who may not have been able to make it in person would, I hope, benefit from reading some of the papers presented there.

Pheroze Nowrojee, a senior member of the Kenyan bar, discusses the role that lawyers are often asked – and expected – to play during troubled times: a theme on which he has spoken eloquently on numerous occasions. Such actions, he notes, are fraught with risks, but they should be seen as part of the traditions of the Bar and Bench. In his article he cites the case of two Kenyans, an advocate and an NGO worker, who were recently subjected to mistreatment by authorities in neighbouring Uganda where they had gone to assist other Kenyans held in detention. Nowrojee's passionate speech at the Hyderabad conference was instrumental in the CLA Council passing a resolution protesting against the behaviour of the Ugandan authorities.

Human rights is the subject of another article in this issue, albeit in the context of how jurisprudence from Europe has been influencing the decisions of English courts. Nicholas Blake, a London-based High Court judge, argues that a 'sensitive dialogue' between international courts, national judiciaries and national executives tend to produce better laws that conduce to a greater respect for human dignity. Interestingly, Blake disagrees with the recent criticism aired by Lord Hoffman of the inappropriateness of bodies such as the European Court of Human Rights to be prescriptive about how broadly-worded human rights provisions should be interpreted and applied in domestic contexts.

Lord Hoffman's reflections have, understandably, triggered a vigorous debate on what is becoming an increasingly contentious issue in British public discourse today. It is a debate which, as even those opposed to Hoffman's views have accepted, deserves to be had, not least because it deals with a point of great importance to any democracy. In essence, Hoffman questioned both the legitimacy and the competence of the Strasbourg court to second-guess the judgment of a duly-elected national parliament. Blake argues that Hoffman's views do not take sufficient notice of the interests of minorities who may not be properly represented in parliament.

The debate has been made even more interesting by the intervention of Lord Neuberger, the Master of the Rolls, who in a widely-publicised speech delivered on 7 April 2011, raised the possibility of the United Kingdom disregarding decisions from the Strasbourg court without fear of judicial reprisals. His remarks deserve to be quoted verbatim:

> It is true that membership of the convention imposes obligations on the state to ensure that judgments of the Strasbourg court are implemented, but those obligations are in international law, not domestic law. And, ultimately, the implementation of a Strasbourg, or indeed a domestic court judgment is a matter for parliament. If it chose not to implement a Strasbourg judgment, it might place the United Kingdom in breach of its treaty obligations, but as a matter of domestic law there would be nothing objectionable in such a course. It would be a political decision, with which the courts could not interfere.

Doubtless, this is a debate which will go on for some time yet. I would urge readers who may have a viewpoint that they wish to share to write in. We are always happy to provide a platform for discussion on such matters.

Another topical matter that is the subject of comment in this issue is the limits to which freedom of information can be carried in democratic societies governed by the rule of law. Charles Glasser Jr, an American lawyer, offers his views on where the balance needs to be struck between the public's right to know and competing interests such as individual privacy or commercial confidentiality. The salient point that Glasser makes is that "overuse of secrecy creates a market for what many now refer to as call 'information pornography'." Freedom of information has, of course, been in the news in another context as well, viz the pros and cons of the systematic release, by the WikiLeaks website, of classified governmental information and its republication by several newspapers around the world.

Happy reading!

– Dr Venkat Iyer

Case Notes

AUSTRALIA: Transfer of prisoner between two Territories meant Director of Public Prosecutions in former Territory could not determine length of non-parole period of a sentence despite statutory power to do so as this only applied to current prisoners in the jurisdiction.

[High Court: *Bakewell v The Queen*, 7 July 2009, [2009] HCA 24]

In April 1989 B was charged with aggravated unlawful entry of a dwelling house, aggravated sexual assault, murder and stealing, pleading not guilty to the charge of murder but guilty to the other three charges. At trial in the Supreme Court of the North Territory (SCNT) B was found guilty of murder and sentenced by Kearney J to life imprisonment. No minimum term of imprisonment could be fixed.

On 11 February 2004 the Sentencing (Crime of Murder) and Parole Reform Act 2003 (NT) ('the Act') came into force, which provided a 20 year fixed non-parole term to be applied to B.[1] On 15 April 2005, B was transferred from the North Territory ('the NT') to the South Territory. Then in June 2007, under s 19(1)[2] of the Act the Director of Public Prosecutions for the North Territory ('the Director') made an application to revoke this 20 year fixed period and apply a 25 year non-parole fixed period. The primary judge (Southwood J) concluded that s 19(3)[3] of the Act was engaged and was bound to fix the period of 25 years before the appellant was eligible for parole. The Court of Criminal Appeal of the NT allowed B's appeal against this,[4] dismissing the application on the basis that Southwood J had possessed discretion in the matter and the application did not fulfill criteria set out in s 19(2).[5]

The Director made a second application relying on provisions inserted in the Act by the Sentencing (Crime of Murder) and Parole Reform Amendment Act 2008 (NT) ('the Amendment Act'). It is this second application that is in question. B challenged the validity of these provisions, citing *Kable v DPP* ([1996] HCA 24). The Full Court dismissed the appeal and by special leave B appealed to the High Court. The High Court asked the parties and the Attorney-General for South Australia to address the premise of B's argument before the Court considered the constitutional validity. Leave was granted to B to amend his notice of appeal. Two arguments were brought forward; the first being the construction and application of the Prisoners (Interstate Transfer) Act 1982 (NT) (PA 1982) and Interaction of Prisoners (Interstate Transfer) Act 1982 (SA) (IPA 1982) and the second being the construction and application of the Act.

Under both Acts, once B arrived in South Australia the life sentence and minimum term of 20 years fixed and imposed upon B by the SCNT ceased to have effect in that territory and subsequently imposed on B by the Supreme Court of South Australia (SCSA). This was subject to an exception 'for the purpose of an appeal against or review of' a sentence and for cases where a minimum term deemed to have been fixed by a corresponding court of South Australia was varied 'on a review by or appeal to a court' of the transferring jurisdiction. The Act could be engaged only in respect of a prisoner who met two criteria. First, the subject of the application, was serving a sentence of imprisonment for life for the crime of murder (imposed and being served in the NT) and secondly, that the subject was a 'prisoner'.

In allowing the appeal, dismissing the second application made by the Director and reinstating the 20 year non-parole fixed period, it was held that:

(1) Upon his arrival in South Australia, B ceased to be serving a sentence of life imprisonment under NT law. He was no longer a 'prisoner' within the meaning of Div 1 of Pt 5 of the Act. The term 'prisoner' when used in those provisions should be understood as meaning a prisoner serving a sentence under and in accordance with NT law.

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1 S 17 provides that Div 1 of Pt 5 applied to prisoners who, at the commencement of the Act, were serving a sentence of imprisonment for life for the crime of murder. Section 18 provides that, subject to Div 1 of Pt 5: (a) the prisoner's sentence is taken to include a non-parole period of 20 years; or (b) if the prisoner is serving sentences for 2 or more convictions for murder – each of the prisoner's sentences is taken to include a non-parole period of 25 years, commencing on the date on which the sentence commenced.

2 S 19 permits the Supreme Court of the Northern Territory, on the application of the Director, to revoke the non-parole period fixed by s 18 in respect of a prisoner and either fix a longer non-parole period or refuse to fix a non-parole period,

3 S 19(3) of the 2003 Reform Act provided that, subject to some qualifications which are not immediately relevant, on application by the Director, 'the Supreme Court must fix a non-parole period of 25 years' if, among other things:

'The act or omission that caused the victim's death was part of a course of conduct by the prisoner that included conduct, either before or after the victim's death that would have constituted a sexual offence against the victim.'

4 *DPP v Bakewell* [2007] NTSC 49.

5 S 19(2) provides that the application is must be made: (a) not earlier than 12 months before the first 20 years of the prisoner's sentence is due to expire; or (b) If, at the commencement of this Act that period has expired – within 6 months after that commencement.

(2) In all Acts of the NT legislature, references to localities, jurisdictions and other matters and things shall be construed as references to such localities, jurisdictions and other matters and things in and of the territory, which is reason enough to conclude that 'prisoner' is to be understood as a prisoner 'in and of' the territory. Section 23 of the PA 1982 provided that a sentence ceased to have effect in the territory upon B's arrival in South Australia and therefore B was no longer a 'prisoner'.

(3) The Director's application was not deemed a review as it does not seek any reconsideration or re-examination of the sentence or of that sentence as subsequently modified by statute, rather the institution of a new and separate proceeding for the revocation of what has been fixed by law and a determination of the minimum term according to criteria under s18(a) of the Act.

(4) Because the Director's application did not class as a review, the Act could only be engaged by reading Div 1 of Pt 5 as impliedly repealing PA 1982 s 23 to permit dealing with a person who was not subject to a NT sentence.

(5) To do that would require reading 'prisoner' as extending to a person who had been, but was no longer, serving a sentence under NT law. The term 'prisoner' in Div 1 of Pt 5 should be given its natural meaning. The application made by the Director in respect of the appellant did not relate to a 'prisoner'.

CANADA: Refusal to have photograph on driving licence as required by statute could not be justified by claiming right to freedom of religion. Limitation of the right was proportionate to the aim of the legislation, namely limiting the risk of identity-related fraud.

[Supreme Court: *Alberta v Hutterian Brethren of Wilson Colony*, 24 July 2009, 2009 SCC 37]

The Hutterian Brethren objected to the requirement for all driving licences to contain a photo being made universal on religious grounds. They had previously been permitted to use non-photo licences. They sincerely believe that the Second Commandment prohibits them from having their photographs willingly taken and claimed that not being able to obtain a driving licence threatened their lifestyle in the Colony and thus their religious freedom under s 2(a)[6] of the Canadian Charter of Rights and Freedoms ('the Charter'). The Province of Alberta provided evidence that the photograph requirement was aimed at reducing identity theft and fraud.

The Alberta Court of the Queen's Bench held that the universal photo requirement did limit the Brethren's right to religion under the Charter and that this was not shown to be justified as it did not meet the requirement of minimal impairment under s 1[7] of the Charter. An appeal to the Alberta Court of Appeal was dismissed on the ground that the photo requirement did not minimally impair the right because it did not reasonably accommodate the Colony members' religious freedom. The members were exempt from the requirement for nearly 30 years with no evidence of resultant harm. The regulation provided only a very slight protection against identity theft and fraud while completely infringing the member's rights.

The Province of Alberta appealed to the Supreme Court.

In allowing the appeal (Abella, LeBel and Fish JJ dissenting), it was held that:

(1) The impugned regulation is a reasonable limit on religious freedom, demonstrably justified in a free and democratic society.

(2) An infringement of s 2(a) is made out where: (1) the claimant sincerely believes in a belief or practice that has a nexus with religion; and (2) the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial. The Province concedes the first element of this test, namely a sincere belief in a belief or practice that has a nexus with religion. The previous courts proceeded on the basis that the second element was met and the requirement interferes with religious freedom in a way that is more than trivial or insubstantial. This Court therefore followed that assumption.

(3) In deciding whether the limit on the s 2(a) right was justified, the bar of constitutionality must not be set so high that responsible, creative solutions to difficult problems such as identity theft would be threatened. The limit must firstly be prescribed by law. Regulations are law.

(4) The purpose for which the limit is imposed must be pressing and substantial. Maintaining the integrity of the driver's licensing system in a way that minimises the risk of identity theft is clearly a goal of pressing and substantial importance, capable of justifying limits on rights.

(5) The means by which the goal is furthered must be proportionate. To be proportionate the limit must firstly be connected rationally to the purpose. The argument that exempting a few hundred Hutterites from the requirement

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[6] S 2(a) provides: 'Everyone has the following fundamental freedoms: (a) freedom of conscience and religion.'

[7] S 1 provides: 'The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.'

was minimal is rejected. The universal photo requirement is rationally related to its goal of protecting the integrity of the drivers licensing system and preventing it from being used for the purposes of identity theft.

(6) Secondly the limit must minimally impair the right. The Government must show that the measures at issue impair the right of religious freedom as little as reasonably possible in order to achieve the legislative objective. The test is whether there is an alternative, less drastic means of achieving the objective in a real and substantial manner. There was no alternative in this case.

(7) Thirdly, the law must be proportionate in its effect. When one balances the harm done to the claimants' religious freedom against the benefits associated with the universal photo requirement for driver's licences, the limit on the right should be proportionate in effect to the public benefit conferred by the limit. The salutary effects of the legislation include enhancing the security of the drivers licensing scheme, assisting in roadside safety and identification and eventually harmonising Alberta's licensing scheme with those in other jurisdiction. These are compared to the deleterious effects of the limit on Colony members' exercise of their s 2(a) right including the seriousness of the effects of the limit on their freedom of religion.

(8) The limitation still allowed the members to follow their religious beliefs and practices. The seriousness of a particular limit must be judged on a case-by-case basis. The impact of the limit on religious practice in this case is that Colony members will be obliged to make alternative arrangements for highway transport. This would effect the Hutterites from a financial perspective and may force them to depart from their tradition of being self-sufficient in terms of transport. The impact was not deemed trivial but it was concluded that it did not affect their right to pursue their religion. Balancing the salutary and deleterious effects of law the impact on religious was deemed to be proportionate.

(9) Section 15[8] of the Charter is aimed at preventing discriminatory distinctions that impact adversely on members of groups on grounds as identified by s 15. These include religious grounds. The matters considered in relation to s 2(a) also relate to a claim under s 15. Therefore this claim is also rejected.

Per Abella, LeBel and Fish JJ dissenting:

(1) The Government must demonstrate that the benefits of infringing on religious freedom outweigh the harm it imposes. The photo requirement has been in place for 29 years during which time the Hutterites have been exempt. There have been no incidents. Over 700,000 Albertans do not have driving licences and are therefore not in the database. This number is significant compared to 250 exempted Hutterites. The benefits to the Province are therefore marginal. The impact on the Hutterites affects them not only individually but also severely compromises the autonomous character of their religious community. The salutary effects of the infringing measure are considered slight and largely hypothetical. It is therefore concluded that the benefits of the infringement is not balanced against the damage it causes. The overall requirement of proportionality is not met.

(2) It is agreed that the objective to protect the integrity of the licensing system and minimise the risk of identity fraud is important. It is agreed that this objective is rationally connected to the legislative goal.

(3) The driver's licence that the legislation denies is not a privilege. It is granted because a person meets the required standards and conditions and not at the government's discretion. Other approaches to dealing with identity fraud could be devised that could establish a proper balance between the social and constitutional interests at stake.

CANADA: Clarification of balancing exercise which must be undertaken when determining whether to exclude evidence obtained in breach of Constitutional rights, weighing, *inter alia*, the severity of the breach against the risk of bringing the administration of justice into disrepute.

[Supreme Court: *R v Grant*, 17 July 2009, 2009 SCC 32]

G, a young black man, was stopped by a uniformed police officer on routine patrol of a high crime neighbourhood. Two plainclothes police officers had noticed G staring at them and fidgeting with his clothes. The officers approached G, taking up positions behind him and showing their badges. When asked if he was in possession of anything he should not be, G admitted he had 'a small bag of weed' and a firearm. At this point, the officers arrested and searched G, seizing the marijuana and a loaded revolver. They advised him of his right to counsel and took him to the police station.

[8] S 15 provides: '(1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. (2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.'

At trial, G alleged violations of his rights under ss 8,[9] 9[10] and 10(b)[11] of the Canadian Charter of Rights and Freedoms ('the Charter'). The trial judge found no Charter breach and admitted the firearm. The Court of Appeal upheld the convictions, concluding that a detention had crystallised during the conversation with the officer, before G made his incriminating statements, and that the detention was arbitrary and in breach of s 9 of the Charter. The officers acknowledged at trial that they did not have legal grounds or a reasonable suspicion to detain G prior to his incriminating statements and also failed to advise G of his right to speak to a lawyer before the questioning.

G appealed to the Supreme Court on the basis that the gun was obtained in breach of his Charter rights and should therefore have been excluded as evidence under s 24(2).[12]

In allowing the appeal on the trafficking charge but dismissing the appeal for exclusion of evidence on the basis of arbitrary detention, it was held that:

Per McLachlin CJ, LeBel, Fish, Abella and Charron JJ:

(1) When faced with an application for exclusion under s 24(2), a court must assess and balance the effect of admitting the evidence on society's confidence in the justice system having regard to: (a) the seriousness of the Charter-infringing state conduct, (b) the impact of the breach on the Charter-protected interests of G, and (c) society's interest in the adjudication of the case on its merits (*R v Collins* [1987] 1 SCR 265 distinguished).

(2) Whilst the impact of the breach on G's Charter-protected rights weighs strongly in favour of excluding the gun, the public interest in the adjudication of the case on its merits weighs strongly in favour of its admission. As the police officers were operating in circumstance of considerable legal uncertainly, this tips in the balance in favour of admission.

(3) Detention under ss 9 and 10 of the Charter refers to a suspension of the individual's liberty interest by a significant physical or psychological restraint. Psychological detention is established either where the individual has a legal obligation to comply with a restrictive request, or a reasonable person would conclude by reason of the state conduct that he or she had no choice but to comply.

(4) The court should apply the three lines of enquiry identified in Collins (above) following which the judge must determine whether, on balance, the admission of evidence obtained by the Charter breach would bring the administration into disrepute. Where the breach is less egregious and the intrusion is less severe, reliable evidence obtained from G's body may be admitted.

Per Binnie J partially concurring:

The approach taken in such cases must a) not be too claimant-focused and b) take into account adequately what the police officer's perception of G was at the time the person was stopped (*R v Therens* [1985] 1 SCR 613 distinguished). There should not be too much focus on the claimant's perception of psychological pressure.

Per Deschamps J partially concurring:

In determining whether the inclusion of the evidence would bring the administration into disrepute, the judge must strike a balance between the public interest in protecting the Charter right and the public interest in an adjudication on the merits.

HONG KONG: Definition of mother under intestate legislation referred to natural birth mother, not 'legal' mother under Chinese law and custom, and did not amount to unlawful discrimination.

[Court of Final Appeal: *Leung Lai Fong & Anor v Ho Sin Ying*, 24 July 2009, [2009] HKFCA 68]

L and T married in 1947 and had three children together, including Dr T, the deceased. T later took H as his concubine according to Chinese law and custom and the marriage of T and L was validly dissolved, also under Chinese customary law. In 1958 T held a *fuzheng*, a ceremony in which H became his principal wife and the *jimu* (step mother) of L's children. It is undisputed that L's divorce severed her relationship with T and his family but not with her children. Therefore, according to Chinese customary law, her children (including Dr T) would have a *jimu* (legal mother) and a *chumu* (natural mother). Dr T died intestate in 2001 (by which time T had passed away) and his residuary estate fell to be governed by the Intestates' Estate Ordinance, Cap 73 ('the Ordinance'). According to s 4(7) of the Ordinance, if an intestate leaves no husband or wife and no issue but one parent, then his residuary estate shall be

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[9] S 8 provides: 'Everyone has the right to be secure against unreasonable search or seizure.'

[10] S 9 provides: 'Everyone has the right not to be arbitrarily detained or imprisoned.'

[11] S 10(b) provides: 'Everyone has the right on arrest or detention to retain and instruct counsel without delay and to be informed of that right.'

[12] S 24 provides: (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. (2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.'

held in trust for his father or mother absolutely. Furthermore, under Rule 21(1) of the Non-contentious Probate Rules, Cap 10A (NCPR), where a person dies wholly intestate, persons having a beneficial interest in the estate are entitled to a grant of letters of administration in the order of priority set out in the rule, according to which the father or mother of the intestate is entitled to a grant under Rule 21(1)(iii). The case turns on the definition of 'mother'. Neither the Ordinance nor the Rules contain any definition of the word. L maintained that the meaning is 'natural mother' and as such she is the only person entitled to Dr T's estate. H argued that 'mother' must be construed to mean 'legal mother', and as she had become T's principal wife and the only *jimu* of Dr T in the fuzheng ceremony, she was entitled to inherit to the exclusion of L. The trial judge held in L's favour and his decision was upheld by the Court of Appeal. H appealed to the Court of Final Appeal on the basis of her status as the only legal mother, and on the grounds that the judge's construction of s 4(7) did not conform to Articles 19 and 22 of the Hong Kong Bill of Rights which are similar to Articles 23 and 26 of the International Covenants of Civil and Political Rights (ICCPR) as applied to Hong Kong through Article 39 of the Basic Law.

In dismissing the appeal, it was held that:

(1) A new set of rules was intended to establish a new and unequivocal regime for intestate succession in Hong Kong from 7 October 1971, as made clear in s 4(1) of the Ordinance and closely follows the Administration of Estates Act 1925 as amended by other English Acts. It is the intention of the new legislation that such relationships are understood in the context of the family law reform[13] and succession reform[14] legislation enacted on 7 October 1971. The succession reform legislation provides for the freedom of testamentary disposition by will and, in the absence of any will, for intestate distribution under the Deceased's Family Maintenance Ordinance, if the need arises. Chinese customary law concepts therefore have no place in intestate succession after 7 October 1971.

(2) The word 'mother' should be construed as the natural mother, i.e. the woman who gives birth to the intestate, according to the common law rule of statutory construction that an ordinary word should be given its ordinary meaning unless the context otherwise requires. It was not the intention of the legislature to determine succession by trial on mixed law and each time the question arose as to whether another person were legally recognised as the mother. Furthermore H was, in law and practice, Dr T's step mother. If the legislature intended to cover a broader class of people – namely natural mother, step mother and legal mother – they would have defined the term as such. No definition was included.

(3) It was submitted that the courts are obligated to ensure that all laws of the State are consistent with the ICCPR, and thus have the power to construe any law legislation taking into account the provisions of the ICCPR, even when it is a law dealing with inter-citizen disputes as in this case (*Tam Hing Yee v Wu Tai Wai* [1992] 1 HKLR 185, *Cheung Ng Sheong v Eastweek* Publisher Ltd (1995) 5 HKPLR 428, and *Solicitor* (302/2002) *v Law Society of Hong Kong* [2006] 2 HKC 40 considered). However, by enacting s 7 in the Bill of Rights Ordinance, the law has expressly and unequivocally stated that the ICCPR binds only the government and public bodies (*Secretary for Justice & Others v Chan Wah & Others* (2000) 3 HKCFAR 459 at 470 G-471 A applied). On this basis, the Bill of Rights is not engaged in the present case. Although it was also submitted that even if the Bill of Rights were not engaged, the Ordinance should still be construed consistently with the ICCPR it was not seriously pursued before the Court of Appeal, and so is not considered in this appeal.

(4) However, even if the Bill of Rights were engaged, it would not assist H in this case. In construing s 4(7), the court must adopt a remedial construction such that it conforms to the requirements of Articles 19 and 22 (the local equivalent of Articles 23 and 26 of the ICCPR). Article 19(1) provides for the protection of the family as a natural and fundamental group unit of society. Although H was deemed 'legal mother' in the *fuzheng*, s 4(7) of the Ordinance provides for a natural mother to inherit upon the intestacy of her natural child. A natural mother who has divorced the father severed only her ties with her husband, not her child. She is therefore not an outsider and s 4(7) is consistent with Article 19 of the Bill of Rights (*Marckx v Belgium* (1979) 2 EHRR 330 considered and distinguished).

