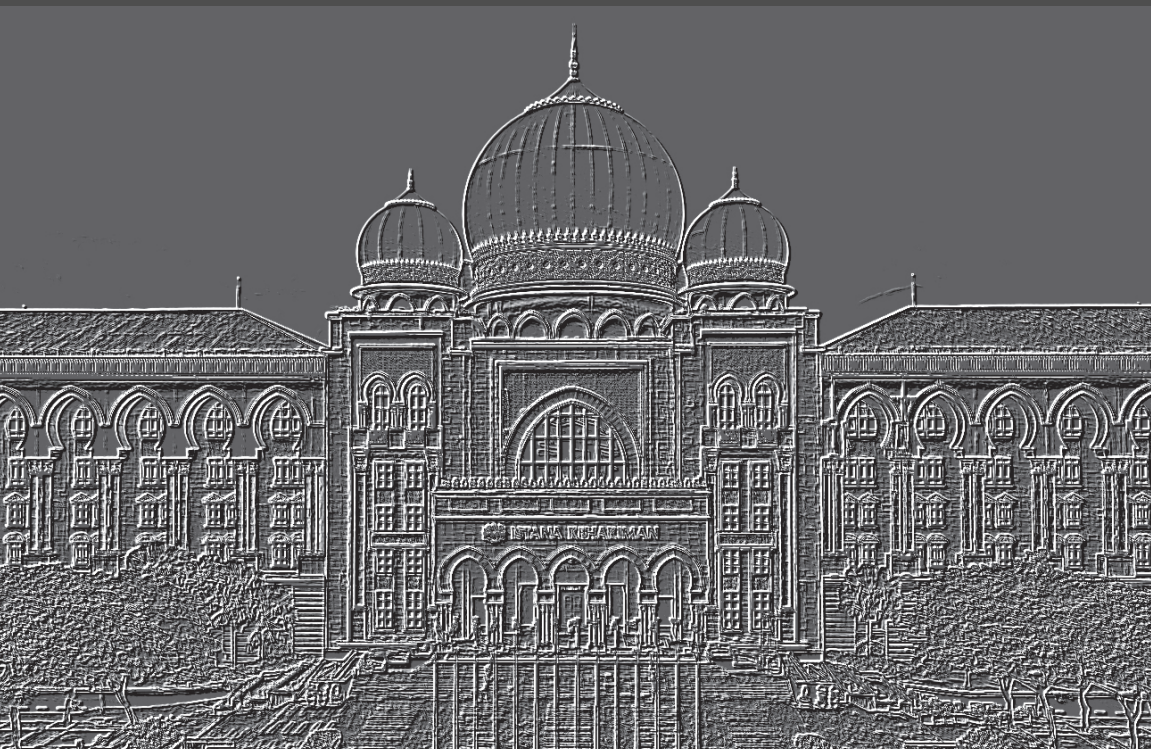
JOURNAL OF THE MALAYSIAN JUDICIARY

January 2024



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MODE OF CITATION
Month [Year] JMJ page

ADMINISTRATIVE SERVICE
Publication Secretary, Judicial Appointments Commission
Level 5, Palace of Justice, Precinct 3, 62506 Putrajaya
www.jac.gov.my
Tel: 603-88803546 Fax: 603-88803549

ISSN 0127-9270
(bi-annually)

Published by
Judicial Appointments Commission
Level 5, Palace of Justice, Precinct 3, 62506 Putrajaya, Malaysia.

Editing, design and layout by THOMSON REUTERS

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PREFACE

We are pleased to present the first issue of our biannual publication of the *Journal of the Malaysian Judiciary* for 2024. This edition features a diverse and wide-ranging compilation of legal works sourced from different jurisdictions. It offers a holistic perspective on a series of diverse topics and each of these essays makes a substantial contribution to legal discourse on the subject.

This edition begins with an address by the Right Honourable The Chief Justice of Malaysia, Tun Tengku Maimun bt Tuan Mat at the Opening of the Legal Year 2024. In the course of a wide-ranging speech, her Ladyship emphasised the importance of judicial independence and public confidence in the Judiciary as an institution as it forms the foundation for safeguarding the principles of justice and accountability for the nation.

The second item is an address delivered during the Opening of the Legal Year for Sabah and Sarawak 2024 by the Right Honourable Tan Sri Dato' Abdul Rahman bin Sebli, Chief Judge of Sabah and Sarawak. His Lordship expressed similar sentiments as the Right Honourable Chief Justice. Looking back on past events and accomplishments, the Chief Judge of Sabah and Sarawak outlined the objectives aimed at bolstering and advancing the performance of the courts in Sabah and Sarawak for 2024. These objectives provide a roadmap for these courts in terms of progress and excellence, both for 2024 and beyond.

We are privileged to feature a speech delivered by The Right Honourable Sir Geoffrey Vos, Master of the Rolls and the Head of Civil Justice in England and Wales to the Honourable Society of Lincoln's Inn Alumni Association Malaysia on the advancement of technological innovation in the justice system. The discourse delves into the implications of technological advancements for the legal and justice sectors, including challenges and prospects for dispute resolution in the digital era, the influence of artificial intelligence on legal procedures, and the necessity of updating laws to accommodate digital innovations. Additionally, it emphasises the significance of maintaining a balance between innovation and legal protection to safeguard fairness and uphold access to justice in the digital age.

From the Philippines, we benefit from an article on Cross-Border Videoconferencing Hearings in the ASEAN region contributed by The Honourable Maria Filomena D Singh, Associate Justice of the Supreme Court of the Philippines. It explores the integration of videoconferencing technology in ASEAN judicial proceedings, particularly during the COVID-19 pandemic, highlighting the Philippines' prior exploration of this technology. The article stresses the necessity of a comprehensive Model Rule to facilitate cross-border justice effectively within the ASEAN region.

We are also fortunate to have The Honourable Justice Alistair MacDonald, Deputy Head of International Family Justice for England and Wales sharing his insights on the 1980 Hague Convention concerning the Civil Aspects of International Child Abduction. Child abduction is a serious issue which greatly affects the psychological and social welfare of children. The 1980 Hague Convention serves as a vital legal instrument globally, providing a framework to address such cases. Through this Convention, participating countries can resolve disputes effectively and expeditiously. The primary objective is to maintain a balance between ensuring the child's well-being in a familiar environment on the one hand, and their relocation, when necessary.