(5) Article 22 protects a person against unlawful discrimination. However, there are fundamental differences among the status of a natural mother, whose child is linked by blood, a legal mother, whose status is a question of law and fact, and an adoptive mother, whose status is as a result of a court order. It is reasonable to treat these classes of persons differently. Therefore the fact that H's status as legal mother is not recognised for the purposes of s 4(7) does not mean that she is at a disadvantage when compared with a natural or adoptive mother, for

[13] Family law reform legislation: the Marriage Reform Ordinance, Cap 178, the Married Persons Status Ordinance, Cap 182, and the Legitimacy Ordinance, Cap 184.

[14] Succession reform legislation: the Wills Ordinance, Cap 30, the Intestates' Estates Ordinance, Cap 73, the Deceased's Family Maintenance Ordinance, Cap 129, and the Probate and Administration Ordinance, Cap 10.

whom the Ordinance provides, and would not constitute unlawful discrimination against the legal mother.

INDIA: Section 377 of the Indian Penal Code which criminalised adult consensual homosexual sex breaches Articles 14 and 15 (right to equality before the law and prohibition of discrimination) and Article 21 (protection of life and personal liberty) of the Constitution.

[High Court of Delhi: *Naz Foundation v Government of NCT of Delhi & Ors*, 2 July 2009, [2009] INDLHC 2450]

The Naz Foundation ('the Foundation') submitted a petition to the High Court to challenge the constitutional validity of s 377 of the Indian Penal Code, 1860 ('the Code'). The Code criminalised what are termed 'unnatural offences' which are defined as 'carnal intercourse against the order of nature with any man, woman or animal'. In Khanu v Emperor AIR 1925 Sind 286 it was held that 'the natural object of carnal intercourse is that there should be the possibility of conception of human beings'. Therefore s 377 of the Code criminalised consensual sexual acts between adults in private other than heterosexual acts. The Foundation argued that in doing so it infringes fundamental rights guaranteed under Articles 14,[15] 15,[16] 19[17] and 21[18] of the Constitution of India. An earlier petition was dismissed by the same Court in 2004.

The Foundation claimed the legislation impaired HIV/AIDS prevention efforts because of discrimination by Sate agencies against the gay community and denied them fundamental human rights. In addition the criminalising of homosexuality was leading to abuse of the lesbian, gay, bisexual and transgender (LBGT) community and forcing them underground. The Foundation contended that the Code denies fundamental rights such as the right to life and liberty under Article 21. The Union of India filed two contradictory affidavits. One from the Ministry of Home Affairs justified the legislation and argued that Indian society was not ready to show greater tolerance to homosexuality. The other affidavit from the Ministry of Health and Family Welfare said that the homosexual community were particularly susceptible to attracting HIV/AIDS and that this current legislation meant that those in high risk groups are mostly reluctant to reveal same sex behaviour due to the fear of law enforcement agencies thus hampering HIV/AIDS prevention efforts.

In allowing the petition and holding that s 377 of the Indian Penal Code violated the Constitution, it was held that:

(1) Inclusiveness is an underlying theme of the Indian Constitution and recognises a role for everyone including those perceived as 'deviant' or 'different'.

(2) Indian constitutional law does not permit statutory criminal law to be held captive by popular misconceptions of LGBT people.

(3) Section 377 of the Code in criminalising consensual sexual acts of adults (anyone 18 years and above) in private violates Articles 21, 14 and 15 of the Constitution. However, it will continue to govern non-consensual penile non-vaginal sex and penile non-vaginal sex involving minors.

(4) A number of significant national and international cases were discussed covering areas including dignity, privacy, sexuality and identity, and criminalisation, including: India (*Maneka Gandhi v Union of India* (1978) 1 SCC 248); US (*Jane Roe v Wade* 410 US 113 (1973); *Lawrence v Texas* 539 US 558 (2003); *Romer v Evans* 517 US 620 (1996)); UK (*Dudgeon v UK* 45 Eur Ct HR (ser A) (1981)); Canada (*Corbiere v Canada* [1999] 2 SCR 203; *Egan v Canada* 1995) 29 CRR (2nd) 79); Republic of Ireland (*Norris v Republic of Ireland* 142 Eur Ct HR (ser A) (1988)); South Africa (*The National Coalition of Gay & Lesbian Equality v The Ministry of Justice* [1998] ZACC 15; *Prinsloo v Van Der Linde* 1997 (3) SA 1012 (CC)); *Australia* (Toonen *v Australia* No 488/1992 CCPR/C/ 50/D/488/1992, March 31, 1994).

(5) This judgment will not result in re-opening criminal cases involving s 377 of the Code that have already been decided.

NAMIBIA: Police had been negligent in their duty to protect a suspect from committing suicide when in custody.

[Supreme Court: *Shaanika v Ministry of Safety and Security*, 23 July 2009, [2009] NASC 11]

On 29 January 2004 N committed suicide whilst under the control and supervision of the Namibian police. S, the mother and natural guardian of the deceased's minor son, subsequently issued combined summons in the High Court where she claimed for loss of support as a result of the death of N. S further alleged that the Namibian police breached their duty of care owed to N as they acted negligently in allowing him to obtain a pistol whilst under their control. The Minister of

[15] Art 14 provides: 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

[16] Art 15 provides: 'The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.'

[17] Art 19 provides: '(1) All citizens shall have the right—(a) to freedom of speech and expression;(b) to assemble peaceably and without arms;(c) to form associations or unions;(d) to move freely throughout the territory of India;(e) to reside and settle in any part of the territory of India;(g) to practise any profession, or to carry on any occupation, trade or business.'

[18] Art 21 provides: 'No person shall be deprived of his life or personal liberty except according to procedure established by law.'

Safety and Security ('the Minister') admitted there is a general duty of care towards persons in custody but denied that that the police had a duty to keep those persons from inflicting harm upon themselves. After hearing all evidence absolution from the instance was sought by the Minister and granted. However, S launched an appeal which caused the Minister to abandon the order in his favour. Proceedings therefore continued in the High Court which found that the Minister was liable towards S because the Ministry's employee negligently made it possible for the deceased to kill himself. The Court also found that the Apportionment of Damages Act 1956 applied.

S issued an appeal against this judgment, with particular regard to damages. The Minister filed a cross appeal whereby he attacked the rejection of the possibility that N would have had to go to prison for a very long time. He further attacked the finding that the respondent was liable for 20 percent of the damages suffered, submitting that had N not committed suicide he would have been sent to prison for a very long time and no source of income would have been available for him to maintain his minor child and that therefore the claim should be reduced by 100 percent.

In allowing the appeals, it was held that:

(1) The negligence on the part of the employee of the Ministry materially contributed to the death of the deceased which in turn gave rise to the claim by the dependants.

(2) By admitting there was a casual link between the failure to lock away the firearm and the suicide of N results in a complete admission that the harm wrongfully caused by the Namibian police was casually linked to the damages suffered by S.

(3) Section 1(1)(a) of the Apportionment of Damages Act 1956 did not apply in the present instance. The section states that 'where a person suffers damage which is caused partly by his own fault and partly by the fault of another… the damages recoverable in respect thereof shall be reduced by the court…' Neither S nor the minor were at fault and this provision can therefore not be applied.

(4) It would be fair and reasonable to reduce the claim made by S by 50 percent. Consideration must be given to the contingency that N may have had to spend some unprofitable time in prison had he not committed suicide and that this should be reflected in the damages recoverable by S.

(5) The issue of costs will stand over pending the outcome of the appeal in *Minister of Basic Education Sport and Culture v Uirab* Case No I 1257/2004.

PAPUA NEW GUINEA: Delay of eight years and four months between filing writ of summons and notice of motion was inordinate and entire proceedings dismissed for want of prosecution.

[National Court: *Yona v Wamp NGA Enterprises Limited & Anor*, 2 June 2009, [2009] PGNC 61]

There had been a delay of eight years and four months following the writ of summons being filed in this case. In 2008 both parties were directed by the Court to file and serve affidavits on each other but Y did not comply. Despite this a trial date was allocated. Y applied to vacate this trial, arguing that it had been listed mistakenly after affidavits had been filed for a separate case. W argued that the continuing delay was jeopardising their ability to make their defence, as it was extremely difficult to locate witnesses after such a time. Their desired witnesses were former employees, and the company in question had now wound up, making the task increasingly difficult.

In refusing the application to vacate trial, ordering the trial to proceed, and then dismissing the action for want of prosecution, it was held that:

(1) A period of eight years and four months following a writ of summons is an inordinate delay.

(2) Y's attempts to explain his inability to proceed were not only unsatisfactory and unacceptable but also a clear case of neglect on the part of his lawyers.

(3) Y failed to comply with directions to serve affidavits and a trial date should not have been set.

(4) The inordinate delay has seriously prejudiced W in defending this action and any further delay or adjournment will not be in the best interests in terms of bringing in witnesses for trial.

SAMOA: Additional confession was inadmissible as evidence as it was unfairly and improperly obtained, taking into account both common law comparative jurisprudence and the UN Convention on the Rights of the Child.

[Supreme Court: *Police v Vailopa*, 2 July 2009, [2009] WSSC 69]

V, a 16 year old, was charged with murder and held overnight in police custody. The following day, upon being brought to the police station for remand purposes and to meet his mother, V allegedly made a sudden confession to a police officer. The police officer immediately cautioned and interviewed him for over two hours, without legal counsel or his mother being present or notified, despite her being elsewhere in the police station. The prosecution sought to

tender this signed statement into evidence, where V, inter alia, admits to assaulting the deceased at the time and place of the murder. After the interview, another police officer went outside the station with V to smoke a cigarette together, where it is alleged that V again spontaneously, and unprompted, admitted to 'hitting' the deceased. The prosecution also sought to tender this voluntary admission into evidence. However, this police officer testified that the official interview took less than one hour, and that it was not signed by the recording officer, for no apparent reason. V testified that he was assaulted by two police officers and told that he would be released if he admitted to the murder. In addition, he asserted that he signed his statement but could not read what was written owing to his illiteracy. Counsel for the accused objected to the admissibility of the two pieces of evidence being tendered as the non-presence of a parent or legal counsel at interview infringed the intent and spirit of the Young Offenders Act 2007, as well as Articles 37 and 40 of the United Nations Convention on the Rights of a Child ('the Convention').

In declaring both pieces of evidence tendered as inadmissible, it was held that:

(1) At common law, even a voluntary statement could be excluded in the court's discretion if it was unfairly obtained or obtained by improper or unfair methods (*R v Ali* [1999] NZCA 292 applied).

(2) Article 37(d) of the Convention states: 'Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance'. While the Convention does not explicitly require a parent or legal guardian to be present at the police interview, it has been construed this way, with Article 40(b)(ii) giving any child in the custody of the police the right to have a parent or guardian unless that is impractical (*Simona v The Crown* [2002] TVHC 1 considered). While the two Articles of the Convention may not have been explicitly violated, a breach of their spirit and philosophy is tantamount to obtaining a confession by the use of improper and unfair methods.

(3) The issue that the Convention has not been ratified by Parliament is immaterial, as the courts have already followed it in cases within its scope (*Attorney General v Maumasi* [1999] WSCA 1 applied and a number of other cases in Pacific courts discussed where principles of the Convention were applied).

(4) The statement would furthermore be excluded on the basis that the evidence of the prosecution is of an unsatisfactory, inconsistent nature – in terms of the length of the interview, the police officers present, and whether the final admission during the post-interview smoking session has any veracity.

(5) Even spontaneous admissions made in the absence of a parent or legal guardian should be excluded from evidence in light of the government's obligations under the Convention.

(6) Section 9 of the Young Offenders Act 2007 is not pertinent in the present case, as it refers to the parent or caregiver being present at the hearing or court proceedings, rather than at the police interview; its focus therefore is on the protection of minors once within the court system, and not before.

SOUTH AFRICA: Legislation which prevented women who were party to a polygynous Muslim marriage from inheriting from an intestate estate upheld as unconstitutional.

[Constitutional Court: *Hassam v Jacobs NO & Ors*, 15 July 2009, [2009] ZACC 19]

H married her husband according to Muslim rites who subsequently married a second wife without H's knowledge or consent. Following his death in August 2001, a death certificate was issued which indicated he had never been married. The executor of the deceased's estate refused to recognise H as a spouse for the purposes of Intestate Succession Act ('the Act'). Van Reenen J in the High Court applied *Plascon-Evan Paints Ltd v Van Riebeck Paints* (Pty) Ltd 1984 (3) SA 623A to establish that a marriage existed at the time the deceased died. Van Reenen J found that the word 'spouse' in s 1(4) of the Act should include husband or wife married using Muslim rites and held the section to be inconsistent with the Constitution (as it only provided for one spouse in a Muslim marriage to be the heir in the intestate estate of her deceased husband). By excluding H the Act limited her right to religious freedom and equality before the law.

H applied to the Constitution Court for a confirmation of the declaration of constitutional invalidity of s 1(4)(f) of the Act. H argued that widows in her position were discriminated on three grounds: gender, marital status and religion.

In confirming the constitutional invalidity, it was held that:

(1) The exclusion of spouses in polygynous marriages from the intestate succession regime of the Act violated s 9(3)[19] of the Constitution. The Act treats those married under the Marriage Act differently from those married according to Muslim rites, as it does widows in monogamous

[19] S 9(3) provides: 'The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.'

Muslim marriages and widows in polygynous customary marriages and those in polygynous Muslim marriages. The Act works to the detriment of Muslim women and not Muslim men. This religious discrimination overlaps with gender discrimination as only Muslim men are permitted to have more than one wife.

(2) The exclusion of H and women in her position is discriminatory and cannot be justified under s 36[20] of the Constitution.

(3) 'Spouse' is not defined in the Act however the word ought to be read through the prism of the Constitution. Muslim marriages have been recognised in case law (*Daniel v Campbell* [2004] ZACC 14; 2004 and *Bhe and others v Magistrate* and *Khan v Khan* 2005 (2) SA 272 considered). To recognise the validity of such marriages wherever the word 'spouse' appears in the Act the words 'or spouses' must be added, after every use.

(4) The order must be retrospective, to avoid injustice. Thus all estates that have not been fully wound up will be affected.

TONGA: Detention at police station was unlawful. Use of handcuffs could not be justified and amounted to inhuman and degrading punishment. Exemplary damages could be awarded alongside basic and aggravated damages.

[Court of Appeal: *Hurrell v Naufahu & Ors*, 10 July 2009, [2009] TOCA 2]

H brought a civil claim against the police on the basis of alleged false imprisonment and assault. He claims he was arrested on 6 July 2004 and locked in a cell overnight at the Central Police Station and was transported on 7 July 2004 to be further detained at the police station at Mu'a where he was interviewed many times concerning the alleged criminal activated of his uncle in the Eastern District. H claimed he was unnecessarily and unlawfully held in custody until 10 July 2004. Throughout this period, H asserts he remained continuously handcuffed, except when he went to use the bathroom and one hand would be released. He stated that whilst sleeping the police would sometimes stand on the handcuff or pull them or kick him, causing his hands to become swollen and blistered. There is evidence to support the swollen state of his wrists upon release from his uncle and a medical report from the hospital. N, a police officer, stated H was not handcuffed until he was transported to Mu'a Police Station and when he arrived there instructions were given to release the handcuffs, as they had noticed swelling. N stated that there was no entry of H in the Mu'a cell book between 6-10 July 2004, and that H was ordered to be released at around 6 pm on 6 July 2004. The station diary which recorded the release could not be located. There is no evidence that H was taken before a magistrate at any time during his period in custody. The primary judge found there was no credible evidence that H suffered any injuries at the hands of the police from 6 or 7 July 2004 when he found he was released from custody.

H appealed on the grounds that the trial judge erred in law in allowing N to argue that H had been released from custody on 7 July 2004 and in referring to his personal police experience during the judgment, showing that he leaned towards N and was prejudicial to H, giving rise to an apprehension of bias.

In allowing the appeal and fixing an award of damages, it was held that:

(1) When an allegation made in a statement of claim is admitted then the party who made the allegation need not prove it, and any evidence in reference to those facts is inadmissible. The Supreme Court Practice 1991 para 18/13/2 confirms that if the defendant admitted the facts pleaded in the statement of claim there is no issue between the parties on that part of the case, therefore no evidence is admissible in reference to those facts (*Pioneer Plastic Containers Ltd v Commissioner of Customs and Excise* [1967] Ch 597 applied). No application was made in the present case for leave to amend the statement of defence in relation to the admission in question and no leave was granted to withdraw the admission and therefore there was no issue in dispute about the period of time the appellant spent in custody. Therefore the appeal is allowed on this ground.

(2) The rule, outside of the doctrine of judicial notice, is that no finder of fact may act on their personal knowledge of the facts (Cross and Tapper on Evidence 11th ed (2007) 89 and *Palmer v Crone* [1927] 1 KB 804 considered). Recent cases involving alleged breaches of this rule in cases where a judge applied his own specialised knowledge include *R v Fricker* (Clive Fredrick) (CA, unreported) Court of Appeal Criminal Division No: 9807581/Y2, 24 June 1999; *Carter v Eastbourne Borough Council* [2000] 2 P.L.R. 60 (a decision of Lord Bingham, sitting as a divisional court judge) and *Wetherall v Harrison* [1976] 1 QB 773

[20] S 36 provides: '(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose. (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.'

(especially considering O'Connor J observations (779)). A trial judge may make adverse finding against a party on credibility, and may make positive findings on credibility, however in his judgement the judge at first instance reverts to and relies upon his own experience and observations which does not sit comfortably with the evidence and facts of the case.

(3) The tort of false imprisonment is a tort of strict liability, once the plaintiff establishes the fact of imprisonment this establishes a prima facie case on which the onus is on the defendant to prove that the imprisonment was lawful. The use of handcuffs is governed by Rule 170 of the Prison Rules (Cap 36) which provides that 'handcuffs may be used as a means of restraint in the case of a prisoner whose conduct shall be so violent as to render such action necessary.' The use of handcuffs in this case could not be justified, as H had not been charged with an offence and was not a prisoner in terms of the Prison Rules.

(4) Under s 22 of the Police Act 1968, an arresting officer must take or send the arrested person before a magistrate to be charged 'without unnecessary delay'. Failure to do so could amount to unlawful detention (*To'a v Naufahu AC* 8/09 considered).

(5) Those unlawfully detained should have the appropriate remedy, regardless of whether they are 'undeserving' or 'the merits' of detention (*R (on the application of Abdi and others) v Secretary of State for the Home Department* [2008] All ER (D) 247 (Dec) considered). Damages for false imprisonment are awarded on the principles confirmed in *Edwards v Pohiva* [2003] Tonga LR 231.

(6) Through the unlawful use of handcuffs, the two police officers subjected H to inhuman and degrading punishment over a three-day period in an unsuccessful attempt to try to obtain certain admissions from him.

Articles

No Respecters of Persons: Advocates in the Front Line

Pheroze Nowrojee

Introduction

On the scarred masonry marking the front line can just be made out, scratched in no doubt by some determined defender, the words of Thomas Erskine in his 1792 defence of Thomas Paine for sedition in The Rights of Man. They read:

> From the moment that any advocate can be permitted to say he will or will not stand between the Crown and the subject arraigned in the Court where he daily sits to practise, from that moment the liberties of England are at an end.

Standing between authority and subject is always uncomfortable, often dangerous. But that is what we are trained to do.

Another well-known reminder followed a hundred and fifty years later from the same jurisdiction:

> It has always been one of the pillars of freedom, one of the principles of liberty for which, on recent authority, we are now fighting, that the judges are no respecter of persons, and stand between the subject and any attempted encroachments on his liberty by the Executive, alert to see that any coercive action is justified by law.[1]

This statement applies with equal force to advocates. And the duty enjoined therein is too what we are trained to do. Whether those encroachments come from persons in authority or from persons within our own profession, we are bound to examine their coercive actions and to challenge them if necessary.

Siren of avoidance

It is necessary to look back at these basics from time to time. One would have thought that these were questions each one of us had successfully navigated when they first came to us, many years ago, and then put behind us. Ironically, their message gets ever more relevant as we become more senior, more capable, and our work therefore brushes up closer and closer against Government and power. That is when the siren of avoidance of such cases is most beguiling.

Then it helps to call upon the past in our profession, and to recall that though we are in different strands of it, we all come from a line of tradition and follow those who embody those traditions. Such predecessors influence us by their effective mix of legal expertise and traditional values.

It also helps to recall that minority dissents of integrity have often been vindicated. In the same House of Lords, in Regina v Inland Revenue Commissioners ex parte Rossminster Limited, Lord Diplock stated:

> For my part I think the time has come to acknowledge openly that the majority of this House in Liversidge v Anderson were expediently and, at that time, perhaps excusably, wrong and the dissenting speech of Lord Atkin was right.[2]

These help us to trust our professional instinct on such cases, and to question our other and personal fears. These help us because the duty of representation remains with us regardless of the prevailing political fashion, or a vindictive Executive, or whether or not an unpopular individual has already been convicted guilty in the minds of the public, or even a correct public anger at an accused person. Ignoring such duties makes us what Atkin, a little earlier in his speech, had condemned: "I view with apprehension the attitude of judges who, on a mere question of construction, when face to face with claims involving the liberty of the subject, show themselves more executive minded than the Executive." The words indict not just such judges, but such advocates too.

These duties have remained constant for the profession. And they must remain so. Neither increased numbers nor the increased complexities of new threats absolve us from the professional and human necessity of attempting the protection of those afflicted by oppression and unlawful harm from the State. Those complexities are now bringing not just lawyers, but all human rights defenders, to the front line, and all too often, having to go over the top into no man's land as well. And

[1] *Liversidge v Anderson* (1941) 3 All ER 338, 361 (per Lord Atkin).

[2] (1980) AC 952, 1101; [1980] 3 All ER 80, 93.

thus the front line still is where lawyers are most needed, and still where lawyers must be.

The safety of the client, the accused person, must at all times take priority. But there are other duties too, other responsibilities. A principal responsibility at the front line is the subversion of tyranny and oppression. We must delegitimise such regimes and its adherents even if the courts are not the means to overthrow them. The Courts are however the appropriate arena of holding up the alternative of the Rule of Law. The Courts are the arena to demonstrate the gap between normative freedoms and oppressive reality, between the professed pretensions of oppressive regimes and the true situation. By such demonstrations, we can through the courtroom achieve both legal and political gains for the Rule of Law.

Abandonment of the front line

We must nevertheless keep in mind that there are situations where lawyers feel that the front line must be abandoned for a different kind of resistance. For them, the legal front itself becomes no longer an ethical position to occupy, and the struggle in the courtroom is increasingly seen as participation in injustice rather than the opposite.