Mr Tee Geok Hock's article, "Pillars, Beams and Gems in the Rules of Court 2012", addresses lawyers' challenges in comprehending the complexities of civil procedure in the Rules of Court 2012. The recently retired Judge of the High Court of Malaya commends the adoption of a fresh perspective to identify important elements for efficient management of cases, emphasising fairness and efficiency. Four "pillars" of civil procedure are highlighted, stressing the importance of understanding the core principles required to balance procedural and substantive rights. The article also explores procedural mechanisms such as mediation for fair case resolution, underscoring the importance of upholding natural justice to enhance the administration of justice.

In the realm of arbitration, Prashanto Chandra Sen, a Senior Advocate practising in the Supreme Court and High Courts of India, provides insightful perspectives from an Indian context. Arbitration remains a preferred method for resolving commercial disputes, with the autonomy of the involved parties being central. This article delves into the extent of state intervention in domestic arbitration within India, accentuating the importance of arbitrators' autonomy and impartiality, as well as their immunity from external influence. Additionally, it acknowledges the state's role in promoting arbitration to enhance access to justice and facilitate efficient dispute resolution.

In the area of artificial intelligence ("AI"), we have the benefit of an article from Assoc. Prof. Dr. Hartini Saripan, Assoc. Prof. Dr. Nur Ezan Rahmat, Dr. Rafizah Abu Hassan and Ms. Nurus Sakinatul Fikriah Mohd Shith Putera of Universiti Teknologi MARA (UiTM). The authors examine AI's profound impact on the legal profession, highlighting its role in transforming traditional practices. It discusses AI's enhancements in research, task automation, and service delivery while addressing legal and ethical considerations like privacy and biases. The article also singles out AI's transformative influence on legal education, advocating adaptation and upskilling.

On behalf of the Editorial Committee, I extend my sincere appreciation to the authors once more for their commendable commitment of considerable time and effort in producing these exceptional legal essays.

On behalf of the Editorial Committee
Nallini Pathmanathan

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Judicial Independence*

by

The Right Honourable The Chief Justice of Malaysia,
Tun Tengku Maimun binti Tuan Mat

Introduction

[1] Allow me to take a moment to express my gratitude to each and every one of you for your presence today, on the occasion of the Opening of the Legal Year 2024.

[2] The legal new year brings with it two things. Firstly, it marks new beginnings and journeys. In this regard, I would like to take this opportunity on behalf of the Malaysian Judiciary to congratulate all judges of the Federal Court, the Court of Appeal and the High Court including judicial commissioners who were appointed in the last year. In particular I would like to congratulate YAA Tan Sri Abang Iskandar bin Abang Hashim on his appointment as the President of the Court of Appeal, as well as YAA Tan Sri Mohamad Zabidin bin Mohd Diah and YAA Tan Sri Abdul Rahman bin Sebli on their appointments as Chief Judges respectively of the High Court in Malaya and of the High Court in Sabah and Sarawak.

[3] The second thing that I think is ushered by the new legal year is remembrance. The celebration of the new year gives us occasion to pause and reflect on all of the chapters that have since closed and to remember those who have completed at least one part of their legal journey. And so, I hope it is not too late to wish a happy retirement to all the judges who retired in the past year.

[4] As all the recently appointed judges and judicial commissioners can appreciate, and all the recently retired judges can attest – a judge's duty to preserve, protect and defend the Federal Constitution, is a difficult one and one that is carried out with little rest. At all times,

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* Speech by The Right Honourable The Chief Justice of Malaysia on the occasion of the Opening of the Legal Year 2024, Monday, January 15, 2024 at the Putrajaya International Convention Centre.

all judges – even retired judges – remain under the duty to preserve the integrity and image of the Judiciary and those still in service must continue to hear cases impartially, independently and without an inch of fear or favour.

Separation of powers and judicial independence

Forms of interference

[5] Prior to my appointment as Chief Justice, the Judiciary had been mired in the negative perception that as an institution, we had lost our independence or that our independence was significantly eroded. These heinous connotations owe their existence in large part to the Judicial Crisis of 1988 – a blemish in our history and from which the bruises and scars still remain.

[6] More recently, I must share with you that people have been coming up to me from all walks of life to tell me that, in their view, the Judiciary has redeemed itself as an independent institution both in substance and in perception. If this is truly the perception of the public and legal profession, then to that I can only say *Alhamdulillah*. While I feel a great sense of gratitude and achievement by these kind comments, I cannot help but recall the two important facets of judicial independence.

[7] The first of these facets is internal judicial independence. The judicial institution as well as the judges within it must be free among themselves to make their own decisions based solely on the facts and the law without any other considerations. Apart from their managerial functions, the four senior-most judges cannot and do not interfere with the decision-making process of any other judge. If the Judiciary has been remarked or observed as being independent, then perhaps as an institution, we have worked hard to be internally independent not only in fact, but also in perception.

[8] That leaves us with the second and no less integral of its facets: external judicial independence. This category is limitless because it deals with external pressures and influences that can directly impact the Judiciary's actual ability or perceived ability to decide cases. Certain non-exhaustive examples include: (i) intimidation of judges either in the form of threats, physical harm, lies or even public humiliation by, for example, attacking the personal reputation of certain judges

or their family members; (ii) attempting to seek favour with judges or contacting them directly or indirectly to decide cases in a certain party's favour or against another party; and (iii) manipulative media reports that unfairly paint the impression of a judicial decision meaning more or less than what it actually is.

[9] Those are just some examples of acts that are sometimes intentionally, either directly or indirectly, employed with a view to swaying the cause of justice in a certain direction. These are just a fraction of available examples from a bottomless list of anything that can effectively amount to external judicial interference affecting external judicial independence.

[10] The Judiciary has little to no control over external judicial pressures. In this sense, the Judiciary and those who rely on this institution depend on other parties to act responsibly in sustaining and upholding a continuously fair, independent, impartial and efficient justice system.