They then leave the legal struggle and move away into other arenas, some that enjoin the use of violence, some the use of non-violence. Examples are Gandhi in the early 1900s, as satyagraha convinced him away from the courtroom, Nelson Mandela and Oliver Tambo in 1960 after Sharpeville, Bram Fischer in 1965. Such decisions are not easy. In January 1965, after decades in the profession, Bram Fischer SC made this difficult decision. He wrote to the Court from which he was absenting himself as an accused person, and therefore disqualifying himself as counsel in the future. When hearing resumed after a long adjournment, his lawyer Harold Hanson rose to say that a letter had been delivered to him that morning which he would like to read out to the Court. It had been addressed to him by Bram.

This is part of what the lawyer read out:

> By the time this reaches you I shall be a long way from Johannesburg and shall absent myself from the remainder of the trial. But I shall still be in the country to which I said I would return when I was granted bail.
>
> I wish you to inform the Court that my absence, though deliberate, is not intended in any way to be disrespectful. Nor is it prompted by any fear of the punishment which might be inflicted on me. Indeed I realise fully that my eventual punishment may be increased by my present conduct.
>
> I have not taken this step lightly. As you will no doubt understand, I have experienced great conflict between my desire to stay with my fellow accused and, on the other hand, to try and continue the political work I believe to be essential. My decision was made only because I believe that it is the duty of every true opponent of this Government to remain in this country and to oppose its monstrous policy of apartheid with every means in his power. That is what I shall do for as long as I can.
>
> I can no longer serve justice in the way I have attempted to do in the past thirty years. I can do it only in the way I have chosen.

Lawyers cross that line only in the most extreme and unyielding of situations. And the tear away from our profession costs us more than even the dangers in the hugely uncertain political arena. Bram Fischer felt the hurt of his being disbarred by the Johannesburg Bar more than that of the prison sentence he eventually received. It was only posthumously that he was honourably restored to the Roll of Advocates, long after the democratic changes of 1994. Such situations are fewer rather than the majority. For most of us the battles and the resistance remain within our chosen forum, the court. But we must always be alive to the escalation of oppression. And more importantly, to the corruption of the profession itself into base subservience to an order that is devoid of legal or moral legitimacy. Apartheid South Africa and Nazi Germany are examples of such societies and, within them, of the shifting dangers for our profession.

To the profession on such fronts, and to our colleagues engaged there, we as a body owe the duty of expressed support and protection. One of these embattled groups at present is our profession in Zimbabwe. Their struggles and the cost they pay for their resistance to oppression is a testament to the strength of the ideals of the profession and of its members there. This Conference is obliged to voice an expression of support for them.

The successful turning around of oppression however is not the end of such struggles. It is important to keep in mind that the front line is a shifting line. A continuous vigilance is necessary. It is not only in oppressive regimes that we must expect it to be drawn. The front line has other habitats as well. We must guard against its reappearance anywhere.

The front line even within an established norm

The Emergency of 1975-77 in India offers an illustration of this. In an already established democratic constitutional structure with an active Supreme Court, there was a sudden deviation from that norm. The deviation pushed the country into suspension of the declared fundamental rights, and a denial of habeas corpus.

The response of some lawyers is instructive. In the Supreme Court, Mr Justice Khanna, in another lone and famous dissent,

refused to join the other members of the Court in endorsing the removal of these rights and remedies. Within Government, Fali Nariman resigned as Additional Solicitor-General. In private practice, Nani Palkhivala returned the brief of the Prime Minister in the litigation concerning her. These were steps in conscience. They did not seek public acclaim. And indeed, some of these, as well as such steps by others, could not be, and were not, even reported by the media due to the censorship then in force.

The front line then ran through the breadth of the country. It generated many detentions and many brave responses. It was a further three years before the Emergency ended.

The front line when reformers turn anti-reformist

Another such turn-around is that of reformers who, once in office and entrenched, lapse into anti-reformist modes. The recent conduct of the Governments of Kenya and Uganda is an unhappy illustration of this, and of the danger to advocates in the front line. Mr Mbogua Mureithi, Advocate of the High Court of Kenya is the advocate in the front line here, together with an NGO colleague and human rights defender, Mr Al-Amin Kimathi.

In July 2010, bombs exploded at two different sites in Kampala, Uganda. The police investigated the scenes and concluded that it was the work of individuals in neighbouring Kenya. Uganda requested Kenya to arrest the suspected persons and hand them over to Uganda. The Kenya Government arrested them, and, without further steps, rendered them to Uganda. The families engaged a prominent lawyer in Kenya to represent the accused persons. On 15 September 2010, that advocate, Mr Mbogua Mureithi, flew to Kampala accompanied by the human rights defender, Mr Al-Amin Kimathi of the Nairobi-based NGO Muslim Human Rights Forum (MHRF). On arrival at Entebbe Airport, Mr Mureithi and Mr Kimathi were both arrested and detained in prison. No charges were preferred. Three days later, Mr. Mureithi was released without any charges having been lodged against him, and allowed to leave Uganda.

The arrest of an advocate on professional duties is not the action of a government that respects due process. Nor is it an action within the spirit of the Constitution of Uganda, or of constitutionalism. Mr Kimathi was then charged alongside the original suspects on terrorism charges. Mr Kimathi, who has worked within the law to challenge the illegalities of, and government abuses in, the "war on terror" in East Africa, was then denied bail in December 2010. This was in circumstances which raise doubts whether the constitutional protections to which he as an accused person was and is entitled were sacrificed to the opportunity to punish him extra-judicially for questioning these abuses. REPRIEVE, the London-based human rights body, noted that "Despite the fact that Al-Amin suffers from serious health problems, the court denied bail, claiming that his medical records had been lost. The judge also declared that two individuals who had volunteered to stand surety did not have sufficient identification, although they had brought full identity documentation to court."

Al-Amin Kimathi was then remanded in custody at the notorious Luzira jail in Kampala, where he is being held in solitary confinement, with a single hour of exercise a day.

The litany of illegalities did not end there. Arising out of these circumstances, REPRIEVE, which has worked to enforce the human rights of prisoners – those rendered unlawfully, and those who have 'disappeared' – sent one of its senior human rights workers and a British national, Clara Gutteridge, to attend the bail application. Upon arrival at Entebbe Airport on the night of 7-8 December 2010, Gutteridge was herself detained by the Ugandan authorities. She was not informed of the reasons for her detention. She was threatened. Her demand to get in touch with diplomats at the British High Commission was denied, and access was blocked. The Ugandan officials unlawfully refused to notify the British High Commission of her arrest. She was told she would be taken to a notorious interrogation centre. Gutteridge became then the third human rights defender working on the case to be illegally detained by the Ugandan Government.

Only the rapid response of the British Foreign and Commonwealth Office emergency team ensured that British diplomats did reach the airport and finally saw her. At this point she was told that she would be deported and would not be permitted entry to monitor Mr Kimathi's case or assist in the defence. As was commented, if the Ugandan authorities are afraid of the accused person getting investigative assistance, then that is eloquent testimony that they do not have a case that can withstand investigation.

The Kenya Government, in violation of its duties to its own citizen, did not assist in ensuring the safety of Mr Kimathi or the extension to him of his rights in custody.

In the meantime, the families of the original suspects and of other persons threatened with arrest, also brought actions in the courts in Kenya challenging the legality of the renditions by the Kenya Government. The first case was *Mohamed Aktar Kana v Attorney-General*.[3] This was by a person who feared that he too would be rendered. The Government had given its justification for the renditions. In respect thereof, the Court, Mr Justice Warsame, noted

... the tenacity of the Government of Kenya through its

[3] High Court Constitutional Application No 544 of 2010 at Nairobi.

agents to simplify and trivialize the matter by saying that there is an agreement to transfer suspects within East Africa provided there is a request by any one member country. That may be true, but the question that arises is whether an individual can be subjected to bi-lateral agreement in contravention of his basic fundamental rights.

The significant issue which we must not lose sight of is that the new constitution has enshrined the Bill of Rights of all its citizens and to say one group cannot enjoy the right enshrined under the Bill of Rights is to perpetuate a fundamental breach of the Constitution and to legalize impunity at a very young age of our Constitution. That kind of behaviour, act or omission is likely to have far-reaching and serious ramifications on the citizens of this country and the rulers. It also raises the basic issue of whether a President [President Mwai Kibaki] who has just sworn and agreed to be guided by the provisions of the Constitution can allow his agents to breach it with remarkable arrogance or ignorance. All these are issues which require a sober and attentive judicial mind in order to address the rights and obligations of all parties involved.

Prima facie the allegations contained in this application are a serious indictment of the institution of the President and whether he is protecting, preserving and safeguarding the interests, rights and obligations of all citizens as contained in the new Constitution. This application is a clear indication that the new security arms of this country have not tried to understand and appreciate the provisions of this new Bill of Rights. It also shows the yester years of impunity are still thriving in our executive arm of the government.

On 28 September 2010, Warsame J accordingly made orders ensuring that the applicant was not to be surrendered, handed over, transported and or transferred to Uganda or any other country without further orders from the Court. "If the Applicant is arrested he shall be brought to this Court without fail, and subjected to the due process enshrined in our Constitution." The order was to be served upon the Office of the President.

A second case

This was a major step in halting further illegal renditions. A second case strengthened this. *Zuhura Suleiman v The Commissioner of Police, The Commandant, Anti-Terrorism Police Unit and the Attorney-General*[4] was an habeas corpus application in respect of one of the persons rendered to Uganda. It came before Mr Justice Muchelule.

The State swore an affidavit that after his arrest the subject had already been flown to Uganda and there handed over to the Uganda Criminal Investigations Department.. Therefore the court no longer had anything to look into. The applicant submitted that the Court was entitled to examine this return by the State, and satisfy itself whether the initial arrest and detention were lawful or not. If the detention were held to be unlawful the subject ought to be discharged. On 30 September 2010 the Court gave its ruling. On an examination of the affidavit evidence from both sides, the Court held as follows:

The subject was arrested at 10.30 p.m. on Friday and on the following day, a Saturday, he was in Uganda being handed over. He had been collected from Kasarani Police Station, where he had slept, at 7.55 a.m.. There was certainly no opportunity afforded for him to apply to the Kenyan courts for release, for instance. There was no formal communication with his family, or information that he was being taken out of jurisdiction. He is a Kenyan citizen who had immunity against expulsion. There was no formal request by the Ugandan authorities for him. There was no warrant issued by a court in Uganda seeking his arrest. All extradition provisions were disobeyed in his connection. In short, all the evidence indicates he was illegally arrested, detained and removed from Kenya.

Whether one is a terror suspect or an ordinary suspect, he is not exempted from the ordinary protection of the law. Whatever the security considerations that the Police had in this case, the recognition and preservation of the liberties of this subject was the only way to reinforce this country's commitment to the rule of law and human rights. Police must have the capacity to battle terrorism and enforce human rights at the same time, as the two are not, and should not, be incompatible.

Muchelule J concluded:

I find that no exceptional circumstances whether state of war or terrorist actions, can be invoked to justify the treatment handed down to the subject herein by the Respondents. I find that the return made by Inspector Ogeto was not sufficient and that the arrest, detention and removal of the subject from Kenya to Uganda were illegal and transgressed his fundamental rights and liberties. These rights and liberties cannot be given up for expedience's sake. Since the subject is out of the jurisdiction, however, I make no further orders.

The judges had set out the proper position in law. And had themselves moved forward to the front line. Both cases are of enormous value because the danger from either Kenya or from Uganda, of rendition of 'suspects' to the UK, or to Guantanamo Bay or to other states co-operating in torture has resurfaced. On 25 January 2011 the Kenya National Commission for Human Rights and Muslim Human Rights

[4] High Court Constitutional Application No 441 of 2010 at Nairobi.

Forum appeared before the Parliamentary Defence and Foreign Relations Committee in Nairobi. The media reported that appearance in the following terms:

> Human rights organizations claim Ugandan authorities are plotting to send eight Kenyans held in Kampala on terrorism charges to UK and Cuba. They told Parliament's Defence and Foreign Relations Committee yesterday that there are no sufficient guarantees to stop the Kenyans from being taken to the United Kingdom and the US base at Guantanamo Bay in Cuba.[5]

Earlier, as cited above, Muchelule J had held:

> Police must have the capacity to battle terrorism and enforce human rights at the same time, as the two are not, and should not, be incompatible.

This is also what the US President had stated in his Inaugural Address in January 2009:

> As for our common defence, we reject as false the choice between our safety and our ideals. Our founding fathers, faced with perils that that we can scarcely imagine, drafted a charter to assure the rule of law and the rights of man, a charter expanded by the blood of generations. Those ideals still light the world, and we will not give them up for expedience's sake.

Conclusion

If this is an 'enduring conviction' (as President Obama defined it), if it is to be a reality for persons within Kenya and Uganda, then the danger must be publicly repudiated by the United States. This is the front where Al-Amin Kimathi and Mbogua Mureithi presently reside.

[Pheroze Nowrojee is an Advocate of the High Court of Kenya. This article is based on a presentation made by him at the 17th Commonwealth Law Conference held in Hyderabad, 5-9 February 2011.]

[5] *The Standard,* Nairobi, 26 Jan 2011.

International Courts and the Domestic Adjudication of Human Rights and Immigration Cases in the United Kingdom

Nicholas Blake

Introduction

It is well known that, in contrast to most Commonwealth countries, the United Kingdom does not have a written constitution or entrenched legislation protecting human rights. The United Kingdom was a founder member of the Council of Europe and was prominent in drafting and ratifying the European Convention on Human Rights 1950 (ECHR) that established the European Court of Human Rights.

The ECHR provides amongst other things by Article 1 that states "shall secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention". Amongst those rights and freedoms is Article 13 "The right to an effective remedy". This reads:

> Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed in an official capacity.

Thus it is reasonably clear that by this international human rights treaty the United Kingdom undertook both to respect the substantive human rights set out in the ECHR to all subject to its jurisdiction, and also to provide an effective remedy before a national authority for violation of such rights. It is unsurprising that the ECHR was the inspiration and the model for many of many human rights provisions of the constitutions of independent Commonwealth nations drawn up after the 1950s.

In 1966 the United Kingdom recognised the individual right of application to the Commission and the Court, and the period 1970 to 1998 has seen much debate in the domestic courts of the United Kingdom as to the impact of such facts in domestic law. The rather unsatisfactory decision of the House of Lords in *Brind v Secretary of State* [1991] 1 AC 696 reminds us that common law treaties are not self-executing and that an unincorporated treaty cannot be the source of legal rights or new legal duties. In public law cases, the ECHR may be a guide to how a reasonable decision maker ought to exercise a statutory discretion but not the source of a legal duty on the decision maker to direct him or herself according to the Strasbourg case law.

Unsurprisingly, from 1966 to 1998 the United Kingdom lost many cases before the Strasbourg courts where neither the judiciary nor Parliament had applied their minds to the Strasbourg principles before passing judgments or laws that turned out to have engaged human rights questions. The Civil Service Code required members of the executive branch to have regard to the United Kingdom's international obligations, but since there was no domestic judicial authority to rule on what those obligations were, a great many actions were taken in the fields of immigration, prison law, interception of communications and the like that were found to be violations of those obligations. The international duty to afford a domestic remedy for adjudication on arguable violations of rights seemed poorly provided for.

In 1998 the United Kingdom Parliament passed the Human Rights Act which was brought into force in October 2000. It broadly creates a domestic legal duty on public authorities to act compatibly with the core provisions of the ECHR. Further, the constitutional legislation of the Labour Government in its first term saw devolution to a Scottish Parliament and executive of issues concerned with the government of Scotland, and there was a requirement on the Scottish executive, independent of the Human Rights Act to respect the human rights afforded by the ECHR.

January 1973 had witnessed the accession of the United Kingdom to the European Economic Community (the Common Market), subsequently renamed the European Community and now called the European Union. This is a different institution to the Council of Europe although there are many overlaps. For example, Members of the European Union must also be members of the Council of Europe and recognise the individual right of application to the European Court of Human Rights. The ECHR is regarded as the embodiment of the common constitutional traditions of the European Union and a source of inspiration for the interpretation of European Union law. Recently the European Union adopted its own Charter of Fundamental Human Rights and Freedoms, reflecting but in a number of respects going beyond the ECHR.

Under the European Communities Act 1972,[1] European Union law is directly applicable in the domestic courts of the United Kingdom. This means that individuals can rely on European Union regulations, national law measures designed to give effect to a European Directive and, in certain cases, the Treaty itself when the provisions are clear, precise, and the time for implementing them into domestic law has passed.

The Court of Justice of the European Union (CJEU) sitting at Luxembourg (formerly the ECJ) has responsibility for interpreting the meaning of European Union law. It may act on an application made to it by the governing bodies of the European Union – the European Parliament, Commission, and Council – or on a reference by any national court or tribunal seeking to find ?clarify the meaning of Union law; where the answer to the problem is not completely clear. A final court or tribunal must make the reference to the CJEU.

There are thus two powerful European courts at Luxembourg and Strasbourg whose decisions have a significant effect on all those within the United Kingdom. There are other bodies whose decisions and opinions may also be influential in human rights questions that come before British judges even though there is no individual rights of application to them from those in the United Kingdom: the American Court of Human Rights in San Jose, Costa Rica; the Human Rights Committee and the Committee Against Torture sitting in Geneva, both of which are charged with the supervision and application of the International Covenant for Civil and Political Rights and the Convention Against Torture; and indeed the General Assembly and Security Council of the United Nations itself.

European Union law in the courts of the UK

The decisions of the CJEU at Luxembourg are binding in the United Kingdom and can be directly applied in cases involving individuals covered by the point in question, irrespective of national law measures on the subject. All Member states of the European Union must accept this principle as part of the package of benefits and obligations that membership brings.

EU law only operates where there is a need for a level playing field to give effect to the principles of an area of free movement of goods, services and persons. The EU legislator is required to apply the principle of subsidiarity and examine whether the issue can best be resolved at national or local level. EU laws must mean the same thing throughout the Union, and thus the national court cannot be the last word on the meaning of an EU law provision or a national provision designed to give effect to EU law.

Many thousands of individuals have benefited from CJEU rulings on equal pay, sex and age discrimination and the like, where a dynamic principle of purposive interpretation has frequently gone far beyond what the national courts of the United Kingdom have decided or would decide employing strict construction principles of statutory interpretation.

European Union law has been influential in the field of immigration, as the Treaty on European Union (recently renamed the Treaty on the Functioning of the European Union) provides a right of free movement to the territory of any other Member state of the EU for citizens of the EU and their families, as well as corporate entities established elsewhere in the EU. This is subject to the restrictions laid down in the Treaty and the measures giving effect to it, and proportionate measures of public policy against those who endanger the health or security of the host state. However, for those within the scope of EU law, it essentially gives rights of entry and residence to family of EU citizens - that is to say spouses, children under 21 and dependent relatives in the ascending or descending line, whatever nationality the family member is without much more than proof of the relationship (see Directive 2004/38/EC of the European Parliament and Council, the 'Citizens Directive'). Domestic immigration rules are much stricter in terms of qualification, documentation and procedure.

Thus an Indian national who is married to an Italian national working in the United Kingdom has free movement rights of entry that would not necessarily apply if he or she were married to a British citizen. EU free movement law is meant to have been brought into force in the UK by the EEA Regulations 2006 that are applied in the First tier and Upper Tribunal Immigration Chambers. Where the regulations make no provision for a right of entry recognised by the EU Treaty or where they impose requirements or restrictions inconsistent with the case law of the CJEU, these legislative measures must be dis-applied.[2] The same result would follow if these measures were set out in primary legislation from Parliament.[3] There are many examples of this principle at work to be found in the jurisprudence of the Upper Tribunal and the superior courts in the United Kingdom.

Effect of international human rights decisions

The position is different under the Human Rights Act. The legislative scheme may be summarised as follows:

a. It imposes a duty on public authorities to act compatibly with the Convention rights that are set out in the Schedule (2 to 12, 14 and First Protocol ECHR), unless primary legislation requires them to act in a particular way.

[1] s 2.

[2] See *Bigia v ECO* [2009] EWCA Civ 79; [2009] Imm AR 515.

[3] See *ex p Factortame* [1991] I AC 603.

b. An individual may complain to the national court about a violation of a Convention right after the coming into force of the HRA and obtain an appropriate remedy (s 7 and 8).

c. The courts must try to interpret primary legislation compatibly with Convention rights it is possible to do so (s 3).

d. In deciding whether there has been a violation of a Convention right the national court must take into account the jurisprudence of the ECtHR (s 2)

e. Where a national court cannot interpret primary legislation compatibly with a Convention right, it may issue a declaration of incompatibility that requires a responsible Minister to consider whether to amend legislation speedily by subordinate instruments (s 4)

Strictly speaking, under the Human Rights Act, the decisions of the national Court are not binding in domestic law. There is a duty on national courts in the UK to have regard to Strasbourg jurisprudence when interpreting the same rights as have been scheduled to the HRA, but the courts are free to disagree if they conclude such jurisprudence is obscure in its meaning and application or plain wrong. The Appellate Committee of the House of Lords (now the Supreme Court) under the leadership of the late Lord Bingham has established a body of learning that where there is a consistent line of Strasbourg jurisprudence, particularly where the Grand Chamber of the court has deliberated, such jurisprudence should be followed in the interpretation of the same rights.[4]

Thus, in 1996 in the celebrated case of *Chahal v United Kingdom*,[5] the ECHR concluded that the right afforded to individuals within the jurisdiction of the United Kingdom not to be subjected to torture or inhuman or degrading treatment or punishment, applied to prevent the deportation of a person where there were substantial grounds for believing that there was a real risk of torture if returned to another country; further, this was an absolute right not subject to exceptions on the grounds of national security (unlike the *nonrefoulement* provisions of the UN Convention on Refugees 1951.[6] The Court has re-affirmed this jurisprudence despite pressure from states to modify it in the light of the security concerns that have arisen in Europe post September 11, 2001.

However, the United Kingdom courts are not bound to reach the same conclusion as the Strasbourg court. In the case of *R v Horncastle and others (Appellants)*,[7] the Supreme Court declined to follow the decision of the Strasbourg Court in *Al-Khawaja and Tahery v United Kingdom*[8] to the effect that hearsay evidence would result in a criminal prosecution being conducted in breach of the right to a fair trial (Article 6 ECHR) where it was the sole or decisive evidence on which the conviction was based. The issue will now be decided by the Grand Chamber where the Strasbourg court will have the benefit of the detailed criticisms of the *Al-Khawaja* case by the British judges.

In *Hirst (No 2) v United Kingdom*,[9] the Strasbourg Court decided that the British legislative provisions barring all serving prisoners the right to vote in general elections was incompatible with Protocol 1 Art 3 to the ECHR. The flavour of the judgment can be gauged from the following paragraph:

> 82... [W]hile the Court reiterates that the margin of appreciation is wide, it is not all-embracing. Further, although the situation was somewhat improved by the Act of 2000 which for the first time granted the vote to persons detained on remand, section 3 of the 1983 Act remains a blunt instrument. It strips of their Convention right to vote a significant category of persons and it does so in a way which is indiscriminate. The provision imposes a blanket restriction on all convicted prisoners in prison. It applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances. Such a general, automatic and indiscriminate restriction on a vitally important Convention right must be seen as falling outside any acceptable margin of appreciation, however wide that margin might be, and as being incompatible with Article 3 of Protocol No. 1.

The reference to the margin of appreciation is a reference to the doctrine of the Strasbourg Court where difficult moral or policy questions are involved where the Court's role is secondary to the choices made at national level. In the context of the right to vote this was made clear by remarks made by the Strasbourg Court in another case *Greens v United Kingdom* (2010):

> 113. As the Court emphasised in *Hirst*, there are numerous ways of organising and running electoral systems and a wealth of differences, *inter alia*, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision (see § 61 of its judgment). The Court recalls that its role in this area is a subsidiary one: the national authorities are, in principle, better placed than an international court to evaluate local needs and conditions

[4] See *Regina v Special Adjudicator ex parte Ullah and Do v Secretary of State for the Home Department* [2004] UKHL 17 Jun 2004.

[5] (1996) 23 EHRR 413.

[6] Art 33(1).

[7] [2009] UKSC 14.

[8] (2009) 49 EHRR 1.

[9] (2006) 42 EHRR 41.

and, as a result, in matters of general policy, on which opinions within a democratic society may reasonably differ, the role of the domestic policy-maker should be given special weight...

114... [T]he Court considers that a wide range of policy alternatives are available to the Government in the present context. In this regard, the Court observes that the Government of the respondent State have carried out consultations regarding proposed legislative change and are currently actively working on draft proposals... Emphasising the wide margin of appreciation in this area (see *Hirst*, § 61), the Court is of the view that it is for the Government, following appropriate consultation, to decide in the first instance how to achieve compliance with Article 3 of Protocol No. 1 when introducing legislative proposals. Such legislative proposals will be examined in due course by the Committee of Ministers in the context of its supervision of the execution of the *Hirst* judgment. Further, it may fall to the Court at some future point, in the exercise of its supervisory role and in the context of any new application under Article 34 of the Convention, to assess the compatibility of the new regime with the requirements of the Convention.

The UK Parliament has delayed amending its legislation in accordance with this judgment. There is considerable opposition to this judgment by Members of Parliament, particularly in the Conservative party.

In *Chester v Secretary of State for Justice*[10] a prisoner sought relief from the English Court of Appeal saying that since it was obvious that the legislation was incompatible with the Convention the Court should exercise its jurisdiction to interpret legislation in accordance with the Convention so as to ensure that there is a December 2010 right to vote for at least certain classes of prisoners. The Court declined to so because it said these were policy and moral choices to be made by Parliament and not by the courts. Here was an issue on which reasonable people may disagree.

Legislation is to be introduced giving the minimum number of prisoners the right to vote. Even this may be rejected by MPs though the government will warn that if nothing is done substantial damages awards are likely to be made by the Strasbourg Court.

Local or international approaches

With this brief description of how international judicial decisions operate in the United Kingdom, I can summarise the different positions taken about the benefits and burdens of such a system.

National legislation is doubtless closer to the democratic forces in a particular society, can reflect its economic and social priorities, its deeply held beliefs and moral codes, and carries with it a perception of greater legitimacy and call for obedience to the law. National laws can also change with the mood of the people expressed in free elections, as Parliament is sovereign and (at least in the absence of an entrenched constitution) cannot bind itself on a particular topic.

Politicians tend to think of themselves as better placed to make the relevant decisions on matters of moral or political controversy than judges generally and international judges in particular.

There are distinguished former judges like Lord Hoffman, who have forcibly expressed the opinion that a body like the European Court of Human Rights is not necessary in a sophisticated democracy where national judges and legislators are best placed to identify which human rights should be respected and how they are to be interpreted and applied.[11]

On the other hand, there are the victims or indeed the instigators of national prejudices, and as most societies (and certainly all European societies) become more diverse in ethnic, cultural, religious and moral content, a Parliament merely reflecting the opinions of the majority may ignore others' claims to respect. Lord Hoffman's model of a common law constitutional convention which is presumed not to legislate contrary to fundamental and constitutional rights may be a perfectly sensible rule of statutory interpretation, but it is not a sufficient one to ensure respect for the human rights of minorities.

The Council of Europe was established in the devastating aftermath of the Second World War where the consequences of unrestrained sovereign action by nation states were all to plain to see. A number of these governments: Nazi, fascist or Communist had come to power with popular support and their repressive measures against unpopular minorities reflected popular sentiment. These are not simply historical aberrations in Europe or the Commonwealth, as sadly too many contemporary examples of repressive and discriminatory laws would suggest. In the United Kingdom there are groups who may not be favoured by the majority in civil society: travellers, prisoners, irregular migrants amongst others, and these sentiments may be reflected by elected representatives in approving laws. In the case of *Huang v SSHD*,[12] Lord Bingham made the pertinent observation that one reason why the Immigration Rules regulating entry of family members cannot be taken to be the legislative judgment on proportionality of interferences with the right to respect for family life, is that

[10] [2010] EWCA Civ 1439.

[11] See Lord Hoffman's valedictory lecture to the Judicial Studies Board 2008, accessible at *www.judiciary.gov.uk/Resources/JCO/Documents/Speeches/Hoffmann_2009_JSB_Annual_Lecture_Universality_of_Human_Rights.pdf*.

[12] [2007] UKHL 11, [2007] 2 AC 167.

the subject of these measures will not be represented in the Parliament that adopts them.

So if one wants respect for human dignity and fundamental human rights there must be an effective mechanism for recognising what those rights are, how they may be infringed and giving remedies for enforcing them, which means something above and beyond the reach of national legislators. A constitutional court with an entrenched bill of rights is one such mechanism, and is particularly useful in federal political systems such as India and Canada where it must adjudicate on the legislative capacities of the different units making up the federation.

Human rights, however, are not a purely domestic concern – they are universal in nature although regional in application and enforcement as the American and African systems as well as the European show. A national constitutional court needs at least to be aware of and keep pace with the settled jurisprudence on the same topics addressed in international human rights law and national constitutional law. The Bangalore Principles promoted by the Commonwealth Lawyers' Association were an important and imaginative call to be mutually aware of and respond to these principles and jurisprudence, and a gathering such as the Commonwealth Law Conference one gives the lie to the corrosive assertion of some repressive regimes that universal human rights are western European or even neo-colonial in content, true although it is that these rights were not secured or enjoyed by colonial subjects during colonial times. For an informative account of the relationship between the United Kingdom, the ECHR and colonialism see Brian Simpson's monumental work, *Human Rights and the End of Empire*.[13]

The cases of *Chester* and *Horncastle* cited earlier in this paper suggest at least four things about the relationship between the national and the international court:

a. Strasbourg case law and principles of interpretation, apart from being based on democracy and the rule of law, recognise and respect the space to be afforded to national judgments in controversial issues of the day. This is the margin of appreciation. It is through this means that Strasbourg Court has been able to accommodate a variety of European states with different social and religious attitudes to, for example, abortion, the wearing of *burkhas*, recognition of same-sex marriages;

b. There are some issues where the margin of appreciation is not wide: the prohibition of torture or inhuman and degrading treatment, the suppression of racism and hate speech, the fundamental principles of a fair trial;

c. Where there is room for disagreement between reasonable people on the merits or demerits of a measure, it is far better to have dialogue and debate than hermetically sealed approaches where one is indifferent to another.

d. I have noted that prior to the Human Rights Act, the UK used to lose regularly and often in Strasbourg because decisions were taken in ignorance of human rights. Now our national courts and authorities are taking human rights seriously, a discourse of relevant principles has emerged that has resulted in violations being comparatively few and far between. By engaging human rights in their judgments, British judges have been able to make a contribution to what the ECHR means in substance in the United Kingdom and elsewhere.

There are many notable examples of a sensitive dialogue between the international court, the national judiciary and the executive that in the end have produced better laws that better respect human dignity. Let me give a few examples:

(a) In *Rees v UK*[14] the Strasbourg Court held that the UK was not in violation of Art 8 in refusing to recognise a transgendered person for all social purposes in their post-operative identity. The Court noted the degree of social ambiguity resulting from this decision and measures that were being taken by other states internationally, although it recognised that the situation had to be kept under review. Nothing was done, despite further challenges and increasing expressions of concern by family judges in the UK. In 2002 the Strasbourg Court re-examined the matter and found a clear violation on every aspect of the claim in *Goodwin v UK*..[15]

(b) In *Fitzpatrick v Sterling Housing* [2001] 1 AC 27 the House of Lords concluded that a same-sex partner could be a family member for the purposes of succession to a tenancy. This decision prompted Strasbourg to re-evaluate its international jurisprudence as to whether such relations could be seen as part of family life in the light of developing social norms inside Europe. It concluded in a number of cases, including the recent decision in *Schalk and Kopf v. Austria*,[16] that it could.

(c) In *Pretty v United Kingdom* (2002} EHRR 35 1 the dialogue was the other way. The House of Lords concluded that a severely disabled person's plea that her partner could assist her to die with dignity without risk of prosecution for assisting a suicide, did not engage the right to respect for private life under Art 8. The Strasbourg Court disagreed, but recognising the difficult ethical and legal issues involved, did not conclude that an absence of

[13] Oxford University Press, 2000.

[14] (1987) 9 EHHR 56.

[15] (2002) 35 EHHR 18.

[16] 24 Jun 2010.

assurances violated the Convention. Subsequent concern led the national court to conclude in *Purdy*[17] that some indication as to how the discretion to prosecute should be exercised was necessary in order to be in accordance with the law and proportionate. A code of guidance was necessary was subsequently drawn up by the DPP.

(d) The case of *McCann v United Kingdom*[18] was a decision of the Strasbourg Court finding that the right to life under Article 2 was violated in the organisation of a military operation to prevent terrorist operations in Gibraltar. The decision was hugely controversial in the United Kingdom at the time and deeply resented by many parliamentarians, but it has proved to be the core decision in a subsequent line of decisions imposing strict standards for state use of force, and demanding procedural standards at inquests or other inquiries where people may have died as a result of state action or failure to act.

(e) At the same time and in similar vein is the *Chahal* case itself. It was not welcomed by the British Home Secretary (although in response to critics that the Court was being improperly activist in its constructions, it should be pointed out that it was precisely reflecting the terms of Art 3 of the UN Convention Against Torture that the United Kingdom had signed shortly beforehand). It can now be seen to have been prophetic in setting the standard that respect for human dignity does not tolerate extraordinary rendition or merely utilitarian arguments justifying the use of torture in the more dangerous world we all live in after the events of September 11, 2001.

(f) In *R v SSHD ex p Adan and Limbuela* [2001] I AC 477 the House of Lords had to decide in what circumstances the failure to provide shelter and support to destitute asylum seekers who were waiting for decisions on their claims to refugee status made later than on entry to the country amounted to inhuman or degrading treatment contrary to Article 3. It was recognised that human rights law was not the source of a positive obligation to house and feed the indigent (here perhaps the European case law has not kept pace with some of the dynamic jurisprudence of the Indian Supreme Court on the topic). Nevertheless, it was concluded that the factors combining to prevent asylum-seekers looking after themselves (they were prohibited from working, denied access to the social security system, were dependent on the Home Office for the time and place where their claims were processed) meant that the failure to support those who were truly indigent and compelled to sleep on the street was a violation of this fundamental norm. Subsequent EU legislation (the Reception Directive) required all states of the Union to make adequate reception arrangements for asylum-seekers as part of a package of measures to enable states to return asylum-seekers to the first state of entry to the EU to determine refugee claims. It was well known that Greece's implementation of these rules left a great deal to be desired and on 21 January 2011 the Grand Chamber of European Court of Human Rights in a significant judgment *MSS v Greece and Belgium* found a violation of Article 3 in respect of both the reception arrangements by Greece and the decision of Belgium to send asylum-seekers to Greece to face such conditions in the knowledge of the treatment that they would face, even though Belgium was acting under EU legislation in doing so.

Conclusions

This brief survey suggests that the relationship between international courts and national arms of government – executive, legislative and judicial – is the relationship between fundamental principles and local initiatives in developing and applying those principles to changing social needs.

The notion of the rule of law and the requirements of fair trial have not remained static or frozen in time. Many forms of social regulation and control of those who have disturbed the public good or are assessed to be likely to do so, have been created consistent with human rights principles: examples are football hooligan travel bans, anti-social behaviour orders, control orders of suspected terrorists who cannot be prosecuted, civil confiscation of assets.

Victorian notions of the fundamental elements of fair trial have grown to accommodate the evidence of children and other vulnerable witnesses, victims of serious sexual abuse, and such like. We have discovered that the bar on referring to previous convictions in a criminal trail can be lifted as long as the judge remains in control of the application to admit on relevance grounds and has discretion to exclude such material where is it considered purely prejudicial. Here an always-speaking human rights model may be more sensitive instrument that fixed constitutional norms permitting no departure from the practices of 1776 or whenever.

But fundamental principles are just that. In the Old Testament God commanded "Thou shalt not oppress a stranger". In terms of modern human rights law and the work of British judges making asylum, immigration and deportation decisions this singular command has devolved into three complementary principles:

(1) Expulsion to face treatment that meets the high threshold of seriousness to be characterised as inhuman or degrading is prohibited;

[17] [2009] UKHL 45.

[18] (1996) 21 EHRR 97.

(2) Interference with the right of respect for family and private life by those non-citizens who do not have permission to remain must be justified for certain limited purposes and proportionate to those aims;

(3) In the enjoyment of these fundamental rights there shall be no unjustified discrimination; like must be treated with like.

Adjudication on measures that may oppress strangers is the work of the Upper Tribunal. There is a whole body of UK case law from the House of Lords down to the Upper Tribunal identifying these principles and working them out in a variety of contexts: children, marriages, durable relationships, limited overstay of conditions, lengthy irregular residence, criminal conduct and the like. It would be beyond the scope of this article to engage in a detailed citation of these cases. A sequence of decisions from the House of Lords in 2008 have been particular important: *Beoku-Betts*, *Chikwamba*, *EB (Kosovo)* and *EM (Lebanon)*. The interested reader is referred to the BAILII website where they can all be found. There is a host of decisions confirming that offending by juveniles or those resident for most of their lives in the UK, or relatively minor offences where there are strong family ties should not justify deportation. These decisions would not have been possible without the dialogue with the case law of the international court developing the notion of respect and the limits of justified interference. They have now played back into the development of British public law where the abstractions of the *Wednesbury* test have tended to yield to more principles scrutiny of decisions affecting families and human rights interest. A very recent example is the decision of the Court of Appeal than *Quila and others*[19] that it is a disproportionate measure against forced marriages to require every party to a marriage to be over 21 even when there is no suggestion of forced marriage problems.

This is the practical aspect of the relationship between international and local justice. Deprived of a nexus to fundamental principle, some immigration decisions might be seen as arbitrary and unjust. With the nexus to human rights and the principle of proportionality in domestic and European law, judges have the necessary instruments of adjudication to prevent the public from the truly dangerous but respect the dignity of the individual and the core social relationships on which all human societies are based.

[Mr Justice Nicholas Blake is a Judge of the High Court of England and Wales and President of the United Kingdom Upper Tribunal Immigration and Asylum Chamber. This article is based on a presentation made by him to the 17th Commonwealth Law Conference held in Hyderabad, 5-9 February 2011.]

[19] [2010] EWCA Civ 1482.

After Assange: Balancing 'Information Pornography,' the Need to Know and Freedom of Information in the Digital Age

Charles J Glasser, Jr

Introduction

"A secret is something you tell somebody."

– Indian proverb

"The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them."

– American revolutionary Patrick Henry

After more than 30 years as a journalist and media lawyer, I have come to learn a truth that applies to all newsrooms around the world. If you want to pique a reporter's curiosity, convince the press that you must be doing something bad, be hounded and harried and painted as a villain and enemy of democracy, you need do only one thing: hide a document or government proceeding from the public view. It works every time.

This is not unique to journalists, of course. Taboos carry magnetism. Labeling information, images, ideas or meetings 'secret' invokes an instant and concomitant prurient thrill in trying to learn what's so 'secret.' There is an almost Newtonian principle at work: the more secret or forbidden something is, the harder people will try to learn about it. What may in ordinary context seem mundane becomes a very big deal.

I admit I learned this firsthand around the age of twelve. A neighbourhood boy had, through a network of espionage that would make the CIA envious, somehow laid his hands on a copy of *Playboy* magazine. We had no idea exactly why a glossy magazine was spoken about in hushed tones, but we knew we weren't supposed to delve into these forbidden pages. This of course, drove us mad: not with lust but with curiosity. What was so secret? Why was something so forbidden? I was not much of a trouble-maker at twelve years of age, but the fact that this magazine was forbidden simply made it so much more alluring. I'll not discuss here my utter confusion and disappointment after I had finally seen a skilfully airbrushed photograph of nubility incarnate. Let me just say that it was a much more naïve era – man had not yet landed on the Moon – and it would be a few years until I could in any sense appreciate (if not enjoy) what I had seen.

Secrecy and the desire to know

As of this writing, Julian Assange, the founder of the now-infamous WikiLeaks, is being held in the United Kingdom on charges ostensibly unrelated to his document-leaking activity. The purpose of this note is not to defend or decry him or his activities. But not unlike the twelve-year-old source of my first glimpse at *Playboy*, Mr Assange has managed to get a lot of attention for acting upon a fundamental truth, namely, that the more secretly we treat information, the hungrier for its revelation we become. Moreover, the fact of secrecy itself becomes a larger story than the substance of the secret itself. Overuse of secrecy creates a market for what many now refer to as call 'information pornography'.

Just as today I would not think gazing upon a *Playboy* centrefold is a particularly big deal, a number of veteran political observers have said that so far, the sum and substance of Assange's leaked diplomatic cables carry little real surprise,[1] showing instead the quite mundane conversations that have been going on in diplomacy since the time of Metternich:

> Take a moment to think over the sensitive U.S. diplomatic and military documents that could have been revealed over the past half-century. There would have been reports of attempted assassinations, bribes and the procurement of prostitutes for foreign leaders, or the illegal use of torture... This isn't to suggest that the motives of WikiLeaks and its

[1] By way of example, the Dec 11-12, 2010 Weekend Edition of the *Sydney Morning Herald* carried a front page WikiLeaks-based story about how a mining company allegedly tried to lobby their government officials for a favorable position. Alongside this six-column story was a prominently-featured front-page sidebar headlined '*How I Got The Secret Files From Assange*' by Philip Dorling. This breathless account glamorised the cloak-and-dagger business of meeting Assange, but never questioned the irony -- if not hypocrisy -- of a cause dedicated to 'transparency' operating in the shadows, complete with anonymous characters, dead-letter drops, code-words, and secret disposable cell phones straight out of a John LeCarre thriller. The jump page was a two-page spread (each with a special six-column-wide 'WikiLeaks' graphic) about the supposedly 'explosive' revelations of the cables, such as former Australian Prime Minister Rudd mocking the German contribution to the war effort in Afghanistan as 'sponsoring folk festivals.' In journalism, this is called 'dog bites man.'

shadowy, publicity-seeking founder, Assange, were noble. He acknowledges the purpose was to humiliate the U.S. government...Yet beyond the predictable reactions both inside and outside the administration, the reality was best captured by Defence Secretary Robert Gates, who suggested that while the cables were "awkward" and "embarrassing," the consequences for U.S. foreign policy are "fairly modest."

The analogy to the famous 1971 Pentagon Papers, which exposed the internal deliberations of Vietnam War decision-making, is absurd. Those documents chronicled years of deliberate lies and misrepresentations that caused a debacle resulting in the loss of hundreds of thousands of lives. There's nothing remotely comparable in the WikiLeaks.[2]

Once we separate substance from secrecy, thoughtful citizens, lawyers and lawmakers understand that the hue and cry about WikiLeaks may raise a genuine peril, but it's not the first one that comes to mind. As we shall see shortly, the law teaches us that this peril is not in the embarrassment that a diplomat faces for having spoken a plain truth in a whisper: The danger is that a renewed call for darker, deeper secrecy is itself a threat to the core principles of democracy. Every secret meeting in violation of Freedom of Information laws creates legitimate suspicion that something corrupt is going on. Each time a courtroom is closed, public trust in the legal system and rule of law is eroded. When economic data is locked away in a government file cabinet, the market's ability to make rational decisions is impaired. There is an argument to be made that Mr Assange may have inadvertently damaged the dialogue on the crucial role of freedom of information because the mundane nature of much of the Wikileaks material gives succour to those who would readily categorize *all* secret information as merely prurient – 'information pornography' – solely by dint of its secrecy.

Access to information and democracy

Yet, the Commonwealth, as have other NGOs and working commissions, has recognised the critical importance of free information to democracy. The Commonwealth Secretariat and various working committees have several times reiterated a commitment to the right to information. The Commonwealth Human Rights Initiative noted that:

As far back as 1980, the Commonwealth Law Ministers declared in the Barbados Communiqué that "public participation in the democratic and governmental process was at its most meaningful when citizens had adequate access to official information." Collective policy statements since then have encouraged member countries to "regard freedom of information as a legal and enforceable right." The Commonwealth Secretariat has even prepared guidelines and a model law on the subject.

Despite strong commitments to openness and transparency, the Official Commonwealth itself however, has failed to lead member states by example in the area of information sharing. The Commonwealth Secretariat does not have a comprehensive disclosure policy in place – other than a rule requiring release of certain documents after thirty years. Despite some welcome good practice at recent meetings of its officials, the Official Commonwealth continues to hesitate to engage civil society in its working or functions.[3]

In the 2002, the Heads of Government of the Commonwealth of Nations, meeting at Coolum, Australia, issued 'The Coolum Declaration' of 2002, underscoring the 'commitment to democracy, the rule of law, good governance, freedom of expression and the protection of human rights.'[4] These noble ideals take meaning only when they are being applied in practice to the lives of citizens, and become the standard, rather than the exception, of governmental conduct regarding information.

It is at this point that law becomes particularly instructive, and I suggest here that American case law may even be inspirational. The *stare decisis* of American Freedom of Information law is rich and detailed, predominantly and philosophically based on the critical role of information in a stable and meaningful democracy.[5] Moreover, the judicial literature of the United States provides for us very workable guidelines to protect interests that may be served by *some* measure of secrecy balanced against a presumption of openness. In short, American law is highly instructive as to the means and mechanisms by which we may separate on the one hand information that democracy needs in order to function, and on the other, mere "information pornography".