[11] Be it internal or external judicial independence, they are both inextricably intertwined with the notion of public confidence in the Judiciary and perhaps I can now move on to state my observations on that.

Public confidence in the Judiciary

[12] Unlike politicians, judges do not, and indeed, cannot answer to or be governed by political will or popularity. A judge is meant to be an independent constitutional arbiter of justice between the state and its subjects (and *vice versa*) as well as between subjects *inter se*. His or her loyalties are apparent in a constitutionally-ordained judicial oath taken to protect, preserve and defend the Federal Constitution.

[13] Since judges do not answer to public opinion, popularity or sentiment by virtue of them being appointed and not elected, judges then in the truest sense are accorded that independence to make decisions based solely on the facts and the law without any attendant fear of the political or social outcome of their decisions. This then begs the question:

> where does public confidence fit into this equation?

[14] What I can say is that public confidence and popularity though related, do not mean the same thing. A Judiciary that enjoys popularity, would naturally command significant public confidence. In such a situation, popularity is merely the outcome of strong public confidence.

[15] In my view, public confidence in the Judiciary is the measure and tool by which judges remain transparent and accountable to the public.

[16] Since we are appointed, the public whom we serve by authority of the Federal Constitution, has no means of voting us out of office so to speak. Public confidence in this sense means that the Judiciary is mindful of the fact that it is the ultimate servant of the Federal Constitution for the benefit of the public. Because we are appointed, the basis of the foundation of our powers is trust and confidence in the process. It therefore continues to generate an impetus for judges to remain accountable and transparent and this is obvious in our need to write judgments and to abide by case timelines.

[17] Perhaps it is pertinent to highlight that contrary to common belief, judges truly do not carry much in the form of direct power. Take for example a criminal case. A judge trying the case and passing a sentence (all things considered) does in effect only make a declaration. This declaration is in the form of a conviction with a resulting sentence. Who ensures the sentence is carried out? Who keeps the sentenced person in jail or enforces the sentence in default of a fine?

[18] I think it is the right time to share with you the apocryphal events surrounding the decision of the United States Supreme Court in the case of *Worcester v Georgia*.[1] It is not the case *per se* that is the subject of controversy, rather the events that transpired after. Again, even though the events are said to be apocryphal, meaning that their authenticity is doubted, the example itself (real or not), is worthy of reflection.

[19] In *Worcester*, a group of native Americans had challenged the State of Georgia for enacting a law that required the said native Americans to be granted a licence before they may be permitted to enter the lands which they called their ancestral home. The Supreme Court presided by Chief Justice John Marshall (delivering the majority judgment) effectively enforced a rule on the sovereignty of the native tribes and held that the Georgian law in question was unconstitutional.

1 *Worcester v Georgia* 31 US 6 Pet 515 (1832).

[20] Historically, and again though there is no clear proof to the effect, the then President of the United States, Andrew Jackson, was infamously reported to have remarked against the Supreme Court judgment that:

> Marshall has made his decision, now let him enforce it.

While the truth of this statement is suspect, history shows that the Jackson's federal government did not aid in the enforcement of the *Worcester v Georgia* decision and the President was himself known to be in favour of expansion of US territory at the expense of the natives. In fact, the Cherokees were eventually forcibly removed from their ancestral lands leading to the unfortunate incident known as the Trail of Tears, which resulted in thousands of tragic deaths.

[21] The unfortunate historical episode that I just described, in my view, exemplifies the notion that courts are both powerful and powerless at the same time. In the absence of people who can support and carry through judicial decisions, a mere declaration of liability or guilt in itself carries little to no weight.

[22] When we put this into perspective, we will come to appreciate that public confidence in the Judiciary is meant more for the institution than for its individual judges though the implication of a lack of confidence can also adversely affect a judge's independence in making a decision, being human beings, for fear of reprisals or in extreme cases, unjust removal. When we consider the occurrence of the 1988 Judicial Crisis and how the then Judiciary was treated with such impunity, the harrowing fear that such events may reoccur haunts to some extent the halls of justice till today.

[23] When a message is sent that a judicial decision is worth even lesser than the paper it is printed on, it gives the state's subjects a reason to denounce the validity of judicial decisions. In such a situation, the rule of law, public order, the respect for authority all enter into a state of chaos.

[24] It is therefore worth remembering that any attempt to externally influence the Judiciary or to undermine public confidence in the Judiciary is an aberration to the rule of law.

[25] In this regard, allow me to address certain aspects within which judicial independence stands threatened especially from a public confidence perspective by having regard to certain events that transpired in the past year.

Threats to public confidence in the Judiciary

[26] In commenting on threats to the Judiciary, I must first acknowledge that free speech is central to democracy. Genuine comments and criticism act as positive pressure on elected officials to perform, spur the growth of political will, and motivate judges to remain apprised of recent legal developments as well as to keep updated on practical knowledge on various fields.

[27] What remains unacceptable in a democracy as the antithesis of free speech are concepts such as hate speech, uneducated propaganda and fake news. Comments and criticism must be based on some fact and not on lies or ignorance. In the best case, uneducated comments reflect sheer ignorance and in the worst case, they reflect malice.

[28] Allow me to focus on an instance of external interference with the Judiciary, which applies in relation to the judicial role itself especially in the hearing of constitutional cases. In these examples, I will let you make your own assessment on whether these instances reflect either sheer ignorance or worse, malice.

[29] Malaysia is a federation where the primary executive and legislative powers are accorded to the federal government. Recently, the Federal Court had the occasion to decide two cases, namely, *Iki Putra bin Mubarrak v Kerajaan Negeri Selangor & Anor* ("*Iki Putra*")[2] and *SIS Forum (M) v Kerajaan Negeri Selangor (Majlis Agama Islam Selangor, intervener)* ("*SIS Forum*").[3] Without commenting on the substance of the two cases I just cited, they dealt essentially with the question of whether the Legislature of the State of Selangor was empowered to pass certain legislation. This is a kind of challenge that is expressly envisioned and catered for by our Federal Constitution.