Distinguishing the need to know from 'information pornography'

The primary and dispositive factor in making such a determination is rooted firmly in whether the information being sought serves a genuine and direct public interest. As a newsroom lawyer, I am often approached by intrepid reporters

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2 '*WikiLeaks Backfires by Exposing Hidden US Virtue*', Albert R Hunt, *Bloomberg News*, 12/05, 2010, available at *www.bloomberg.com/news/2010-12-05/leaks-backfire-by-exposing-hidden-u-s-virtue-commentary-by-albert-hunt.html.*

3 *www.humanrightsinitiative.org/programs/ai/rti/international/cw_standards.htm.*

4 *www.thecommonwealth.org/shared_asp_files/uploadedfiles/%7B5D88C133-679E-4F04-88E3-688B14E59749%7D_coolumdeclaration.pdf.*

5 In this note, I conjoin access to government records, (which is generally considered under the rubric of 'Freedom of Information' or FOIA), with access to open courts and courtroom proceedings. In American law the former is a statutorily created right, the latter a combination of common-law and constitutional predicate.

who have uncovered some previously unpublished fact that might be of interest to our readers. For example, a reporter learns that the married CEO of a large, publicly traded company is having an affair with an administrative assistant. Aside from proving the truth of the matter – a question for discussion on libel law not here relevant – the key question to be asked is whether the lurid details of his personal life is merely 'information pornography' or if in fact there is a genuine 'need to know'. Determining the need to know is made by exploring questions relevant to the facts of the matter at hand:

- Has the company faced fines for gender-discrimination in the past, such that his behaviour would expose his company to regulatory risk?
- Did the executive position himself or his company publicly in a way that calls into question his sincerity or honesty, or exposes him to allegations of hypocrisy or misleading marketing?
- Does the company face a lawsuit that would levy a cost upon the shareholders, pensioners and eventually the employees?
- Has he used corporate funds or property to pay for trysts with his paramour or hush money to keep her silent?
- Has he passed on to her market-moving information which is being used in violation of securities laws?

In short, those who publish previously unheard information must ask themselves whether publication will result in a safer, richer, better informed, healthier public, or is instead the purpose of the information to merely titillate, and a self-aggrandising gesture for a publication to say 'look how clever we are'? There are some fact patterns of such obvious public interest that they immediately give the lie to those who would argue that secret information should stay that way without judicial scrutiny, and these fact patterns make clear the need to adopt a presumption of openness that a party asking for secrecy must overcome with a compelling governmental need.

For example, in the 1970s, a Massachusetts neighbourhood had been terrorised and shocked by a series of rapes committed against girls aged 16 and 17. An arrest was made, and the trial court, in an example of overuse of secrecy, barred the press from attending the trial, based on a formalistic reading of procedural rules that allowed for complete courtroom secrecy. The trial judge's decision was based on a concern about preventing the victims – many of whom were not in court or named in the trial – from experiencing further trauma.

The media appealed the closure to the Supreme Court of the United States in *Globe Newspaper Co v Superior Court.*[6] In holding that the overbroad closure violated the First Amendment, Justice Sandra Day O'Connor noted that "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted."[7]

Justice O'Connor's writing underscored the strength of the 'watchdog' role of the press at its most noble: the interest served by openness belongs not only to the particular defendant but to the public *en toto*, who through openness and free reporting may be assured that the evidence against the defendant was not fabricated; that the judicial process was fair; and that the defendant did not suffer abuse or coercion at the hands of authorities. Similarly, the public's trust in law enforcement and the judiciary may be bolstered by openness, because the public can learn about the hard work and dedication to an investigation that led to the arrest and the public can examine for itself the reasoning and fairness that permeated an open trial. Through well-reasoned and justified openness the public can take pride and confidence in their public servants when warranted. Conversely, citizens can learn when a criminal procedure is political punishment in nature[8] or when it is bungled by those charged with protecting society.[9]

In *Press-Enterprise v Superior Court*, another case involving the public's ability to attend a criminal trial, the Supreme Court of the United States noted the requirement of free information in order for a democracy to flourish:

> The common core purpose of assuring freedom of communication on matters relating to the functioning of government...provides protection to all members of the public "from abridgment of their rights of access

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6 457 US 596 (1982).

7 Ibid, at 611.7

8 Indeed, what is at stake in openness of criminal trials is not uniquely American. Consider the political history of some of the Commonwealth nations. Without transparency, how can the public distinguish between who is a terrorist and who is freedom-fighter? Our Singaporean friends can tell you about Lim Chin Siong, who in the 1960s spent several years in jail as a result of political activity considered by the then government to be illegal. In such cases, only access to the investigation and an open and fully reported-upon trial can help the public make up its mind and perhaps protect itself. Who is a criminal threat to society and who is a political prisoner?

9 See, eg, *'KY Supreme Court Overturns Murder Conviction Because Of Improper Police Questioning'*, Jason Riley, Louisville Courier-Journal, Jan 11, 2011 (murder conviction overturned for improper denial of legal representation) available at *www.courier-journal.com/article/20110111/NEWS01/301110087/Ky.+Supreme+Court+overturns+murder+conviction+because+of+improper+police+questioning*; *'Spokane Woman's Murder Conviction Thrown Out'* Meghann M Cuniff, *Spokane Spokesman-Review*, Dec 16, 2010 (murder conviction reversed for faulty jury instructions), available at *www.spokesman.com/stories/2010/dec/16/spokane-womans-murder-conviction-thrown-out/*.

to information about the operation of their government, including the Judicial Branch.[10]

Secrecy and the erosion of public trust

The roots of confidence and trust of the populace in its government go well beyond public scrutiny of the conduct of criminal trials, and extends to a presumption of openness to all phases of government activity, particularly the workings of government agencies. The late 1960s and early 1970s represented a low-water mark for the American public's trust in government. Vietnam, the disclosure of previously-secret material that showed the role of the American CIA in murdering heads of state in Southeast Asia ('*The Pentagon Papers*'), Nixon's 'Watergate Affair' and other scandals eroded the public trust with each passing day. At that time of 'Cold War' and Vietnam, peace activists and environmentalists sought information about American underground nuclear bomb testing, but were stopped by agencies determined to keep as much secret as possible. Further, under the Freedom of Information Law in place at that time, agencies were able to declare information shielded from public view by fiat: simply stamping something 'classified' meant it was so.[11]

Arguing for the release of the information, and railing against the government's overuse of the 'classified' stamp, Supreme Court Justice Douglas cited the legislative history of the US Freedom of Information Act, and not unlike some of today's Tea Partyers, invoked the Founding Fathers in asking for a check on government by fiat, noting that:

> The generation that made the nation thought secrecy in government one of the instruments of Old World tyranny and committed itself to the principle that a democracy cannot function unless the people are permitted to know what their government is up to. Now almost everything that the Pentagon and the CIA do is shrouded in secrecy. Not only are the American people not permitted to know what they are up to, but even the Congress and, one suspects, the President [witness the 'unauthorised' bombing of the North [Vietnam] last fall and winter] are kept in darkness.[12]

Democracy and the Social Contract

If democracy is to be nurtured, as the Coolum Declaration and other statements of this body posit, then it must be understood that democracy requires 'consent of the governed'. We must for a moment revisit the 'social contract' theory of democracy, posited by early political scientists such as John Locke, the 18th century English philosopher and one of the founders of modern liberalism. Locke's social contract theory proposed that a government's legitimacy and moral right to use state power is justified and legal only when derived from the consent of the society over whom that power is exercised.

In turn, the social contract, like any other contract, is contingent for its validity upon such consent being 'informed' or at the very least, based upon truthful information. It is black-letter law that 'fraud vitiates all contracts, and a contract induced by fraud, is in fact, no contract.'[13] Just as a conveyance or commercial transaction based on deceit is fraudulent and a nullity, so too, a government's legitimacy is predicated on truth in obtaining consent. This is where the peril of secrecy looms largest, because if a government is opaque on information of public import, then the public consent cannot be said to be 'informed'. The social contract between the government and the governed is predicated on the notion that the government will protect the public interest and enforce laws, regulate certain activities, and vindicate violations.

When the government fails to meet its end of the contractual bargain, freedom of information laws can be used by citizen-activists and their lawyers to prompt government action. In other words, transparency is the means by which the social contract of democratic government is enforced. I would suggest here that transparency must itself be employed in a transparent manner. The demand for checks and balances on government activity by public scrutiny is not the sole domain of fringe elements, be they anti-war leftists in the 1970s, Clinton-haters in the 1980s, or today's fringe who insist that President Obama was born anywhere but in the United States.

By way of example, in August of 2000, more than a dozen people died as a result of an oil pipeline explosion in Carlsbad, Arizona.[14] The ensuing fireball was large enough to be seen 20 miles away, and the victims were mostly families (including children) who had been camping in wildlife areas through which the pipeline ran. Federal investigators determined that year that the owner, El Paso Energy, had violated safety and environmental regulations and levied a penalty against the company.[15] Although a finding of liability was established by regulators, seven years later, El Paso had still not paid the fine, and regulators refused to address public questions about the

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[10] 464 US 501, 16, *cit om.*

[11] USC Sec 552.

[12] *EPA v Mink*, 410 US 73, 105 (1973). Interestingly, Justice Douglas was in the dissent in this case. The text of the Freedom of Information Act at that time allowed the 'classified' stamp to automatically thwart a citizen's right to access a document. After *Mink*, Congress, impelled by a reformist post-Watergate movement, amended the FOIA to disallow blanket use of confidentiality classification.

[13] *Jamison v Ludlow*, 3 La Ann 492, (La 1848). See also, *Lavalleur v Hahn*, 152 Iowa 649, 660, 132 NW 877, 881 (1911) (noting that if fraud in the inception of a contract is proven, the contract was never valid).

[14] Suburban Energy Management Project, Nov 09, 2008, *www.semp.us/publications/biot_reader.php?BiotID=558.*

[15] *www.ntsb.gov/publictn/2003/PAR0301.pdf.*

case. Local activists used the freedom of information laws to find out how El Paso had managed to avoid payment, and to also determine what policies and practices of the government regulators allowed a company to avoid accountability for a historic disaster.[16] The pressure created by public discussion may have been the motivating force behind the federal government finally taking action: although the case had languished for 7 years, within months of the FOIA requests and resulting publicity, the federal government took El Paso to court and obtained a judgment and consent decree requiring the company to pay a $15 million civil fine and abide by regulations.[17]

In most instances, agencies or parties in court with something to hide argue that the information is either proprietary, a trade secret, or that the disclosure would have a deleterious impact on the entity arguing for secrecy. This is perhaps where the distinction between 'information pornography' and data in the public interest takes its most litigious form.

During the financial crisis of 2008, Bloomberg News reporter Mark Pittman had begun to investigate a function of the Federal Reserve colloquially called the 'overnight discount window'. This function allows banks to borrow on short-terms relatively small amounts for book-keeping and check-clearing purposes. The Federal Reserve regularly announced the aggregate amount of such lending each day, but no details beyond that. Looking at the publicly released amounts of such borrowing for the two weeks leading up to the collapse of Lehman Brothers and the resultant financial meltdown, he noticed that the amount lent jumped more than 800 per cent -- from a few million dollars each day to *billions*. Pittman made FOIA requests to determine which banks borrowed how much public funding, on what terms, for what reason, and upon what collateral.[18]

Hiding behind fear of embarrassment, competitive harm

The Federal Reserve ignored the request for months, and when pressed, they refused to disclose the information, saying that the information 'would cast a stigma' on the borrowing banks and damage their reputations and standing in the business community, possibly leading to a run on those banks. In other words, instead of protecting the interests of the investors and depositors, who arguably have a right to know where their tax dollars and deposits were going, the Administration chose to side with the banks as having a greater interest in secrecy, asserting potential competitive disadvantage and essentially saying that if the public knew how troubled the banks are...they would be in trouble.

In November 2009 Bloomberg News filed suit in United States Federal District Court seeking the information, and Judge Loretta Preska noted the circularity of the government's argument. Although Federal FOIA laws allow exemption from disclosure of material that is a genuine trade secret the disclosure of which would harm competitive interests, Preska rejected the Federal Reserve's arguments, holding that:

> At best, the proffered affidavits suggest that the borrowers' competitors may use the knowledge that a borrower participated in a Federal Reserve lending program in order to determine when the borrower is 'in a weakened condition' and spread that information to the borrowers' shareholders or the market in general. But the risk of looking weak to competitors and shareholders is an inherent risk of market participation; information tending to increase that risk does not make the information privileged or confidential under [the statutory exemptions]. The Board would seemingly sweep within the scope of [the] Exemption all information about borrowers that anyone throughout the entire marketplace might consider to be *negative*. The Exemption cannot withstand such inflation.[19]

This balancing represents the approach of weighing the interests in secrecy versus the public need in a manner that I suggest is instructive to courts around the world. We must start with the presumption of openness, and place the burden on the party demanding secrecy to prove that they have a compelling interest. This is no less true for public access to court proceedings than it is to government agency information. In *NBC Subsidiary v Superior Court,*[20] movie stars Clint Eastwood and Sandra Locke had asked the court to deny public access to the civil trial records involving various contractual claims, arguing that the statements made in court would both prejudice the jury and embarrass the parties. Noting that the 'specific structural value of public access in the circumstances" the court reminded the world that "open trials serve to demonstrate that justice is meted out fairly, thereby promoting public confidence in such governmental proceedings.'

Private disputes in public places

At this point, many lawyers may ask, as did the movie stars' lawyers in *NBC*, whether or not parties have a right to have their disputes settled in private, pleading that 'most civil cases, including the civil case here involved, are purely private disputes litigated by private persons, which become public

[16] *http://xa.yimg.com/kq/groups/468332/2046852852/name/1104%2BFOIA%2B7A%2BAppeal.doc.*

[17] *www.justice.gov/enrd/4431.htm.*

[18] '*Fed Defies Transparency Aim in Refusal to Disclose*', Mark Pittman, Bob Ivry and Alison Fitzgerald, Bloomberg News, Nov 10, 2008, *www.bloomberg.com/apps/news?pid=newsarchive&sid=aatlky_cH.tY.*

[19] *Bloomberg LP v Board of Governors of the Federal Reserve System*, No 08 Civ 9595(LAP), (SDNY Aug 24, 2009), *judgment affirmed,* 601 F 3d 143 (2d Cir 2010).

[20] *NBC Subsidiary (KNBC-TV), Inc. v Superior Court*, 20 Cal4th 1178, 86 Cal Rptr 2d 778, 980 P 2d 337 (1999).

only because the parties are unable to resolve them privately.' Addressing that argument, the Court stated that:

> Assuming this is generally true, it does not assist respondent. As noted above, a trial court is a public governmental institution. Litigants certainly anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed or publicly elected judge, that the proceedings in their case will be adjudicated in public... [a]n individual or corporate entity involved as a party to a civil case is entitled to a fair trial, not a private one.[21]

American law sees access to the working of government, and court proceedings in particular, as 'beyond dispute' and 'more than the ability to attend open court proceedings; it also encompasses the right of the public to inspect and to copy judicial records.'[22]

In the *Littlejohn* case, 34-year- old Cynthia Littlejohn used a disposable BIC lighter that exploded in her pocket, causing third degree burns over a quarter of her body. She filed a personal injury suit that went to trial. In the course of that litigation, BIC produced discovery material to Littlejohn under a Protective Order, and on the basis of pleading that the information would disclose 'trade secrets', convinced the trial judge to allow them to submit the evidence under seal and away from public view. *The Philadelphia News* intervened, asking for access to the court documents, which was opposed by the defendant. It turned out their reasons for fighting public disclosure were fairly obvious: internal BIC Corporation documents introduced at trial revealed that the company knew of the defect not only through its own quality control audit but also from numerous reports of consumer injuries similar to Littlejohn's. Evidence introduced at trial showed that BIC was aware of 55 cases from 1980 to 1983 where fires had started in shirt pockets alone. The jury ruled against BIC, and the case ultimately settled for $3.25 million.

As a result of the press bringing the facts of the case to light, Congressmen initiated an investigation of the lighters with specific concern for child safety, and BIC eventually said it would put warning labels on every new lighter until it designed one that was both child-proof and convenient.[23] It was the presumption of openness in American jurisprudence that made consumer protection possible. In providing the newspaper with access to the documents, the Court said:

> As with other branches of government, the bright light cast upon the judicial process by public observation diminishes possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.[24]

Conclusion

If our goal is to promote democracy, we have to recognise that moral philosophy teaches us that consent of the governed is predicated upon an *informed and open* consent. In turn, we must recognise and establish principles and policies that serve this formula. A genuine democracy recognises the mechanics of Freedom of Information as requiring a presumption of openness and a balancing of interests in which the public's need to know outweighs potential embarrassment or the mere public relations concerns of litigants.

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[21] *NBC Subsidiary v Superior Court,* 20 Cal 4th at 1211.

[22] *Littlejohn v BIC Corp*, 851 F 2d 673, 678 (3d Cir 1988).

[23] *See*, '*Lawsuits That Protect Us All*', Centre for Justice and Democracy, 2001, available at *www.centerjd.org/archives/issues-facts/Lifesavers.pdf.*

[24] *Littlejohn,* 851 F 2d at 678.

Justice for Users: New Structures on Old Foundations

Robert Carnwath

Introduction

"A thousand years of judgment stretch behind -
The weight of rights and freedoms balancing
With fairness and with duty to the world:
The clarity time-honoured thinking brings.
New structures but an old foundation stone..."

These words come from the poem written by the Poet Laureate, Andrew Motion, to mark the setting up in 2009 of the new Supreme Court for the United Kingdom. That event was a powerful symbol of renewed commitment to the rule of law at the beginning of the new century, and especially to the principle of the independence of the courts from the executive. We need to, however, look at things from a more practical perspective. How can we as judges better serve our users? How can the structures of justice be remodelled to help us?

In this article I shall look at these questions by reference to three important recent developments in the UK legal scene. First the new Supreme Court itself. Then I shall say a few words about another important building project of symbolic importance, overtly directed at improving its share of a competitive market for legal services. That is the new commercial court building (the Rolls Building) due to open in London later this year. Lastly I shall move to the other end of the spectrum, to the more modest aspirations of the project with which I personally have been most closely involved in the last few years, that is the reform of the UK tribunal system.

The Supreme Court

The new Supreme Court is of course firmly rooted in the traditions of the predecessors in the House of Lords or the Privy Council. But its market has changed out of all recognition. In those great days of the British Empire, the Law Lords were the ultimate arbiters of the law for a large part of the human race. Most of the cases were about business or property. Public law as a separate concept hardly existed.

Today the international status of the court and its workload are quite different. Within the common law world it is matched in influence and intellectual power by a number of supreme courts in other parts of the Commonwealth. Within Europe, it must pay deference, within their respective spheres, to the European Court of Justice and the European Court of Human Rights.

One can get a snapshot picture by comparing last year's (2010) Appeal Case reports with those of one hundred years before (1910). In 1910, 66 appeals were reported, 42 by the House of Lords, and 24 by the Privy Council. The Privy Council cases came primarily from Canada (11 cases) and Australia (6 cases), the others from countries such as New Zealand, Hong Kong, and South Africa. Many (17 out of 66) related in one way of another to mining or railways. Other popular subjects were shipping, tax, and a variety of one-off cases such as peerage, licensing, and defamation.

Today the picture has changed completely. The international work of the Privy Council has been reduced to a fraction of its former glory. In 2010, only 23 cases were reported (out of some 60 decided[1]) none from the Privy Council.[2]

The great majority involved public law, particularly human rights, judicial review, immigration, and extradition, the other main subject being family law (4 cases). Very few are about business or property. The majority of the parties are publicly funded, either government departments or private litigants in the few categories which still attract legal aid (such as asylum-seekers). In effect the service is being provided largely by the public for the public at public expense.

Few now question the symbolic value of the new Supreme Court, or the quality of the building itself and its state-of-the-art facilities. This is in large part due to the close involvement of the senior judges in the detailed planning, and the enthusiasm with which, after a cautious start, they threw themselves into that work. One very important gain is in the opening to the public of the workings of our highest court. The building itself in Parliament Square is highly accessible even to passing visitors. Television cameras are installed in the courts, and the proceedings can be filmed. The new website is user-friendly and informative. In another new departure, a recent television film showed four of the justices, led by the President Lord Phillips, talking frankly about the work of the court, and their own part in it (they even revealed startling facts about

[1] By contrast the Indian Supreme Court, according to its website, delivered 1015 "reportable" judgments in 2010.

[2] 23 judgments were delivered by the Privy Council in 2010, but none made their way into the Appeal Cases reports. The geographical spread was of course much smaller (the great majority came from the West Indies or Mauritius).

their ordinary lives, such that they travelled by underground or bicycle, and did their shopping at supermarkets).

Less attention perhaps has been paid to defining the role of the Supreme Court in the modern world. President Barak (former President of the Supreme Court of Israel) gave his view:

> The role of the supreme court is not to correct individual mistakes in lower court judgments. That is the job of courts of appeal. The supreme court's concern is broader, system-wide corrective action...

That implies that at this level the process should look beyond the interests of the immediate parties; it should look primarily to the future, not the past. The judgments should be directed at those who interpret and apply the law from day to day, as judges, decision-makers, or legal advisers. Their need is not for intellectual stimulation, but for guidance as to what the law is and how practically to apply it, in terms as simple and clear as the subject matter allows.

A big challenge for the Supreme Court, as for all appellate courts, is what I would call "taming the common law". Complaints about what Lord Diplock called the "superfluity of citation" have been a frequent theme in the higher courts. More than 30 years ago, he called for restraint:

> The citation of a plethora of illustrative authorities, apart from being time and cost-consuming, presents the danger of so blinding the court with case law that it has difficulty in seeing the wood of legal principle for the trees of paraphrase".[3]

That of course was long before the internet revolution led to exponential growth in the availability of potential cases. In 2000 Lord Bingham, speaking extra-judicially said:

> Large numbers of decisions, good and bad, reserved and unreserved, can be accessed... it seems to me that the common law system, which places such reliance on judicial authority, stands the risk of being swamped by a torrent of material...[4]

The problem remains. In the recent television programme Lord Phillips spoke of a recent case in which the list of authorities ran to 400 cases. It was not clear whether he spoke with pride, horror or mere resignation. But it must be for the Supreme Court to take the lead in enforcing rigorous discipline over the advocates in the preparation of cases before it. It is to be hoped that they will follow the lead of Lord Judge, in the Criminal Court of Appeal:

> If it is not *necessary* to refer to a previous decision of the court, it is *necessary* not to refer to it. Similarly, if it is not *necessary* to include a previous decision in the bundle of authorities, it is *necessary* to exclude it. That approach will be rigorously enforced."[5]

Another striking contrast between 1910 and 2010 is in the length of the judgments. In the 1910 volume of Appeal Cases the average length of a judgment was 10 pages; in 2010 it was 60. That is partly due to the increase of cases with multiple judgments. Lady Hale touched on these issues in a recent interview for UKSC Blog (yes, there is one!). She had asked a group of judicial assistants (our version of US Supreme Court clerks) for the high points and the low points in the court's first year. The case they highlighted was one about the rights of the Jewish Free School to exclude pupils on religious grounds. The court found that the school had broken the law by refusing to admit a boy, whose mother had converted from Catholicism to Judaism under a non-Orthodox authority.[6]

Lady Hale explained why the judicial assistants regarded it as example of both high and low points:

(a) the high point – interesting subject matter, a large and committed audience, nine fully engaged justices, excellent advocacy, and (in their view) the right result; but

(b) the low point – they thought that we really should have got our judgment-writing act together..."

They had complained that there were nine judgments, including five full judgments "reasoning through the law to exactly the same approach", and two different groups of dissentients. She observed that higher court advocates and academics welcome separate opinions because they give them something to argue about, but that what lower courts and litigants want is clear guidance.[7]

As a spokesman for the lower courts I have no doubt which interest should prevail.

The Rolls Building and the market for justice

I move to a context in which the customer is important, not simply because he is a litigant seeking justice, but also because he has buying power in an increasingly competitive market for high-value litigation business.

Legal services make a large contribution to the foreign earnings of the UK (nearly £3bn in 2007). Further, one of the

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[3] *Lamber v Lewis* [1982] AC 225, 274.

[4] Cited in *R v Erskine* [2009] EWCA Crim 1425 para 73) (as part of a series of quotations on the same theme over more than 100 years).

[5] *R v Erskine* at para 75.

[6] *R(E) v Governing Body of JFS* [2009] UKSC 15, [2010] 2 WLR 153.

[7] *http://ukscblog.com/judgment-writing-in-the-supreme-court-brenda-hale.*

factors contributing to London's position as a major financial centre is the high standing of the country's judicial and legal system. Judge George Dobry, who was commissioned by the Lord Chancellor in 2000 to conduct a review of the UK's international legal relations,[8] perceptively observed:

> The invisible export of legal services is of major public importance commercially, professionally and also politically. An 'export' of English law and its system is of precisely similar significance. The two 'exports' are actually indivisible, because the success of English commercial legal skills abroad is linked to the high regard for the English Judicial System, and the operation of the Rule of Law in this country..."[9]

Approximately 70 per cent of all cases issued in the Commercial Court involve at least one, and usually more than one, party who are foreign, in the sense of having their corporate seat overseas.

It is also a very competitive market. Businesses are free to choose any law and any forum to resolve their disputes. There is increasing competition, both within and outside Europe to win the prize of global commercial law of choice, ranging from New York's long-standing challenge, to China's aspirations. An internet search will reveal how many "commercial courts" and "dispute resolution centres" have been sprung up all over the world: Wuhan, Dubai, Qatar and Singapore. They are all competitors for commercial litigation, no doubt claiming that their procedures are quicker, cheaper and more reliable.

The Rolls Building is designed to meet these challenges. It will bring together in one building the judges of the Commercial Court, the Chancery Division and the Technology and Construction Court. It will be the largest specialist centre for business and property litigation in the world. Users will find a compact, modern, one-stop shop with, for example, listing offices and registries side by side, and courts selected for their cases to suit the numbers likely to attend. There will be 31 Courtrooms (including 3 "super courts"), hearing rooms for Masters and Registrars, and 55 conference rooms, a much better ratio than in the RCJ main site. It will be fully wired for computer use in every court. The move coincides with the start of electronic filing in all three court groups. Judges of all three divisions have been closely involved with administrators in the planning of the building and its facilities at every stage.

When the project was launched in 2006, it was described by the then Lord Chancellor, Lord Falconer, as "the biggest dedicated business court in the world", intended to "maintain the UK's world-class reputation as the first choice for business law", supporting legal services which contributed "hundreds of millions of pounds to the UK economy".[10] Five years on that aspiration is about to become a reality.

Tribunals for Users

Finally I turn to the other end of the spectrum. If the Rolls Building represents the Harrods of the judicial market, the tribunals are more at the IKEA end, catering largely for a bulk, low-value market. In this case we have no grand new building, but we do have a radically reformed structure, which has brought together in one organisation a diverse range of more than 30 different specialist jurisdictions, principally relating to disputes between citizen and state, but also employment. The reforms in general follow the lines proposed 10 years ago by Sir Andrew Leggatt in his report, *Tribunals for Users – One System One Service*.[11] (The details can be seen on the tribunals website.[12]) I have been privileged to help the reform process in the newly created office of Senior President of Tribunals. We have come a long way since Leggatt. Lord Justice Sedley said recently: *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859:

> The edifice of administrative and adjudicative tribunals created by the TCEA is a landmark in the development of the UK's organic constitution...[13]

We do have some high-value customers, like corporate institutions within the tax and regulatory jurisdictions. But for the most part our customers include some of the most vulnerable members of society, such as welfare claimants and mental health patients. The high-value customers can look after themselves, but the latter need our active help. Many have no access to legal advice or representation, and rely on the tribunal to ensure that their cases are properly understood and resolved.

Leggatt had a simple guiding principle: "it should never be forgotten that tribunals exist for users, and not the other way round. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases."

The 2004 Government White Paper[14] which followed the report went even further. The new tribunal organisation would not just be a passive recipient of cases for disposal, but would have an active, pre-emptive role: "... Its mission will be to help prevent and resolve disputes, using any appropriate method

[8] He was then aged 80, after a long and varied career in the law, which included returning to his native Poland in 1989 after 50 years to establish a school of English law at Warsaw University, which is still flourishing (as is he).

[9] Dobry: Review of International Legal Relations, Feb 2000, p 5.

[10] Her Majesty's Court Service Press Release 14 Dec 2006.

[11] *http://www.tribunals-review.org.uk/leggatthtm/leg-ov.htm.*

[12] *http://www.tribunals.gov.uk/index.htm*

[13] *R (Cart) v Upper Tribunal* [2010] EWCA Civ 859.

[14] *Transforming Public Services: Complaints, Redress and Tribunals*, July 2004, accessible at *www.dca.gov.uk/pubs/adminjust/adminjust.htm.*

and working with its partners in and out of government, and to help improve administrative justice and justice in the workplace, so that the need for dispute is reduced."

The new approach can be illustrated by reference to the Social Entitlement Chamber, which handles mainly welfare benefit appeals. The name reflects the fact that this is not like adversarial litigation in the courts. Welfare benefit is a right granted by the state, which is often essential to maintain a basic standard of living. The tribunal's object is to arrive at the correct entitlement, no more no less. As Lady Hale has said, the process is "inquisitorial rather than adversarial... a co-operative process of investigation in which both the claimant and the department play their part."[15]

Unlike the commercial court, we have no direct competitors. No-one suggests that the civil courts could do the job more efficiently or economically. The risk, if any, is that government will think that it can do the job adequately in-house, and seek to limit rights of appeal. The Social Entitlement Chamber is a good example. The current recession, combined with legislative changes, has caused a dramatic increase in the workload, with consequent pressure on the system. From 2008-09 to 2009-10, social security appeals received rose from 242,800 to 339,000, and they are expected to rise to a peak of 436,000 in 2011-12. That is a growth of some 80% in three years. As nearly all these cases are about basic living needs, they must be dealt with quickly.

Tribunal justice cannot be turned on and off like a tap. Even if we are dealing with bulk, low-cost justice, quality cannot be compromised. Tribunal judges and specialist members (such as doctors) have to be recruited through the Judicial Appointments Commission, which takes time, and they need to be trained.

We have also had to re-examine our own processes at all levels, including what happens before a case gets to the tribunal. A taskforce was established with representatives of the tribunal judges, the tribunals administration, and the Department responsible for welfare payments. They have been working on measures with the Department to improve communication with claimants, to develop internal review procedures, and to improve feedback from tribunal decisions. Early results show a 20% reduction in the number of cases going to tribunal. By a combination of such initiatives we are gradually getting top of the backlog and bringing levels of service back to what they should be.

Training of judges is of course vital. At the moment, almost all the training funded by this process is delivered 'in-house' with each jurisdiction planning, organizing and executing its own training programme for its members. Hitherto these arrangements have been largely separate from the Judicial Studies Board which oversees training for court judges. That is about to change. On 1 April this year we will establish a new "Judicial College", which will bring together in one organisation training for all courts and tribunal judges.

Now we have the structure in place, the big challenge is how to use modern technology to improve the efficiency of the service. One of my statutory duties as Senior President is to have regard to the desirability of innovation. We are still largely stuck with a paper-based system, sending bundles of papers physically round the country. Attempts to develop effective on-line systems have not been as successful as hoped. We are using video-conferencing for evidence, but we need to go further. We should need to question the assumption that people have to make a journey to a physical court or tribunal to get justice. Much can be done, conveniently, effectively and cheaply, by use of on-line communication, by telephone (particularly for mediation), perhaps even by Skype.

Conclusion

It is useful to look at things from a practical perspective – that of the consumers of legal services, and how we as judges can best meet their needs in the 21st century. The public spends a lot of money on courts and judges, both as litigants and taxpayers. It is entitled to ask that the money is spent in a way that is cost-effective and meets the needs of its market. Although the nature of the market and its needs differs from court to court and at different levels, the principle is the same. Echoing Leggatt, as judges we must never forget that courts and tribunals exist for their users, not the other way round.

[Lord Justice Carnwath CVO, is a Judge of the Court of Appeals, London, and has been serving as Senior President of Tribunals (UK) since November 2007. This article was originally written as a paper for the 17h Commonwealth Law Conference held in Hyderabad, 5-9 February 2011.]

[15] *Kerr v Dept for Social Development* [2004] 4 All ER 385; [2004] UKHL 23 paras 61-3, per Lady Hale.

Religious Suicides and Indian Law

Shekhar Hattangadi

Introduction

A judicial review application against the practice among adherents of the Jain faith of fasting-unto-death could finally force the Indian judiciary's hand on a most controversial and emotive subject: the legality of religious suicides.

Human rights activists in India are up in arms—metaphorically speaking—against a traditional Jain ritual called *Santhara*, which follows the taking of the vow of *Sallekhana*,[1] in which a person starves to death voluntarily. Ever since Lord Mahaveer, the 24th and last *Tirthankara*, established the current tenets of Jainism circa 400 BC, thousands of his followers down the ages have taken their spiritual master's cue and embraced this essential feature of Jain orthodoxy. The antiquity of the practice and its religious significance notwithstanding, *Santhara* has of late come within the cross-hairs of a campaign by activists to abolish this contentious and divisive practice for its alleged abuses.[2]

One such activist, Nikhil Soni, now also a practising advocate, hails originally from the Churu district of the northwestern Indian state of Rajasthan. The district has acquired the dubious reputation of being the world's *Santhara* capital for its highest per-capita incidence of the practice in recent history. Growing up in Churu, Soni was for years a mute witness to several such ceremonial fasts-unto-death—till 2006.

That year, after failing to get the police to prevent one Bimla Devi's demise through *Santhara*, Soni filed a petition against the practice in the Rajasthan High Court.[3] Calling it "an incident of abnormality" that should be deemed an act of "suicide"—and therefore illegal under Indian law—his petition demands that practitioners of *Santhara* should be prosecuted for what is "palpably a crime" under Section 309 of the Indian Penal Code for "attempt to commit suicide" and that their supporters—who encourage it by venerating them as spiritually elevated beings—charged with "abetting" a crime.[4]

Battle lines

The battle lines are clearly drawn. If Soni's petition invokes the right to life enshrined in Article 21 of the Indian Constitution, the *Santhara* apologists turn the tables by positing its very corollary. The right to life, according to this argument, is meaningless without the corresponding right to stop living—i e the right to die. The same Article, they underline, also grants a person the right to personal liberty in such matters. Their defence—bolstered considerably by the active support of retired High Court judge Pana Chand Jain[5]—further invokes the protection of at least three other constitutional provisions, as well as the endorsement of an international covenant.

In order to safeguard the right to freedom of conscience, Articles 25 and 26 of India's Constitution respectively allow followers of all faiths to freely profess, practise and propagate their religious faith; and the freedom to manage their religion-related affairs. Mindful of the country's ethnic and cultural diversity, Article 29 guarantees those citizens having a distinct culture, the right to conserve the same. And Article 18 of the Universal Declaration of Human Rights—of which India is a signatory—states: "Everyone has the right to freedom of thought, conscience and religion; [and the right] to manifest his religion or belief in teaching, practice, worship and observance."

All of the above collides head-on with the very citadel of India's highest judiciary. If the *Santhara* believers have the country's primary statute book and an international covenant apparently on their side, Nikhil Soni has the weight of judicial opinion firmly in his favour. After two judgments on the more controversial side of the "right-to-die" divide—notably *Maruti Shripati Dubal v State of Maharashtra* (1986)[6] and *P*

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1 Both words *Sallekhana* and *Santhara* have their origin in Prakrit, a group of languages spoken in ancient India and from which Sanskrit is said to have evolved. *Sallekhana* comprises the concepts of *sat* (truth) and *lekhana* (decimating bodily desire). The vow leads to *Santhara* which derives from the Prakrit word *santhar* meaning "a bed of grass" symbolising the merging of the sentient body with the natural universe through deep meditation.

2 Several media reports have covered the latest *Santhara* controversy, notably: "Is *Santhara* against the law?" in *Times of India*, 20 Mar 2010; "The fast road to *Moksha*" in *Times of India*, 19 Dec 2010; and "Jain mercy-killing sparks row" in *CNN-IBN*, 24 Sep 2006. See also the academically inclined writings of British anthropologist James Laidlaw [*Riches and Renunciation: Religion, Economy and Society among the Jains*, Oxford: Clarendon Press (1995)], Canadian anthropologist Anne Vallely [*Guardians of the transcendent: An ethnography of a Jain ascetic community*, Toronto: University of Toronto Press (2002)] and American bioethicist Whitny Braun ['Sallekhana: the ethicality and legality of religious suicide by starvation in the Jain religious community' 27: 4 (2008) *Medicine and Law* 913-924].

3 *Nikhil Soni v Union of India & Ors* (Civil Writ Petition No 7414/2006), being heard as a "public-interest litigation" in the High Court of Rajasthan, Jaipur Bench.

4 *ibid.*

5 See, in particular, his article "Gratefully Dead" in *Times of India*, 18 Oct 2006.

6 (1986) 88 Bom LR 589.

Rathinam v Union of India (1994)[7] which respectively held that "if destruction of one's property or its deliverance to others for a cause or no cause is not an offence, there is no reason why sacrifice of one's body for a cause or without a cause or for the mere deliverance of it should be regarded as an offence" and that Sec 309 of IPC was "unconstitutional and hence void"—a five-judge bench of the Supreme Court ruled in *Smt Gian Kaur v State of Punjab* (1996)[8] that "the right-to-life is a natural right embodied in Article 21, but suicide is an unnatural termination or extinction of life and therefore incompatible and inconsistent with the concept of right-to-life." Emphasising the sanctity of human life, the Court, while over-ruling both *Dubal* and *Rathinam*, was categorical that "by no stretch of imagination [sic]" can "extinction" of life be read to be included in "protection" of life.[9]

Should the Rajasthan High Court accept the Supreme Court's binding precedent in *Gian Kaur* and, on that basis as well as on Soni's contentions, finally outlaw *Santhara*, the decision would seriously dent the religious sensitivities of nearly six million practising Jains worldwide (at least 100,000 of them in the USA alone—See Sidebar/Box), for whom the centuries-old ritual holds a pride of place among their sacred traditions. Its supporters—including Justice Jain—have already anticipated this eventuality and, in a clever attempt to pull the rug from under Soni's petition, argue that *Santhara* cannot be characterised in the first place as "suicide" if only because, far from being an act of extreme desperation fuelled by anguish and hopelessness, a person relinquishing food and drink voluntarily by this method has arrived at that decision after calm introspection, with an intent to cleanse himself of *karmic* encumbrances and thus attain the highest state of transcendental well-being. *Santhara*, for them, is therefore simply an act of spiritual purification premised on an exercise of individual autonomy.[10]

They point to an ecological dimension as well. *Santhara* practitioners reduce the burden that the rest of us eaters-and-drinkers routinely place on other life-forms in our environment, including plants. Even here, devout Jains subscribe to a hierarchy of sorts on the amount of "bad" *karma* resulting from consumption of certain foods. Thus, eating a single-seed fruit (like a mango) would be much less "sinful" than chomping on a multi-seed strawberry because of the latter's natural potential to procreate several more "lives" in the flora. The same philosophy, sociologists point out, prompts Jains to shun vocations like farming—which cause "violence" to plant and micro-organic life in the soil—and to opt for relatively "non-violent" commercial pursuits such as banking and trading in diamonds.[11]

Soni and his fellow-activists remain unimpressed by the nuances of this convoluted theological rationale. They are convinced that *Santhara* is, at best, suicide *simpliciter*

Santhara—in the USA too!

With the Brownian movement of people across the globe peaking over the last few decades, it is hardly surprising that the immigrant Indian community in the United States contains more than 100,000 practising Jains. And with the sharp revival of religious orthodoxy over roughly the same period, it is perhaps inevitable that there has been at least one documented case of *Santhara* in USA, while over a dozen others are whispered to have occurred as well.

The concept of religious suicide is alien to mainstream America whose Judeo-Christian ideology would, like other Western theologies, denounce such an act as being antithetical to the moral values espoused by Christianity. The Indian Penal Code, which forms the bulwark of criminal law in India, was incidentally drafted by Lord Macaulay who was known to be a devout Christian.

Whereas a devout Christian looks upon the human body as a God-given "temple of the human soul" and therefore beyond the realm of willful and deliberate destruction by any human being, a devout Jain would view that same body as a "prison of the human soul," the fulfillment of whose needs corresponds to the accumulation of bad *karma*.

This basic contradiction in approach and its possible resolution lie at the root of the research of Whitny Braun, an American bioethicist. Braun is particularly concerned with the dilemma of the American medical community when it confronts a *Santhara* practitioner. It is not uncommon, Braun observes, for terminally ill senior citizens in several American hospices to forego food, drink and medicines in their final days in order to facilitate a speedy exit. But what if a healthy Jain youth claims that a divine order prompted him/her to undertake *Santhara*? "Clinicians both in India and the United States can lay the groundwork for an inter-faith and inter-cultural dialogue that will help to facilitate a reconciliation of the American healthcare system's largely Christian-inspired bioethic with the Jain concept of right knowledge and practice," concludes Braun.

[7] AIR 1994 SC 1844.

[8] AIR 1996 SC 946.

[9] *ibid.*

[10] See *Times of India* articles cited above.

[11] See reference to Braun above.

masquerading as religious practice wrapped in the mantle of hoary tradition. At its worst, *Santhara* could well be nothing short of ritualised murder, devised to rid the family of the economic burden of taking care of its aged and seemingly unproductive members. Soni recalls the typical *modus operandi* exemplified in the Bimla Devi case. Diagnosed with terminal cancer, the elderly woman was too weak and depressed to protest as her relatives went about publicly announcing "her decision" to undertake the vow of *Sallekhana*. And, in her final hours, when Bimla Devi began screaming in a last-ditch effort to get food and water, her cries were drowned out by loud *bhajans*[12] sung to the accompaniment of high-decibel percussion, reports Soni.[13]

"If a person undertakes *Santhara* even on his or her own, the other members of the family are duty-bound to stop it," notes Madhav Mitra, counsel for Soni's anti-*Santhara* petition, taking the argument further. "They just can't let a suffering person die without painkillers or medical assistance. Even food and water are stopped. We consider this inhuman."[14]

The parallels with *Sati* [15] are chilling. Most of the *Santhara* "volunteers" (or "victims" according to its opponents), it turns out, are women—elderly widows with relatives keen to celebrate their deaths. Says Sudhir Hirawat, grandson of another *Santhara* volunteer and widow, Keila Devi Hirawat of Jaipur: "Our entire community is celebrating. This fasting is not to die, but a festival to face death. She is only cleansing her soul. This is our festival." Adds Keila Devi's daughter-in-law, Nirmala: "Everyone in the family is very happy. After all, she has brought name and fame to our family."[16]

And how "voluntary," one might well ask, is the decision taken by these so-called volunteers, when it is in fact taken and often persevered with under the threat of being socially ostracized if they entertain second thoughts?

Going strictly by scripture, a Jain *Stravak* (lay person) cannot perform *Santhara* without the express permission of the *dharma guru* or religious head. How many of the 200-plus *Santharas* reportedly undertaken every year (according to media statistics) have religious sanction is a matter of conjecture. For, it is well known that such permission is not easily forthcoming. While the Jain priesthood is quick to defend the practice in theory as an act of rational thinking and courage, and often bristles at its comparison with suicide, it is more cautious in the concept's real-world application. The venerated Jain monk Vimal Sagarji Maharajsaheb concedes that there may in fact be a very thin line between *Santhara* and suicide. "In certain instances, people have faced immense mental and physical tests [challenges] while observing *Santhara* and have not easily felt peace with themselves," he admits. "So whether *Santhara* is suicide or a holy practice to attain *moksha*,[17] I feel, is for the person embracing *Santhara* to answer for himself."[18]

What, the petitioners also question, distinguishes *Santhara* legally from say, euthanasia (or mercy-killing) which, at present, stands afoul of Indian law? And why, one might pose in the same vein, are protestors on hunger-strike promptly arrested and force-fed, and additionally charged under Section 309—as was done with Narmada Bachao Andolan activist Medha Patkar during her agitation against government policies over the rehabilitation of dam-displaced persons[19]—while law-enforcers turn a passive, even indulgent, eye to the likes of quasi-spiritualist Acharya Vinoba Bhave, who refused food and medicine in his last days?[20] Because Bhave had supported the Emergency imposed by the then Congress government? Or simply because he basked for most of his later life in a Godman-Gandhian halo? Why this blatant discrimination?

It is perhaps the fear of exposing such double-standards in the polity as well as the apprehension of antagonising a small but financially powerful Jain minority that explains the Court's foot-dragging for over four years on the Soni petition. Writ petitions, by their very nature, tend to jump the queue in court ahead of regular suits. Which is why lawyers are a bit surprised at the protracted course of the anti-*Santhara* petition.

But with the Rajasthan state administration filing its final reply to the petition in September 2010 and the concluding court hearings (arguments) scheduled for early 2011, Rajasthan's additional advocate-general SN Kumawat is hopeful that the case would be resolved soon thereafter—and in his favour. "The government's stand, which is reflected in our reply, is simply that a long-established religious practice like *Santhara* cannot be called suicide, and that deeming it as such would create serious problems in society like ours," he warns darkly.[21]

For the judiciary itself, there are other "internal" reasons why a clear-cut decision might cut uncomfortably close to the

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[12] Devotional songs in praise of Hindu gods, set to popular tunes.

[13] Quoted from private correspondence with the author.

[14] Quoted in "Religions: Jainism: Fasting" on the website *www.bbc.co.uk*.

[15] A medieval Indian funeral practice in which recently-widowed Hindu women immolated themselves on their husband's pyres either voluntarily or after being forced by relatives. *Sati* was outlawed by the colonial British rulers in 1829 following a mass protest movement led by activist and social reformer Raja Rammohan Roy in Bengal.