[30] Unfortunately, these two cases were made out by some parties to be more than what they actually were. These cases had nothing to do with the fact of the pure religion of Islam. They merely sought to reemphasise the clear demarcation of powers between the federation and the states. The legislation in question had purported to accord certain powers to the state that were not supported by the State List and the two cases would have been decided using the same

2 [2021] 2 MLJ 323.
3 [2022] 2 MLJ 356.

principles, if the state legislation in question had dealt with any other matters not affecting the administration of the religion of Islam or the syariah courts.

[31] The comments by certain irresponsible parties are targeted at painting the picture that the Judiciary has an "agenda" or motives to eradicate Islam in this country, or an agenda to remove the Islamic legal system in Malaysia. Apart from manipulating these cases for their own gain, what these parties fail to mention is that by clearly interpreting the Federal Constitution and defining the powers of Parliament and the State Legislatures, the Federal Court ensures the continuous and steady application of Islamic law in the states because it guarantees that even Parliament cannot erode it.

[32] The comments in relation to the *Iki Putra* and *SIS Forum* decisions are far and wide. In some part these comments unjustifiably question the personal faith of certain judges or even their motivation for deciding as such. In other respects, such comments incite hatred and ill will among the public against the Judiciary or the fear of perceived distorted outcome of such decisions. In certain other respects, large crowds are mobilised and their presence is used to intimidate the judges.

[33] The examples indicate how judicial independence is eroded and how public confidence in the Judiciary is impaired. There is another example which relates to how the Judiciary is unjustifiably painted as the villain for the actions or inactions of another body in the justice system.

[34] In particular, in the recent past including last year, the Public Prosecutor made the decision to withdraw criminal charges against certain high-profile individuals. These decisions were not particularly well received by the public but a large part of the blame was put on the Judiciary for making the only available consequential orders upon the withdrawal of such charges.

[35] Under Article 145(3) of the Federal Constitution the Attorney General who is also the Public Prosecutor has the discretion to institute, conduct or discontinue any proceeding for an offence other than before a syariah court. When the Public Prosecutor decides to withdraw charges, the courts only have one of two very limited consequential options. Depending on the facts, these two options are either granting an order of discharge not amounting to an acquittal, popularly called

DNAA, or a discharge amounting to an acquittal which can be called a DAA. The courts cannot turn around and insist to the Public Prosecutor that a charge remains. Each of them, the Judiciary and the Public Prosecutor, have their own constitutionally-demarcated constitutional functions and both must be adjudged fairly for the exercise of their powers to the exclusion of the other.

[36] And yet, when a charge is withdrawn, the judge making the only available consequential orders is painted as corrupt, sometimes as incompetent or sometimes both. What the public fails to understand is that the person responsible for that decision is the Public Prosecutor and not the courts. It is often the courts that are chastised for such decisions and this erodes public confidence in the judicial system.

Securing judicial independence

[37] Having stated these examples, we must ask: how can we ensure the continued protection and integrity of the justice system, and preserve public confidence in our judicial institution?

[38] Beginning with internal judicial independence, it is my view that a judge must continue to hear cases without fear or favour and without any motivations, hope of reward or any bias. In particular, I would like to remind myself as well as my sister and brother judges about the crucial significance of *stare decisis* or the doctrine of judicial precedent.

[39] Courts lower in the judicial hierarchy must remember to abide by precedents set by higher courts. The Federal Court, being the apex court, must continue to remember that it cannot depart too easily from precedent especially so if a previously decided authority is questioned not so long after it was decided. The Federal Court cannot afford to be inconsistent as that interferes with the public who organises their affairs upon legal clarity and certainty.

[40] In this regard, the individual opinion of a judge, so to speak, is irrelevant on account of *stare decisis*. Even if a judge or court believes a decision of the higher court to be wrong, he is under the obligation to abide by it. It would be for the parties to bring that case to the higher court to argue in favour of departing from the previously established precedent if the circumstances so warrant it.

[41] Certain concepts have recently been well settled into our law. One of these concepts is the doctrine of constitutional supremacy in Article 4(1) which stipulates that certain features of the Federal Constitution are incapable of being destroyed even by constitutional amendment. While judges are free to express their differing opinions on what those integral features are based on the cases that come up before them, I think it is not open for judges to dispute the existence of the concept itself.

[42] In this regard, *stare decisis* must not only be observed by judges but by all officers of the court. This includes advocates from the Bar and the public service. In recent times, from my own observation in court, I have noticed a trend from a minority of both such advocates who cite cases without acknowledging that those cases or principles that they have cited have been expressly overruled. Other times, these advocates advance untenable propositions that stem from a selective, dishonest or warped reading of earlier cases.

[43] These violations happen in all sorts of cases but they are particularly glaring when they happen in constitutional cases. In any event, when it does happen, it throws judges off as certain propositions appear more convincing than they should be because they are articulated selectively yet disingenuously. I think it goes without saying that advocates, especially the senior ones, know that this is not the candour and standard of professional courtesy expected of them and as such, this practice deserves to be called out and must be stopped.

[44] And speaking of seniority, there is a trend in Malaysia like in many Commonwealth nations that senior advocates are accorded a greater amount of respect and patience by the courts. While this makes sense and is fair considering that such an advocate has earned his or her trust and reputation with the Bench, I would think that regardless of seniority, all advocates deserve an equal chance in court.

[45] In any event, leaving aside the minority of advocates who flaunt ethics, I must commend the majority of the better advocates – from the Bar and the AGC – who stand by the principles of ethics expected of the legal profession and whose compliance is impeccable.

[46] I would also like to commend all judges and judicial commissioners as they have been hard at work in spite of all trials and tribulations the Judiciary faced in the past year.

[47] That said, judges are human and are open to human pitfalls such as fatigue and saturation. For these reasons, we routinely rotate our judges such that those hearing civil cases swap to the criminal courts, and so on.

[48] The Judiciary also carries out routine training and refresher courses so that our judges remain updated on recent and emerging trends. In this regard, the Judiciary would like to especially thank the Minister in the Prime Minister's Department (Law and Institutional Reform), Dato' Sri Azalina Othman Said, for her unrelenting support for the long-pending establishment of the Judicial Academy. This Academy, crucially, provides pivotal training to superior court justices, thus enhancing the overall calibre of our Judiciary.[4]

[49] In terms of judicial work, one important area that bears mention is the commercial courts. In a time where our economy is on the downturn, the commercial courts have been working hard to ensure that commercial disputes are resolved quickly but fairly. The importance of commercial courts cannot be overstated because these courts along with the overall impression of an independent Judiciary boost investor confidence and trust in the Malaysian Judiciary.

[50] In that respect, a large bulk of our commercial litigation including construction law is centred in the Klang Valley. The Malaysian Judiciary would like to applaud the Government of Malaysia for previously allocating funds to equip particularly the construction court and the Kuala Lumpur commercial courts. But, as time progresses, technologies develop and the need for more judges arises. We would like to humbly invite the government to consider increasing funding for these courts – in particular, to entertain the idea of enhancing the structure of such courts so that they can continue to compete and remain on par with international standards and international commercial courts.

[51] The Malaysian Judiciary is significantly complemented by our evergrowing alternative dispute resolution ("ADR") scene. These ADR mechanisms significantly help reduce the Judiciary's case load without compromising access to justice. Specifically, I would like to hone in on one feature of ADR, i.e. mediation.

4 https://www.sinardaily.my/article/210786/malaysia/national/budget-2024-allocations-forlegislativereforms-ensure-peoples-right-to-justice---lawyers.

[52] In view of the burgeoning case load that is inundating the Malaysian superior and subordinate courts, mediation has now become an important medium to cope and deal with these cases. Ideally, hearing of cases via trial must be the last resort.

[53] There are generally two modes of mediation, that is to say, pre-action mediation as well as court-annexed mediation which are catered for in the Rules of Court 2012. It is mandatory for all running down cases to undergo mediation. The necessity of other cases to undergo mediation is at the discretion of the judge depending on his or her views on the suitability thereof.

[54] By virtue of the current volume of cases commenced in the courts, there is a critical need to now intensify the usage of court-annexed mediation. In other words, at case management all judges must duly consider why each and every case should not be mediated. Unless absolutely unsuitable, I take the position that cases ought to undergo mediation.

[55] Additionally, judges must also be part of the mediation process sitting as the mediator and should not shy away from the process. This is because judges are in the best position to persuade parties to resolve their dispute amicably by means of facilitative and/or evaluative mediation.

[56] The Court Annexed Mediation Committee is tasked to oversee the implementation of the same. Unlike other countries such as in England and Wales, there is presently no requirement for parties to undergo mediation prior to commencing an action in the Malaysian courts.

[57] As such, the Judiciary strongly feels that the time has arrived to consider the implementation of pre-action mediation through pre-action mediation protocols. Towards this end, the Court Annexed Mediation Committee is further tasked to study and revert on the same soonest possible. This should include requisite proposals on amendments to the relevant statutes and/or rules.

[58] In this vein, I would also like to congratulate the Malaysian Bar for establishing the Malaysian International Mediation Centre (MIMC) which will be launched later this afternoon. This effort signifies the Bar's commitment to mediation and ADR and has the Malaysian Judiciary's full support.

[59] On the topic of internal judicial independence, competency and efficiency, I would like to sincerely believe that the Judiciary is doing its level best to ensure that the high standards expected of us are maintained.

[60] That leaves us with external judicial independence.

External judicial independence

[61] Going by the examples I have set earlier, the number of things the Judiciary can do, in the face of attacks, is limited. In this regard, and as has been stated an innumerable number of times before, the other actors in the justice system play a crucial role.

[62] The Bar Council has of late been very supportive of the Judiciary and the Bar has also played an important role as *amicus curiae* in many important cases that were argued last year. We hope that the Bar can continue to maintain such level of support.

[63] The Attorney General's Chambers or AGC has also been a friend to the Malaysian Judiciary. In particular, the present Attorney General, Datuk Ahmad Terrirudin bin Mohd Salleh, was not too long ago the Chief Registrar of the Federal Court. He has, as Attorney General, played a very integral role as a bridge between the Judiciary and the Executive by ensuring that certain fundamental matters such as legal development and budgeting issues are brought to the ears of the Executive. The Judiciary remains ever thankful to the Honourable Attorney General and the AGC under his able leadership.

[64] Having said that, we can understand that unlike the Malaysian Bar at times, the AGC cannot always come out so strongly in support of the Malaysian Judiciary. The reasons for this, as we can acknowledge, are twofold.

[65] The first reason is that the Attorney General is the principal advisor to the Yang Di-Pertuan Agong, the Cabinet and all its Ministers. When there is a constitutional crisis or constitutional issue, the Attorney General and the AGC will find themselves in a very precarious position of having to defend the government and advise on the outcome of judicial decisions while at the same time defending the judicial institution. It is a daunting task that is easier said than done for anyone who stands in the shoes of the Attorney General.

[66] Secondly, the AGC very often represents the very litigant against which the Malaysian Judiciary acts as a check and balance. Sometimes, the Attorney General being the Public Prosecutor is also directly the litigant in court.

[67] Nonetheless, I think there is a delicate balance that can be maintained. The AGC can continue to carry out its functions to preserve the integrity of the Judiciary and the overall justice system by taking appropriate penal measures against those who unfairly attack the justice system. For instance, as the guardian of public interest, the Attorney General is arguably the only legal person in the country who can initiate contempt proceedings, against a person if he makes scurrilous comments attacking the Judiciary in respect of decided or presently argued cases.

[68] Apart from that, everyone including the Bar, the AGC, politicians, members of government and the general public must make every effort to remain informed. Our grounds of judgment are available for public scrutiny and everyone is welcome to make fair comment on them. No person should be allowed to use the Judiciary and the justice system as leverage for their political or non-political attempts.

[69] Recently the Right Honourable the Prime Minister of Malaysia, Dato' Seri Anwar Ibrahim, is reported to have reminded politicians not to politicise the issue of the constitutional challenge proceedings and in effect, not to turn the case into something more than what it is.[5] This reminder by the Prime Minister to politicians is welcome and we hope that all persons, politicians and activists can follow this line of thinking. The Judiciary expresses its gratitude to the Prime Minister for making this statement as it effectively serves as a call to respect the independence and integrity of the courts.