[16] Quoted in *www.bbc.co.uk*, cited above.

[17] Transcendental liberation from the *karmic* cycle of rebirth.

[18] Quoted in *www.bbc.co.uk*, cited above.

[19] See, e.g. "Medha Patkar arrested, hospitalised" in *www.rediff.com/news*, 6 April 2006.

[20] Most biographical accounts of Vinoba Bhave's life mention his death by *santhara*-type abstinence. See *wikipedia.org/vinoba_bhave* for a succinct description.

[21] Quoted from private correspondence with the author.

bone. Legitimising *Santhara* would provide a backdoor entry to the pro-suicide lobby which has so far been kept out of the debate by the *Gian Kaur* decision, and put a new question-mark over the embattled Section 309 of the IPC. Decreeing against the practice would, on the other hand, mean looking askance at some key articles of the Indian Constitution relating to religious autonomy.

Either way, in ruling whether *Santhara* is indeed a legal means of terminating one's life—and thus opining on whether an act sanctioned by religious belief can bypass the proscriptions of secular law—the Court will need to make a fine distinction between a *bona fide* "religious practice" that reflects and manifests a believer's genuine and deeply felt inner longing, and a seemingly legitimate but pernicious and inhuman "social custom" that preys on the hapless and the marginalised.

Nikhil Soni v Union of India & Ors also could create legal history, if that's any incentive to get the court moving. Not for the first time has an Indian court been called upon to decide between conflicting constitutional provisions concerning religion. Way back in 1958, the Supreme Court in *MH Qureshi & Ors v State of Bihar*[22] took on the issue of a ban on cow slaughter [Art 48] impinging on Muslim festivities during Bakr-Id [Arts 25, 26] and on the fundamental right of butchers to carry on their trade [Art 19(1)(g)]. But this time, the issue is decidedly more sensitive, and its consequences far more profound: it involves the extinguishment of human life.

All the same, the court's verdict on *Santhara* could have serious and long-term repercussions for similar beliefs in other religions practised in India—specifically for the potentially inflammable issue of religious suicide across the country's various faiths. Witness this conundrum: Three members of a Muslim family recently died and ten others were hospitalised in a critical condition during a 40-day-fast at a 14th-century Sufi saint's *dargah*[23] in Ajmer, Rajasthan.[24] The fast was undertaken at the behest of a senior family-member who claimed he was acting under the "orders" of the saint who appeared in his dreams and prescribed the *Chilla Kashi* ritual to ward off black magic. Sufi scholars however are unanimous that *Chilla Kashi* calls for solitude and meditation during the stipulated period, but certainly not the kind of extreme abstinence and self-deprivation that puts its adherents in mortal danger.

Scholars sadly have little say when armed hoodlums take to the streets in the name of religion. The Ajmer tragedy—which attracted little public attention and no state intervention, such as police action—could perhaps be explained away as a stray instance of irrational misinterpretation of an imagined cult diktat. But, in these frenzied times of religious intolerance and knee-jerk opportunism, even the boldest judge would understandably be loath to open that Pandora's box.

[Shekhar Hattangadi is a Bombay-based lawyer and legal academic.]

[22] AIR 1958 SC 731.

[23] Urdu/Hindustani word for "mausoleum" where the mortal remains of Sufi saints lie buried.

[24] "Fasting for 38 days, 3 die at Ajmer *dargah*,", *Daily News & Analysis* (Jaipur edition), 12 Oct 2010.

Ethics and Rules of Professional Conduct: Local Application of International Standards

James McNeill

Introduction

As far as ethics and codes of professional conduct in the practising legal profession are concerned, it seems to me that there are three respects in which International Standards come into play in our practising lives:

- The first is where an international standard is agreed between the professional associations of different jurisdictions, and becomes the code in respect of cross-border work between or among some of those jurisdictions;
- The second is where such an international standard is agreed and is then adopted by a local professional association;
- And the third is where, because of our speedy, global, almost immediate access to electronic information, we become aware of the manner in which another jurisdiction has treated a particular type of conduct.

These are all matters of which we are acutely aware in the United Kingdom where, in one small island, we have two jurisdictions, each highly active in international litigation and arbitration.

European standards

In Europe we are fortunate in having a Council of Bars and Law Societies, the CCBE, of which Scotland has twice held the Presidency. It is the official representative of the bars and law societies in Europe which, between them, comprise more than 700,000 European lawyers. In respect of ethics, it has adopted two, complementary, texts: firstly, a Code of Conduct for European lawyers which dates back to October 1988 and a Charter of Core Principles of the European legal profession, adopted in November 2006.

The second document, the Charter, is not conceived as a code of conduct; rather, it is aimed at applying to all of Europe, reaching out beyond member, associate and observer states of the CCBE. It contains a list of ten core principles common to the national and international rules regulating the legal profession. The charter aims, among other matters, to help bar associations that are struggling to establish their independence; and to increase understanding among lawyers of the importance of the lawyer's role in society. It is aimed both at lawyers themselves and at decision makers and the public in general.

On the other hand, the code of conduct is a binding text on all member states; and all lawyers who are members of the bars of these countries have to comply with the Code in their cross-border activities within the European Union, the European Economic Area and the Swiss Confederation as well as within associate and observer countries.

Global standards

At a higher level, there are texts such as the Basic Principles on the Role of Lawyers, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, in Havana in 1990. That document, among other matters, was formulated to assist member states in their task of promoting and ensuring the proper role of lawyers in the provision of certain legal services.

Sometimes these international expressions are couched in such general terms that they might be thought to act only as a gentle reminder of a point of practice. For example, paragraph 12 of the Basic Principles provides that:

> Lawyers shall at all times maintain the honour and dignity of their profession as essential agents on the administration of justice.

And paragraph 14:

> Lawyers, in protecting the rights of their clients and in promoting the cause of justice, shall seek to uphold human rights and fundamental freedoms recognised by national and international law and shall at all times act freely and diligently in accordance with the law and recognised standards and ethics of the legal profession.

Then paragraph 15:

> Lawyers shall always loyally respect the interest of their clients.

Some might think such very general expressions of limited assistance, but they are important reminders of basic principles, and a careful study of the wording indicates the subtleties

which they embrace. They are probably sufficient to be of assistance in almost any local application.

But it is in cross-border matters that many of us nowadays see the importance of the application of international standards. Trade has been global for centuries. Litigation in relation to trade has been a major element of certain jurisdictions for well over one hundred years. But it is, perhaps, only within our own professional lifetimes that a clearer understanding of operations in the legal systems of other jurisdictions has been the subject of greater awareness. I well remember my own professional experience some twenty five years ago in discovering that, whilst the commercial court in Edinburgh or London was presided over by some of the most intellectually active judges, the commercial court in Bordeaux comprised representatives of local trading houses whose views, on the international aspects of trading contracts, were likely, on matters of doubt, to favour local interests.

The adoption of international codes of conduct is a difficult path, and one requiring constant reappraisal. The code of conduct for European lawyers has been amended three times, the latest in 2006.

Difficulties

But even the genesis of the CCBE is an indication of the difficulties involved. The European Economic Community had been founded in 1957 and European lawyers perceived a threat to their independence. During a boat trip on the Rhine during a Congress of the Union Internationale des Avocats, the idea of the CCBE was conceived by the Presidents of the bars and lawyers associations of the original EEC member states. But the plan soon ran into trouble, because the Paris and Brussels bar associations wanted their own organisations, until some of the founders managed to convince their French and Belgian colleagues that a truly international organisation would be more effective. The CCBE became autonomous in 1966 and has been a powerful force for the profession since then.

The Code has always embraced general principles such as independence, trust and personal integrity, confidentiality, respect for the rules of other bars and law societies, incompatible occupations and the limitation of lawyer's liability towards the client and the client's interest. But on occasion local associations eventually realised that a provision, initially thought only to be of importance in cross-border activities, would be of assistance locally.

Referral fees

In my own jurisdiction in Scotland the Faculty of Advocates, to which I belong, has only recently adopted a rule precluding counsel from entering into arrangements by which a commission or referral fee is paid to any third party as a consideration for referring work. The Law Society of Scotland has had such a rule for a significant amount of time and so, as I understand it, has the English bar. But it was only recently that an organisation set up business in Scotland advertising that it could assist solicitors to instruct counsel at no extra cost to them or their clients. Such an organisation could not instruct counsel themselves, because only solicitors or direct-access organisations can do so, and this was not a direct-access organisation. It was obvious that someone somewhere thought they could find counsel who would accept instructions on the understanding that a commission would be paid to the go-between.

We had thought we were immune from such problems, but it had become clear that we were not. We had to amend our Code of Conduct. Such payments are not inevitably corrupt, but justice has to be seen to be done and, as the CCBE state, a professional provision of this nature 'reflects the principle that a lawyer should not pay or receive payment purely for the reference of a client, which would risk impairing the client's free choice of lawyer or the client's interest in being referred to the best available service.' It does not, of course, prevent fee-sharing arrangements between lawyers on a proper basis.

Need to tighten standards

Electronic access to developments in case law also brings reminders of how matters are developing in other countries, and whether we require to tighten our own standards. In one of my own fields, the law of trusts, a recent first instance decision from New Zealand in *Eden Refuge Trust and Others v Hohepa and Another*[1] was just such a reminder.

The case involves complex issues of law in respect of liability and, as I understand it, is under appeal. But, whatever the eventual outcome of the case, the underlying issues are definitely ones which we should pause to think about in times which are increasing litigious and where we are under greater pressure from our clients and where we are being asked to provide increasingly clever solutions to issues before us.

The circumstances were extreme but, in brief, a barrister and solicitor in practice in New Zealand accepted instructions, carried out investigations, became aware of the existence of a trust and advised his client as to his duties as a trustee. However, having provided that advice, the lawyer allowed matters to proceed in a way that resulted in the client being treated as if personally entitled to deal with the property and any proceeds of sale.

These circumstances, to my mind, are clear reminders of the need to balance duties to the client and his interests and duties

[1] (2010) 3 NZTR ¶20-009.

as an important part of the system of administration of justice.

Complaints bodies

Another area which assists us in developing our own codes of conduct through information from other jurisdictions is the emergence of bodies such as legal complaints commissions, separate from law societies and bar associations, and whose decisions may be subject to judicial review.

We have a recent example in Scotland in the case of *The Council of the Law Society of Scotland v The Scottish Legal Complaints Commission* [2010] CSIH 79. The SLCC is a neutral body which operates independently of the legal profession, but which is funded by an annual levy imposed on all legal practitioners in Scotland. It does not deal with complaints against judges. Complaints are deemed to be one of two types: (i) alleged professional misconduct or unsatisfactory conduct by a practitioner or (ii) suggestions that services have been inadequate.

'Conduct' complaints can be made by any person and, in this case, the complaint followed the receipt by the complainers of a letter, written by a solicitor on behalf of a client and suggesting that the complainers should not be walking on and through certain areas of ground. The Inner House of the Court of Session in Scotland (our Court of Appeal) found that the SLCC erred in law as its determination proceeded on a misunderstanding of the role and duty of the solicitor in the circumstances. But the case gives a practical example of the sensitivity and clarity in understanding the duty of a solicitor and his professional role. The solicitor was acting on his client's instructions and his duty was to report his client's concerns and to warn that, if certain apparent conduct did not stop, legal proceedings could be raised. There was no sense in which the solicitor could be said to warrant, or be personally responsible for, the accuracy of what he was told; nor was he under any duty to carry out any independent check or checks as to whether the information he received was true. He complied with his client's instructions and there was no suggestion that he did anything other than that.

For example there was no basis, other than speculation, that the solicitor was knowingly engaged in some unfounded attempt merely to intimidate. These, therefore, are the sources available to us. It seems to me that they are increasingly relevant because, nowadays, we not only have increased litigation in respect of international trade, we have hugely increased mobility of workforces and, as we all know, an increasing likelihood that individual clients will take issue as to the manner in which representatives of our professions have acted in relation to transactions or litigations in which they are interested.

Changing times

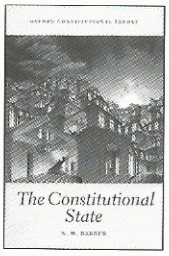
We are fast reaching a stage where, as my example from the change in the Faculty of Advocates code of conduct shows, a reliance on expectations from older times is unlikely to be sufficient. Further, as experience from the CCBE shows, international cooperation on codes of conduct presents, and represents, a stronger legal profession.

I would close with a quote which, to my mind, reflects on the global communication with which we are all involved, with the aspirations of younger members of the profession and with the difficult situations with which those lawyers in this particular part of the world have been faced over recent years. In November 2007 the Carnegie Council, which seeks to be a voice for ethics in international affairs, conducted a conversation with the Dean of the School of Law at the University of San Francisco on a topic of ethics and the legal profession. In discussing, among other matters, how much course work the typical law student carried out on the subject of ethics, Professor Jeffrey Brand said this, "It seems to me that the answer is to make sure that what you do with students, both inside the classroom and outside the classroom, creates lawyers that understand in their guts what it means to do the right thing … If you can start to create in their head a sense that they can be a good professional, make a good living and pay back their debt while at the same time being an ethical professional concerned for others, I think you can start to turn around some of these issues that seem so distressing. That is why the Pakistani situation is so mind-blowing. Here are lawyers that are putting their lives on the line … We have to have leadership in legal education that is willing to say: 'This is what matters'."

[James McNeill QC is a Scotland-based practising barrister. This article is based on a paper presented by him at the 17th Commonwealth Law Conference held in Hyderabad, 5-9 February 2011.]

Book Reviews

THE CONSTITUTIONAL STATE by N W Barber, Oxford University Press, New York, 2010, pp xiv + 199, £50 (hbk), ISBN: 978-0-19-958501-4.



Reflective books on constitutional theory tend, understandably, to be thinner on the ground than texts of a more practical, workaday, character. This slim volume falls into the former category in that it provides an analytical account of what is encompassed within a modern state, but it is not quite so mind-numbingly academic as some offerings in this genre often are.

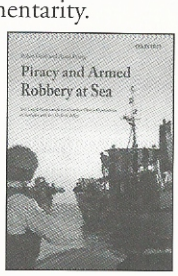
The ten chapters deal with, respectively: the paths of constitutional theory; what is a state?; the purposes of the state and nature of citizenship; the constitution of social groups; the models of state and content of constitutions; laws and conventions; the mentality of the state; the responsibility of the state; legal pluralism; and constitutional pluralism.

Barber begins with the somewhat controversial claim that constitutional theory suffers from an identity crisis in that "its point and method remain obscure". In his view,

> There is no consensus about what constitutional theory is for or how it should be done; and, as a consequence of this, no agreement about what a good argument within the discipline would look like ... The problem is exacerbated by the barely concealed belief of some constitutional theorists that they have identified the unique path of constitutional theory and those working outside of their school are fundamentally mistaken.

Barber nails his flag on the mast of interpretive constitutional theory, arguing that it is prior to other approaches. But he recognises that there is a high degree of complementarity between the interpretive, historical, critical and other approaches and is optimistic that the identity crisis can be ended through an acceptance of that complementarity.

PIRACY AND ARMED ROBBERY AT SEA by Robin Geiss and Anna Petrig, Oxford University Press, New York, 2011, pp xviii + 321, £50 (hbk), ISBN: 978-0-19-960952-9.



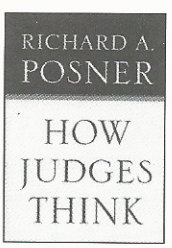
The havoc that has been wrought by Somali pirates off the Gulf of Aden in recent months has opened the world's eyes to a problem that many assumed had passed into history some years ago. Consequently, attention is now turning not only to physical measures needed to ensure the safety of ships passing through that important stretch of the sea, but to the legal regime that governments and others amy to turn to in dealing with this menace.

This book shines a powerful light on that regime and describes the plethora of conventions, agreements, United Nations resolutions, jurisdictional rules, and legal principles that apply to different aspects of anti-piracy operations. The list is impressive, but as the authors ruefully note, the measures do not add up to anything that can be characterised as truly effective. The international community, argue the authors, "lacks a coherent system of transnational security law beyond the limits of the nation State and one that effectively protects human rights by means of judicial remedies. Thus, as in the case of the UN Security Council Resolutions against terrorism, international regulation by the UN against piracy illustrates the need for new concepts on the basis of which a global security law can be established that is transnationally effective and at the same time guarantees international human rights standards."

Much concern has also been expressed over the current laxity in bringing those suspected of piracy to justice. The authors draw particular attention to the so-called 'catch-and-release' practices that seem to be endemic in the Somalia-related operations which, they say, run counter "to the goal of a full and durable eradication of piracy and armed robbery at sea". Many of the states in the region lack either the capacity or the will to administer condign punishment, and the prospect of an international piracy tribunal seems a long way off.

This book is a welcome contribution to the discussion of what is becoming a very troublesome and very urgent problem which the world can only ignore at its peril.

HOW JUDGES THINK by Richard A Posner, Harvard University Press, Cambridge (USA), 2010, pp 387, £14.95 (pbk), ISBN: 978-0-674-04806-5.



To attempt to develop a theory of judicial decision-making is, at the best of times, a hazardous business, but it is a testament to the analytical and expository skills of Richard Posner that he has managed to pull it off so elegantly and so cogently in this highly readable tract. Despite a busy career spanning the Bench (as a Circuit Judge based in Chicago) and academia (as a senior lecturer at the University of Chicago Law School), Posner has been a prolific writer, with an impressive record of books and articles on a wide range of topics.

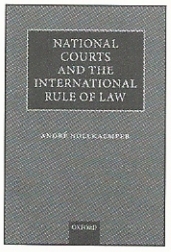
The central question posed – and answered – by Posner is: "What is it about the judicial labour market that determines the balance, which varies among judges and courts, among the personal, the political, and the legalist factors in judging?" Though focused primarily on the American judiciary, the arguments advanced by the author would have a resonance in other legal systems as well. The discussion is wide-ranging: it spans, among other things, the 'political' nature of judging, the external and internal influences on judges, the limits of legal formalism (Posner prefers the term 'legalism'), the stabilising force of consensus (and the varying degrees to which this is present in different areas of the law and at different levels of the judiciary), the increasing chasm between legal academia and the bench, and the importance of pragmatic adjudication (at the core of which is a "heightened judicial concern for consequences and thus a disposition to base policy judgments on them rather than on conceptualisms and generalities").

Those familiar with Posner's forthright – some might say provocative – style will not be disappointed. The book abounds with views and arguments that are bound to infuriate some, but it also offers a cautionary lesson against the risks of applying labels such as 'conservative' or 'reactionary' on the basis of lazy assumptions or superficial readings. Posner is nothing if not a true pragmatist. Sample this broadside against those who advance idealistic views of judicial behaviour based on romantic notions of universalism:

> The incessant efforts to stabilise constitutional decision making through comprehensive theory are an embarrassing failure. The latest example is the quest for global judicial consensus on matters such as capital punishment, a quest certain to founder on the diversity of the world's legal systems and American ignorance of foreign cultures, including foreign legal cultures. The quest replaces time with space – the pretence that when judges strike off in a new direction they do so just to bring American constitutional law into conformity with the best legal thinking in the world as a whole.

A highly thought-provoking book indeed.

NATIONAL COURTS AND THE INTERNATIONAL RULE OF LAW by André Nollkaemper, Oxford University Press, New York, 2011, pp xlvi + 337, £70 (hbk), ISBN: 978-0-19-923667-1.



Until relatively recently, issues of 'international rule of law' seldom featured in the work of national courts. Indeed, the concept itself did not engage the attention of domestic judges except sporadically. Besides, enforcement of 'international rule of law' at national level has always been patchy – and, to the champions of that cause, highly disappointing – as the author of this new study notes.

It is worth remembering that explicit recognition of an international rule of law at global level is itself of fairly recent vintage (most observers would trace its origins to the resolution passed by the United Nations at the 2005 World Summit). The uncertainty of the concept's legal status is reflected in the fact that, as recently as 2008, an academic writer on the subject titled his article 'An International Rule of Law?'.

This book, however, makes an unapologetic case for the concept. The distinction that is traditionally made between a rule of law at the national level and one at the international level is, it contends, 'misleading': "Though the practical and institutional manifestations of the rule of law may take different shapes and forms at different levels of government, we should not demand less at the international level than we do at the domestic level. The very difficulty in distinguishing between what is international and what is national would make such demands also rather pointless."

Not everyone would, of course, argue with the premise underlying the latter proposition. Despite occasional overlaps, national and international legal issues are fairly easy to identify and deal with, and legal systems around the world continue to make that distinction regularly and effortlessly. The real challenge, rather, lies in the enforcement deficit in international law – a point which the author readily accepts when he notes that 'accountability remains the most problematic aspect of an international rule of law'. His solution to that problem is that we should not rely too much on international courts as the only instrument for achieving accountability, but should look to "a variety of other processes, such as quasi-judicial or non-judicial non-compliance mechanisms and indeed by institutions at national level." National courts, argues Nollkaemper, have the capacity – and increasingly the willingness – to enforce an international rule of law, and this, he believes, is the key to future success.

ENDING APARTHEID by David Welsh and J E Spence, Longman, Harlow (UK), 2011, pp xi + 231, £19.99 (pbk), ISBN: 978-0-582-50598-8.

Most assessments of South Africa in its post-apartheid incarnation have tended to err on the side of generosity. This is understandable, given the troubled history of the country and given the huge reservoir of goodwill that Nelson Mandela and his colleagues had built in the years leading up to 1994. But subsequent events have taken some of the sheen off the 'rectitude base' of the new South Africa, and a corrective therefore seems to be called for in any contemporary assessment of the country and its rulers. The book under review performs that task admirably.

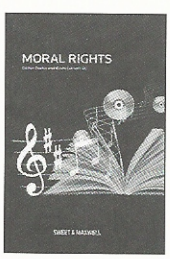
Authored by two academics with intimate knowledge of South Africa, it provides an illuminating account of the forces that shaped the apartheid ideology, the process which led to its dismantling, the highly complex negotiations which culminated in the new constitution, and the rather mixed record of the country's new rulers in living up to the ideals that they had signed up to.

The last mentioned would be particularly of interest to many readers. Among the areas examined, albeit briefly, are: the government's much-heralded affirmative action and black economic empowerment programme; corruption; President Zuma's leadership; foreign policy; and South Africa's position as an emerging world power. Sample this comment on human rights:

> South Africa's record as a defender of human rights has been mixed. Like many states, whose leaders pin their colours to an ethical mast as a matter of ideological principle, the constraints at times outweigh and complicate the incentives to be consistent and avoid accusations of double standards. In South Africa's case ties of gratitude to friends in the anti-apartheid struggle – for example Libya, Cuba and Algeria – overrode concern for human rights derelictions and provoked fierce argument over, for example, the morality of arms sales to these regimes ... Another issue which provoked fierce debate arose over which China to recognise – Taiwan or the People's Republic. In all these cases, principle clashed with pragmatism and the latter won.