[70] From the standpoint of the judges, all members of the public alike must learn to draw the line between legitimate criticism of judicial decisions on the one side, and on the other side, engaging in acts or indulging in words that harm the integrity of the judicial institution as a whole.

5 Mohamed Basyir, "Move to Elevate Syariah Court Status", *New Straits Times* (November 22, 2023), p 3.

[71] There will always be, amongst us, the more recalcitrant persons whose nature it is to cause trouble. In respect of these very few people, it is the Judiciary's hope that all actors involved in the justice system can take the necessary legal action, as well as work to educate the public. This hope extends not only in relation to the Bar and the AGC but to all sectors of our public including enforcement bodies, activists and religious institutions.

Conclusion

[72] To conclude, I would state that as an institution, the Judiciary shall continue to do its best to protect, preserve and defend the Federal Constitution and adjudicate cases fairly in accordance with justice, and without fear or favour. We hope never to flinch in the face of adversity and all the brickbats thrown at us.

[73] The Judiciary shall remain open to working with all institutions that share these goals of enhancing access to justice and the rule of law. And in this regard, we would like to acknowledge all the local and foreign bodies and institutions that engaged with the Judiciary in the last year towards improving legal understanding and competence both at the judicial level specifically and the general level.

[74] I would like to end by thanking each and every judge, judicial commissioner as well as judicial officers who have continued to work hard in the last year. This expression of gratitude also extends equally to all support staff including our IT technicians, court clerks, secretaries, security personnel, librarians, assistant registrars, commissioners for oath, cleaners and everyone else I might have unwittingly missed. Each and every one plays an important role.

[75] With that, I wish each and every one of you a very Happy New Year!

Thank you.

Opening of the Legal Year Sabah and Sarawak 2024*

by

The Right Honourable The Chief Judge of Sabah and Sarawak
Tan Sri Dato' Abdul Rahman bin Sebli

Welcoming remarks

[1] It gives me great pleasure to be here this morning in the company of distinguished members of the legal fraternity and to be part of this meaningful event. On behalf of the Malaysian Judiciary in Sabah and Sarawak, I would like to express my heartfelt gratitude to everyone for coming to mark the opening of the legal year for Sabah and Sarawak 2024 in Kota Kinabalu. Allow me to extend a very warm welcome to YAA Tun Tengku Maimun binti Tuan Mat, the Chief Justice of Malaysia and spouse, Yang Amat Berbahagia Dato' Haji Zamani bin Haji Ibrahim, YAA Tan Sri Datuk Amar Abang Iskandar bin Abang Hashim, the President of the Court of Appeal and YAA Tan Sri Dato' Mohamad Zabidin bin Mohd Diah, the Chief Judge of Malaya. Thank you for taking your precious time to be with us. We are truly honoured by your presence.

[2] I take this opportunity to record my heartiest congratulations to my learned brothers YAA Tan Sri Datuk Amar Abang Iskandar bin Abang Hashim and YAA Tan Sri Dato' Mohamad Zabidin bin Mohd Diah on their recent appointments as President of the Court of Appeal and Chief Judge of Malaya, respectively.

[3] I would also like to extend my heartiest congratulations to YA Datuk Azhahari Kamal bin Ramli on his recent appointment as judge of the Court of Appeal. And of course, welcome to our new judicial commissioners, YA Tuan Saiful Azian bin Mokhtar who is stationed at the Sandakan High Court and YA Puan Maslinda @ Linda binti Mohd Ainal who is stationed at the Kota Kinabalu High Court. Congratulations on your appointments and I wish both of you all the

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* Speech by The Right Honourable Chief Judge of Sabah and Sarawak on the occasion of the Opening of the Legal Year Sabah and Sarawak 2024, Friday, January 19, 2024 at the Sabah International Convention Centre.

best in this new chapter of your career. My congratulations also to Yang Berbahagia Datuk Ahmad Terrirudin bin Mohd Salleh on his appointment as the Attorney General of Malaysia and last but not least, congratulations to Yang Berusaha Tuan Zamri bin Bakar on your appointment as the Chief Registrar of the Federal Court.

[4] For those from Sarawak, Kuala Lumpur, Putrajaya, Brunei, Singapore, Hong Kong, Taiwan, India and United Kingdom, welcome to Kota Kinabalu, Sabah, the Land Below the Wind. I hope you are having a great time in Kota Kinabalu.

[5] On a personal note, my involvement in this year's opening of the legal year is indeed a walk down memory lane. The first time I attended the Opening of the Legal Year for the High Court of Sabah and Sarawak was way back in January 2009, three months after my appointment as judicial commissioner at the Kota Kinabalu High Court, and I did not even have the proper robe to wear, the one with the golden stripes. The walk was from Hyatt Hotel to the old court building at Jalan Gaya.

[6] I feel blessed for being given the opportunity to take part in this auspicious occasion again today, 15 years after my first Opening of the Legal Year in 2009 and now in my capacity as Chief Judge of Sabah and Sarawak. The walk from the Sabah Hakka Complex to the Sabah International Convention Centre (SICC) this morning was not just a stroll outside the four walls of our court houses where we hear cases day in day out, but serves as a poignant reminder of our onerous duty to dispense justice.

[7] Congratulations to the Attorney General's Chambers Malaysia, the State Attorney General's Chambers of Sabah and Sarawak and the presidents of the Sabah Law Society and Advocates Association of Sarawak for your achievements over the past year and thank you for the inspiring speeches delivered a short while ago. I congratulate Mr Mohamed Nazim bin Maduarin on your election as the new President of the Sabah Law Society. If Datuk Roger Chin was the "wartime president", you are the "post-war president". I wish you all the best.

[8] I gather from the speeches that there are some concerns that require the court's attention. Rest assured that those concerns will be dealt with appropriately. I appreciate the feedback that you have given to us. It will guide us in improving our delivery system

and I am committed to realise, with the time that I have, the vision of my predecessor YAA Tan Sri Datuk Amar Abang Iskandar bin Abang Hashim, who is now President of the Court of Appeal. At the Opening of the Legal Year for Sabah and Sarawak in Miri last year, his Lordship had said:

> [17] As a fast-growing emerging and developing country, our aim in the judiciary has always been to deliver a world-class modern justice system that is independent, effective, responsive, efficient, pioneering and one that staunchly upholds the rule of law.