On the world stage, too, the rhetoric has not been matched by actions on the ground:

> One might fairly conclude that [the] attempt to project itself as an emerging power of substance has been over-ambitious. One abiding problem has been the difficulty in reconciling the pressure to play domestically by the rules of globalisation and simultaneously to act as a spokesman for Third World interests in international forums.



MORAL RIGHTS by Gillian Davies and Kevin Garnett, Sweet & Maxwell, London, 2010, pp cxii + 1177, £165 (hbk), ISBN: 978-0-421-72940-7.

"Moral rights imported from France via International Conventions have provided fresh pastures of Gallic charm for grazing by English copyright lawyers," says Lord Justice Mummery in an interesting Preface to this magisterial work. Mummery also makes the important point – which will be readily recognised by anyone with more than a passing familiarity with copyright law – about the relative side-lining of this topic:

> It has taken a long time for moral rights to find their way on to the Statute Book and even longer for them to justify a whole book devoted to them. Until recently moral rights have been written up towards the end of long legal texts on larger topics, like intellectual property, in the same way that quasi-contract was marginalised by contract lawyers before unjust enrichment was accepted as a subject in its own right. Since then restitution lawyers have never looked back. The same might happen to moral rights practitioners.

An idea of the extent to which moral rights have remained neglected in the English system can be had from the fact that case law on the subject is still very sparse (the authors point out that only five cases involving moral rights have gone to full trial since their entrenchment in statute just over two decades ago). By contrast, moral rights have flourished in other jurisdictions. This book has discrete chapters devoted to their treatment under Belgian, French, German, Greek, Italian, Dutch, Danish, Finnish, Norwegian, Swedish, Portuguese, Spanish, Swiss, Russian, Australian, Canadian, Chinese, Israeli, Japanese, Argentinian, Brazilian, Mexican and American law.

In substantive terms, the work covers a wide field which includes a discussion of the origin and theory of moral rights, their international development, their treatment in international instruments, as well as a detailed exegesis of their position under English law. A concluding chapter casts a reflective eye on the universality of moral rights, the international inconsistency of domestic legislation on such rights, and the prospects for harmonisation of moral rights within the European Union.

All in all, a work of unparalleled sweep which will continue to dominate the field for the foreseeable future.

ADVERTISING LAW AND REGULATION by Giles Crown, Oliver Bray and Rupert Earle, Bloomsbury Professional, Haywards Heath (UK), 2010, pp lxvi + 980, £125 (hbk), ISBN: 978-1-84592-451-5.

Ten years is a long time between successive editions of an authoritative textbook on any modern area of the law. It is particularly so in a fast-developing subject such as advertising law which has seen an exponential growth in recent years. For that reason alone, this much expanded edition of what began life as a work of sole authorship but now comprises a major team effort is to be welcomed.

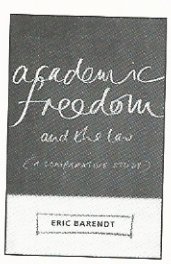
The regulatory juggernaut (to which the Chief Executive of the Advertising Association makes reference in a somewhat folksy Foreword to this book) continues to roll on with unrelenting speed, leaving behind a mind-boggling trail of rules, regulations, and codes of practice for advertising executives to grapple with. The influence of Europe in the process cannot, of course, be ignored or underestimated. Within the British

domestic context (which is the main concern of the book), advertisers have to contend with regulatory bodies at different levels and with varying powers of enforcement: in addition to the Committee of Advertising Practice (CAP), the Advertising Standards Authority (ASA), and the Office of Communications (Ofcom), there are trading standards departments in local authorities (who exercise statutory powers) and a number of sector-specific regulators.

The book deals with each of them with the necessary detail. It is divided broadly into three parts, looking respectively at: (i) the general legal areas (consumer protection, defamation, malicious falsehood, trade marks, passing off, deceit and misrepresentation, privacy, data protection, copyright, obscenity, contempt of court, etc.), (ii) specific rules concerning different professionals (eg accountants, actuaries, lawyers, opticians, timeshare salesmen) and different products or activities (eg alcohol, care homes, contraceptives, financial services, holidays, medicines, tobacco, taxis); and (iii) regulatory bodies and their codes of practice. A concluding chapter offers a snapshot of the regulatory framework in selected foreign jurisdictions, both within Europe and further afield.

Arguably, the greatest merit of the work lies in the practical guidance it is able to offer the reader on a diverse range of issues connected with the advertising world. To that extent, it will be much sought after by advertising professionals and their advisers. It is to be hoped that the next edition of this book will not be as long in gestation as this one has been.

ACADEMIC FREEDOM AND THE LAW by Eric Barendt, Hart, Oxford, 2010, pp xxviii + 331, £40 (pbk), ISBN: 978-1-84113-694-3.



Despite frequent affirmations of its importance, academic freedom has seldom been the subject of scholarly analysis. This slim volume goes some way in filling that gap.

It is a comparative study of how this concept has been justified, and legally protected, in three Western jurisdictions: the United Kingdom, the United States of America, and Germany. The subject has assumed particular topicality in the UK given the enormous economic pressures that British universities are being subjected to in recent months and years. Such pressures are clearly bound to impact on academic freedom as traditionally understood and practised.

Barendt identifies a number of other recent influences on academic freedom that cannot be lost sight of either. These include constraints placed by terrorism (and calls upon academics to sniff out radicals within the student population), demands made by private parties who may endow chairs or other positions in universities, and 'gag' orders placed on scientists funded by pharmaceutical and other companies preventing the dissemination of data that the companies may find inimical to their commercial interests.

More fundamentally, says the author, the meaning of academic freedom itself is hotly contested. To equate the concept to unrestricted freedom of speech, as some academics do is, he argues, "fundamentally misconceived". Academic speech must be subject to quality controls "on the basis of general professional standards of accuracy and coherence, as well as the specific requirement for publication in the better journals that it makes an original contribution to knowledge." Academic freedom also has a organisational dimension which finds particular emphasis in the German concept of *Wissenschaftsfreiheit*.

Other aspects of the subject which Barendt discusses – in varying degrees of detail – are: the justifications for academic freedom; restrictions on freedom of research; academic freedom in the age of terrorism; and the freedom of extramural speech. Also included is a case study involving Chris Brand, a psychology lecturer at Edinburgh University, who was suspended and then dismissed after being seen to engage in conduct that the university found offensive and unacceptable. Barendt's assessment of the case is fair and balanced.

PARTITIONING PALESTINE by John Strawson, Pluto Press, London, 2010, pp x + 253, £19.50 (pbk), ISBN: 978-0-7453-2323-7.

To say that the Israeli-Palestinian conflict is a conflict "forged by law" is probably overstating the importance that law has played in this long-running dispute. But there can be no denying that law has loomed large in the fight at every stage, as the author of this slim but interesting volume argues:

> For over a hundred years law has served the protagonists as a resource not only to justify their rights but also to dignify lurid threats and violent acts. This use of law has engendered a festering sense of justice amongst Palestinians and Israelis that has fostered conflict rather than offering a means for its resolution. Each side has become cocooned within a legal righteousness in which its own legitimacy is unimpeachable while that of the other is compromised … A cycle of law has sustained a cycle of violence.

How then can the cycle of violence be stopped? The author believes that, for far too long, there has been too much legal nit-picking. "We need to eliminate the idea," he says, "that international law sets a series of strict imperatives that must be followed … law and justice cannot operate well without wisdom." He is firmly in favour of a two-state solution and insists that international law should be deployed in the service of enforcing the partition of Palestine.

News and Announcements

ENGLAND & WALES: New training arrangements for judges

From Friday 1 April 2011, the separate arrangements for the training of judges in the courts and judges in the majority of tribunals in England and Wales will be brought together to create a Judicial College.

The Judicial College will be the establishment which will train judicial office-holders including magistrates and members of tribunals in the knowledge and skills they need to carry out their duties effectively.

This unified training organisation will allow judicial office-holders across the spectrum of courts and tribunals to benefit from shared good practice and learn from the best in both areas. It will build on the existing high standards of training and will be the central professional learning and development institution for the judiciary.

Current programmes of training will continue in the first year of the College's existence, but over time the College will be concerned not only with specialist training for the varied courts and tribunals jurisdictions, but also with the generic skills exercised by all judges irrespective of the jurisdiction in which they are sitting.

The Judicial College will be governed by a Board chaired by an Appeal Court Judge. The members of the Board are representatives of the judiciary in tribunals and courts, including magistrates' courts, Directors of Studies for courts and tribunals and the Executive Director of the College.

There is no new funding as the Judicial College will operate using the existing resources dedicated to judicial training in courts and tribunals.

The Judicial Studies Board (JSB) has been responsible for organising training for judges in the High Court, Crown and County Courts and for magistrates and legal adviser training. Under these new arrangements the JSB's functions will be subsumed within the Judicial College.

Further details are available at.*www.judiciary.gov.uk/training-support/judicial-college*

[*Source*: Judicial Communications Office News Release, 01 April 2011]

ENGLAND AND WALES: Consultation on use of Twitter in court

On 20 December 2010, the Lord Chief Justice of England and Wales issued an Interim Practice Guidance titled 'The Use of Live Text-Based Forms of Communication (Including Twitter) from Court for the Purposes of Fair and Accurate Reporting'. The effect of the Interim Guidance was to clarify the circumstances in which judges may allow use of mobile electronic devices to transmit text-based communications directly from the courtroom for the purpose of reporting the proceedings. "Live, text-based communications from court" includes the use of internet enabled laptops to make text-based communications, smart phones used for mobile email and other internet services and similar devices.

When issuing the Interim Guidance, the Lord Chief Justice said that he would conduct a full consultation regarding the use of live, text-based communications from court. A consultation paper issued subsequently sets out the considerations taken into account when the Interim Guidance was framed, and outlines issues which need to be considered before a final policy is determined.

The focus of this consultation, is the use by the media of live, text-based forms of communication for the purposes of fair and accurate reporting. The media are presumed to be familiar with the requirements of the Contempt of Court Act 1981 to engage in 'fair and accurate' reporting, in a manner which respects any applicable reporting restrictions and the relevant Press Complaints Commission Code of Practice.

The consultation invites responses in relation to the courts of England and Wales. It does not relate to the courts in Northern Ireland or Scotland. Nor does it relate to the UK Supreme Court, which has produced its own policy on the matter, in the light of the fact that appeals heard before it do not involve interaction with witnesses or jurors, and that it is rare for evidence to be introduced which may then be heard in other courts.

Following the consultation, consideration will be given as to what, if any, further guidance or rules may be required, and what the nature of those changes will be.

Other than the Interim Guidance, the contents of this paper should not be considered to reflect the final views of the Lord Chief Justice.

The consultation opened on Monday, 7 February 2011 and closes on 4 May 2011. Responses may be submitted by

email to *courtreporting@judiciary.gsi.gov.uk* or by post to: Court Reporting Consultation, Royal Courts of Justice, Strand, London WC2A 2LL. More details are available at *www.judiciary.gov.uk/courtreporting.*

[*Source*: Judicial Communications Office News Release, 07 February 2011

AUSTRALIA: Review of law reform body

The Legal & Constitutional Affairs Committee of the Australian Parliament has released the report of its inquiry into the Australian Law Reform Commission (ALRC) on 8 April 2011.

The Committee's recommendations are that:

1. The Australian Government restore the ALRC's budget cuts for the period 2010-11 to 2013-14 as a matter of urgency.
2. The ALRC Act be amended to provide for a minimum of two standing, fixed-term (not inquiry-specific), full-time commissioners.
3. An additional full-time commissioner be appointed, for each additional inquiry referred to the ALRC, in circumstances where the ALRC already has two or more ongoing inquiries.
4. The ALRC's public information and education services programme be resumed immediately.
5. The ALRC be provided with all necessary resources to enable it to continue to travel to undertake face-to-face consultations as part of its inquiry processes.

The committee concluded that the ALRC is critically important to the development of legal policy in Australia. It has a proud history of undertaking important reviews and inquiries into key areas of law and making significant recommendations to unify and improve Australia's laws. The ALRC's high quality of work cannot continue on a shoestring budget.

Government Senators dissented, stating that, in their view, the Australian Government strongly supports the work of the ALRC. The changes to the ALRC's structure introduced in 2010 will, they believe, improve the ALRC's flexibility to respond to circumstances as required, and will enhance the ALRC's ability to undertake expert analysis through access to subject-matter expert commissioners for specific inquiries. Government Senators also believed that the ALRC is adequately resourced to undertake its important functions, particularly in light of the Attorney-General Department's ongoing commitment to assist the ALRC and ensure that it is adequately resourced.

A copy of the full report can be accessed at: *www.aph.gov.au/senate/committee/legcon_ctte/law_reform_commission/report/report.pdf.*

SINGAPORE: Concern over conviction of opposition leader

The International Bar Association's Human Rights Institute (IABHRI) has expressed grave concern over the recent ruling of the Singapore High Court, in which Dr Chee Soon Juan's conviction for speaking in public without a permit was upheld. The IBAHRI believes that Dr Chee, leader of the Singapore Democratic Party (SDP), has been the target of repeated attempts by Singapore's ruling People's Action Party (PAP) to stifle his opposition views and prevent him standing for parliament.

On 20 January 2011, Judge Steven Chong in the High Court, sentenced Dr Chee to a $20,000 fine which would have been commuted to a prison term of 20 weeks in the event that it had not been paid by 10 February. SDP supporters raised and paid the fine. However, the IBAHRI is gravely concerned that the ruling PAP party has passed and continues to enforce unlawful domestic legislation which prevents the open political discussion necessary to ensure a democratic society. Of particular concern to the IBAHRI are the Public Entertainment and Meetings Act, Public Order Act and the Miscellaneous Offence Act. Section 2(1) of the latter, makes it illegal to conduct any activity without a permit if it: (a) demonstrates support for, or opposition to, the views and actions of any person; (b) publicises a cause or campaign; or (c) marks or commemorates any event.

The IBAHRI understands that the government has repeatedly stated that no permits will be given for outdoor political events and believes that the government refuses permits and/or prosecutes those groups which challenge or oppose it. Furthermore, under section 45 of Singapore's Constitution, a person who has been convicted of an offence and sentenced to a fine of at least $2,000 is not eligible to stand for Parliament.

In response to the recent Singapore High Court ruling on Dr Chee, the IBA's Executive Director, Mark Ellis said: *'When Singapore's restrictions on freedom of expression, assembly and association are read in conjunction with its constitutional rules for parliamentary candidates, it appears that the government is attempting to silence its critics. This is achieved through a combination of legislative restrictions on freedom of expression and assembly, the routine denial of permits and selective prosecution of political opponents.'*

[*Source:* IBA Press Release, 14 Feb 2011, accessible at: *www.ibanet.org/Article/Detail.aspx?ArticleUid=568B54B5-F316-4BA3-96E4-410A6C3AAA77.*]

CANADA: Bar Association criticism of Immigration Minister

The Canadian Bar Association (CBA) has expressed the view that recent criticism of judges and courts by the federal Minister of Citizenship, Immigration and Multiculturalism was likely to erode public confidence and weaken the administration of justice.

"Your public criticism of judges who follow the law but not the government's political agenda is an affront to our democracy and freedoms," says CBA President Rod Snow of Whitehorse in a letter to Immigration Minister Jason Kenney.

The CBA took issue with the Minister's comments to students at the University of Western Ontario earlier this month, and reported widely in the media, where he criticised Federal Court judges for rendering decisions he did not agree with. Those comments, said the CBA, left Canadians with a faulty understanding about how the justice system works.

"Canadians should not be encouraged to make conclusions about the judiciary based on criticism of judicial decisions for not supporting the government's agenda. Judges cannot enter the public arena to respond to criticism. Given that reality, your public invitation to the Federal Court to engage in a 'constructive dialogue' was either naïve or misleading," says Snow.

[*Source*: CBA News Release, 22 Feb 2011, accessible at: *www.cba.org/CBA/News/2011_Releases/2011-02-22-Kenney.aspx.*]

NEW ZEALAND: Concern over earthquake recovery law

The New Zealand Law Society has expressed concern over what it considers 'hasty' legislation passed in the wake of that country's recent earthquakes. Such legislation, it argues, should be limited to those matters that require an immediate response. Less urgent matters, particularly issues relating to compensation, should be set aside for closer consideration in Parliament.

This message was conveyed by the Society in its comments to the select committee considering the Canterbury Earthquake Recovery Bill in Christchurch on 13 April 2011.

"The Law Society acknowledges that the Canterbury earthquakes and their aftermath justify emergency legislation to facilitate the speedy restoration of the region, but we have concerns about the haste with which the bill has been conceived," said Rachel Dunningham, a Christchurch lawyer and spokesperson for the Society's Law Reform Committee.

For the most part the bill balanced the need to facilitate the speedy restoration of the region while maintaining transparency and accountability, but in a number of areas its provisions are unclear, Ms Dunningham said.

"In particular the Law Society is concerned that the legislation is unclear on intended compensation in the case of land acquisition and may give rise to unrealistic expectations.

"It is important that care is taken to ensure that the provisions relating to property rights and compensation do not have a detrimental impact on people and businesses. The central principle should be that where private individuals suffer a loss caused by the actions of the Canterbury Earthquake Recovery Authority rather than the earthquake, that loss should be compensated."

The Law Society made a number of suggestions for clarifying the intentions of the legislation as well as a number of specific recommendations.

[*Source*: Law Society media release, accessible at: *hwww.lawsociety.org.nz/home/for_the_public/for_the_media/latest_news.*]

SOUTH AFRICA: Law Society's call for respect to court

The Law Society of South Africa (LSSA) has called on all legal practitioners – attorneys and advocates – to respect the dignity of the courts and of judicial officers. This follows a highly publicised incident in the Western Cape High Court in which a lawyer reportedly used highly abusive language against the presiding judge and stormed out of court.

'Although the LSSA will not comment specifically on the incident in the Western Cape High Court involving Mr Ballem and Judge Bozalek as we understand the Cape Bar Council is dealing with the matter, it is important to stress that legal practitioners must conduct themselves with courtesy and respect towards all participants in legal proceedings so as to ensure compliance with the rules and procedures for the fair conduct of such proceedings,' the LSSA's Co-Chairmen Nano Matlala and Praveen Sham said.

The client's right to access to justice and a speedy resolution of his or her matter should not be prejudiced by unacceptable behavior by legal practitioners, whether they be advocates or attorneys, according to the LSSA. The organisation also used the opportunity to refer to the difficult and stressful conditions which legal practitioners are often obliged to work under in the South African courts.

[*Source*: LSSA Press Release, 03 April 2011, accessible at: *www.lssa.org.za/upload/LSSA%20Press%20release%20court%20ethics%20%2003_04_11.pdf.*]

Conferences

LONDON: W G Hart Legal Workshop 2011

The W G Hart Legal Workshop 2011, to be held on 28-30 June 2011 at the Institute of Advanced Legal Studies, London, will explore the multi-faceted concept of sovereignty. Professor Neil MacCormick (in whose memory the workshop is dedicated) argued that in the face of regional and international developments former understandings of state and nation and of sovereignty were increasingly outdated. At a supranational level this idea has already raised the spectre of a new legal order based on a European super state' with the potential further to transcend traditional views of sovereignty and the sovereign state. Meanwhile, in the United Kingdom for example, established constitutional doctrine in the form of Parliamentary Sovereignty has also now to be considered against the backdrop of the Human Rights Act, the devolution of power to Scotland, Wales and Northern Ireland and the creation of a Supreme Court. Equally however, comparative constitutional discourse confirms the continuing appeal of the concept of sovereignty and its great capacity for reinvention, whether this is in the context of a powerful pull of ideas about local identity (plurinational democracies) or the determinedly globalising guise of international organisations. Focused both on the internal and external aspects, the workshop will aim to consider these various dimensions of sovereignty, examined from a legal, theoretical, political and historical perspective.

Papers are being called for on a number of themes related to the workshop. Further details can be obtained from the workshop website, *www.sas.ac.uk/events/view/9235* or by e-mailing Belinda Crothers at *Belinda.Crothers@sas.ac.uk*.

DUBAI: IBA Annual Conference 2011

The next annual conference of the International Bar Association will be held in Dubai, United Arab Emirates, between 30 October and 04 November, 2011.

It will feature Mohamed ElBaradei, the former Director-General of the International Atomic Energy Agency, as the opening keynote speaker, and will have showcase sessions on: the new media and its effect on government control on information; independence of the judiciary; legal privilege; and the impact of recent events in the Middle East on human rights in the region.

The business sessions will cover the following, among other, areas: corporate and M&A law; oil and gas law; business crime; employment and industrial relations law; arbitration; insurance; family law; medicine and the law; intellectual property and entertainment law; consumer litigation; technology law; capital markets; discrimination law; immigration and nationality law; and law firm management. The programme also includes a visit to the Dubai law courts and social events.

Details are available at: *www.int-bar.org/conferences/Dubai2011/binary/DUBAI2011FINALPrelim.pdf.*

BARCELONA: Internet Law and Politics Conference 2011

The 7th International Internet Law & Politics Conference (IDP, Internet, Derecho y Política – Internet, Law and Politics) will be held in Barcelona on 11-12 July, 2011, and will focus on the current debate on 'Net Neutrality' and its consequences for the development of the Internet, from the legal and political standpoints. The conference will cover as well other core issues in the fields of cyberlaw, e-government and e-democracy that represent important challenges for the future of the internet, including the so-called "right to be forgotten", data protection, Copyright, Privacy, web governance and policies, the right to access public information, and democratic action on the web.

Net Neutrality, the general principle that the network must remain neutral as to the contents transmitted over it, avoiding any discrimination based on the nature or the origin of the data, has become a topic of heated debate worldwide. It is generally seen as a key feature of the Internet, one that has allowed the exponential growth of new services in the recent years. Attempts to introduce certain traffic management schemes by telecom operators are seen by some to threaten the possibilities of future development of the Internet and have an adverse effect on freedom of speech.

Further details of this event can be obtained through the conference website at: *http://edcp.uoc.edu/symposia/idp2011/?lang=en.*

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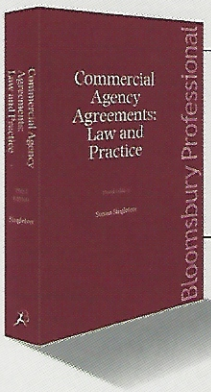

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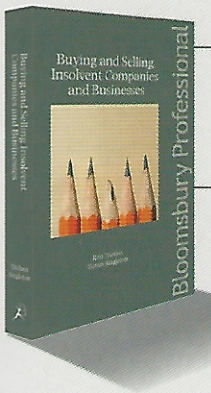

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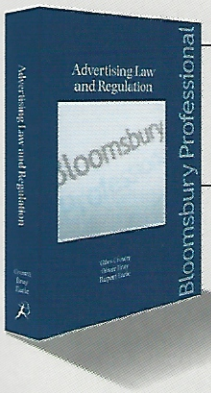

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