Reflecting on 2023

[9] Reflecting on events and achievements of the past year, I must applaud the efforts of the judges, judicial commissioners, officers and court staff of Sabah and Sarawak in ensuring the smooth running of our delivery system. Whilst the digitalisation of Sabah and Sarawak courts started more than 12 years ago, we are continuously working to improve the system. The Integrated Court System (ICS) has been redeveloped through the e-Kehakiman Sabah Sarawak (eKSS) project in 2023. We welcome constructive feedback from all stakeholders on the effectiveness and efficiency of the newly enhanced system. It is only through your feedback that we can further refine and optimise our digital infrastructure, to make sure that it aligns with the evolving needs of the legal community and the general public that we serve.

[10] I am proud to inform you that our Artificial Intelligence in Court Sentencing (AiCOS) system in Sabah and Sarawak won the first prize in the national level competition organised by the *Majlis Anugerah Inovasi dan Kecemerlangan Jabatan Perdana Menteri* held on June 15 last year for the ICT category. This could not have been possible without the commitment of those involved in developing and implementing the system. Well done and congratulations to all of them.

[11] Like any other technology, the AiCOS system requires constant monitoring and enhancement to ensure that this facility remains secure, convenient and reliable to all our stakeholders. We will of course address the concerns raised by Mr Gurvir Singh, President of the Advocates' Association of Sarawak, regarding this system.

[12] While visiting the various courts in Sabah and Sarawak in 2023, I could see significant improvements in the physical infrastructure of

our court buildings, notably the recent repair works at the Tawau and Kuching courts. For this I would like to express my heartfelt gratitude to Yang Berhormat Dato' Sri Azalina binti Othman Said, the Minister in the Prime Minister's Department (Law and Institutional Reform), for the financial support given, which enabled us to improve and enhance the infrastructure facilities and provide a safe environment for the public.

[13] I want to particularly highlight her contribution in the setting up of the child witness room at the Bintulu court in October 2023. This room is designed in such a way as to have a calming atmosphere. The decoration in the room is nicely done, and I encourage other stations to take a similar initiative. We recognise the vulnerability of child witnesses, and it is therefore important that we treat them with sensitivity other than to provide them with the right kind of assistance while giving evidence.

[14] Trial proceedings involving child witnesses need to be conducted with extreme care to minimise the emotional harm that they may be subjected to by having to appear and give evidence in court, which can be stressful even to full-grown adults.

[15] I am also grateful for the support that Yang Berhormat Dato' Sri Azalina gave to our Mobile Court Programmes in Sabah and Sarawak. The provision of 17 new vehicles – four golden dragon vans, five SUV Nissan X-trail, seven Nissan Navara and one three-ton Isuzu lorry – has made it so much easier for us to travel through the treacherous off roads of Sabah and Sarawak in providing our services outside of the courtrooms. We must continue to reach out to those who need our services and not to lose sight of the needs of the people living in the rural and far-flung areas of Sabah and Sarawak.

[16] In October last year, we had the privilege of reaching out to the school children in SK Batu Bungan, SK Long Panai and SK Penghulu Baya at Mulu, Sarawak and we were honoured to have with us during the trip YAA the Chief Justice, YAA President of the Court of Appeal and YAA the Chief Judge of Malaya. While there, we had the opportunity to visit the world renowned Mulu caves. It was then that I realised how physically fit our Chief Justice is as the journey into and out of the caves was very physically demanding and yet it was no sweat for her. I can vouch for that as I went through the

journey myself. I cannot recall though if YAA President of the Court of Appeal and YAA Chief Judge of Malaya made it through the caves because when we returned to base they were already there waiting for lunch to be served.

[17] Looking ahead, I hope we can continue with our outreach programs for both Sabah and Sarawak with the support and blessing of YAA the Chief Justice. By helping those in need in the rural areas, we enrich ourselves and contribute to the welfare of our community.

[18] On November 2, 2023, we were given the honour to organise the 3rd Borneo Colloquium on Environmental Justice in Kota Kinabalu. Judges and judicial officers in Sabah and Sarawak, perhaps due to the fact that Sabah and Sarawak are still largely covered with primary jungle, are committed to environmental causes. It must be acknowledged however that the power of the Judiciary in the enforcement of environmental laws has its limitations. Sustainable and long-term solutions will be more effective through legislative and executive measures.

[19] I am pleased to know that the Commonwealth Law Association and the Sabah Law Society will be jointly organising a conference on February 26 this year in Kota Kinabalu. The conference will focus on issues relating to environmental law, human rights and constitutional law. By bringing together members of the Bar and experts in the various fields, I am confident that they can come up with resolutions that will serve to enhance cooperation among all stakeholders in protecting the environment and human rights.

[20] Numerous activities and events were organised throughout the past year but time constraint will not permit me to mention them one by one. However, I must say that 2023 proved to be an enriching year for the Judiciary in Sabah and Sarawak. All these achievements and activities would not have been possible without the guidance and supervision of key officials, namely, Tuan Nixon Kennedy Kumbong, the Registrar of the High Court of Sabah and Sarawak, Puan Dayang Ellyn Narisa binti Abang Ahmad, the Registrar of the Subordinate Court of Sabah and Sarawak, the Directors of the Courts of Sabah and Sarawak, Puan Egusra Ali and Tuan Steve Ritikos.

[21] I extend my sincere appreciation to these officers, and of course to the court officers, legal officers, and members of the

Bar. Your contribution and cooperation is much appreciated and I look forward to your unwavering support and cooperation in the years to come.

The performance of the Sabah and Sarawak courts

[22] I suppose my speech will not be complete if I do not touch on the performance of the Sabah and Sarawak courts in the past year. On the disposal of cases, it is noteworthy that all courts in Sabah and Sarawak demonstrated commendable performance at all levels in the year 2023. Having said that, I must of course acknowledge that there is always plenty of room for improvement.

[23] Last year, the High Courts of Sabah disposed of 73% of the registered civil cases and 55% of the criminal cases while in Sarawak, the High Courts disposed of 74% of the registered civil cases and 53% of the criminal cases.

[24] Of the registered civil cases in the Sessions Courts of Sabah, 74.67% were disposed last year and 80.5% of the criminal cases. For the Sessions Courts in Sarawak, 66% of the registered civil cases were disposed of and 87% of the criminal cases.

[25] As for the Magistrates Courts in Sabah, 80% of civil cases and 72% of the criminal cases were disposed of. In Sarawak, 78% of the registered civil cases were disposed of and 91% of the criminal cases.

[26] The percentage of disposed of cases that I have just mentioned include cases carried forward from the previous years. In pursuit of continuous improvement, there is a need for us to focus on specific areas for refinement. Some of the cases that could not be disposed within the prescribed timelines are due to reasons beyond the court's control. I have examined the reasons behind these delays and I am committed to solve the problems as best as I can with all the powers that I have at my disposal.

Administration of justice and the way forward

[27] I urge all judges and magistrates to be proactive in case management. The efficient and expeditious disposal of cases can be achieved through effective pre-trial case management conducted by judges and magistrates themselves. This will go a long way in ensuring the smooth running and expeditious disposal of the cases.

[28] I take this opportunity to encourage young lawyers to be fully equipped with their practical legal knowledge. As the Judiciary and the legal profession continue to evolve with the times, each step must be taken conscientiously and anchored on core principles of justice.

[29] To the judges, judicial commissioners, judicial officers and law practitioners, please keep yourselves abreast with the latest development of the law. For the courts, I anticipate more courses to be organised for the Sabah and Sarawak judges, judicial commissioners and officers.

[30] These courses will serve as a platform for judges and officers to exchange ideas with the other participants in an interactive environment. The courses that are organised for the courts in Sabah and Sarawak are meant to complement and in addition to the courses organised by the Judicial Academy of Malaysia for judges and judicial commissioners.

[31] An example of such an initiative is the conference on alternative dispute resolution organised by the Borneo International Centre for Arbitration and Mediation ("BICAM") last year. Such event not only enhances legal knowledge but also fosters a collaborative interaction that contributes to the professional growth of the participants. Similar to the Asian International Arbitration Centre (AIAC) and the Malaysian International Mediation Centre (MIMC), the establishment of BICAM marks the commitment of Sabah to alternative dispute resolution. Such effort has the support of the courts of Sabah and Sarawak. It is my sincere hope that BICAM will continue to foster a conducive environment for resolving commercial disputes efficiently and cost effectively, both for Borneo and beyond.

[32] To members of the Bar, I humbly urge you to take the continuing professional development (CPD) programme seriously. Diligence should be your guiding light as it is fundamental to the practice of law. Strive to maintain professionalism in discharging your duties. It is important to understand, especially for the young lawyers, that your duty goes beyond winning cases. Above all else, your duty as officers of the court is to assist the court in dispensing justice.

[33] I am delighted to learn that both YA Dato' Lee Swee Seng, a Court of Appeal judge and a High Court judge, YA Professor Dr Mohd Johan Lee Kien How, have set aside their busy schedules yesterday and will continue to do so tomorrow, to share their knowledge in

their areas of expertise to members of the legal fraternity. Thank you YA-YA, I appreciate that.

[34] To my brother and sister judges and court officers, my friendly advice to you is for you to administer justice strictly in accordance with the law, free from any interference from any quarters. Do take note of the speech delivered by the Right Honourable the Chief Justice at the Opening of the Legal Year 2024 in Putrajaya a few days ago where she emphasised on the importance of ensuring public confidence in the Judiciary:

> [15] In my view, public confidence in the Judiciary is the measure and tool by which Judges remain transparent and accountable to the public.

[35] The open justice concept or transparency is integral to our court system. In this regard let me echo the sentiment of the learned Chief Justice of the Court of Final Appeal of Hong Kong, Mr Andrew Cheung Kui-nung, who during the Ceremonial Opening of the Legal Year 2023 said:

> Open justice is a key to maintaining public confidence in our judicial system and upholding the rule of law. Open justice mandates that subject to limited and justified exceptions, judicial proceedings shall be conducted in a transparent manner in the plain view of the public. It safeguards the right of those appearing before the court. It also serves to educate the public on the judicial process and make uninformed and inaccurate comments about the proceedings less likely.

[36] As for the media, there is no doubt that they play an important role in ensuring that the concept of open justice is properly observed. It is crucial that the public is given accurate information on the cases that are brought before the court. Regrettably, inaccurate information may result in misplaced criticism over court decisions. The Right Honourable Chief Justice cautioned at the recent Opening of the Legal Year 2024 in Putrajaya that manipulated media reporting will give an unfair impression on judicial decisions.

Concluding remarks

[37] Distinguished guests, each of us in our own way, play important roles in the administration of justice. It is my sincere hope that we continue to collaborate and work together to achieve our common goal of achieving justice. Together, we can uphold and strengthen

the foundations of justice in our legal system. By fostering unity, cooperation, and a shared commitment to uphold the rule of law, we can contribute to a legal system that is fair, transparent, and worthy of public trust and confidence.

[38] Before I conclude, it will be remiss of me not to record my heartfelt appreciation to the Organising Committee for this year's Opening of the Legal Year led by the Registrar of the High Court of Sabah and Sarawak, the Registrar of the Subordinate Courts of Sabah and Sarawak and the Director of the State Court of Sabah for their tireless effort in making this event a meaningful and memorable one for all of us. I am aware that some of the officers and staff had sleepless nights during the preparation, and some even arrived before the crack of dawn today to deal with last-minute details. From the bottom of my heart, I thank you for a work well done. I also wish to place on record my appreciation to Dato' Hasbi binti Hassan the former Chief Registrar of the Federal Court as well as the present Chief Registrar Tuan Zamri bin Bakar who had put in tremendous effort in assisting us to make the event this morning a success. Please accept my sincere apologies for any shortcomings in the organisation of this year's Opening of the Legal Year for the High Court of Sabah and Sarawak.

[39] Let us march into the year 2024 with renewed commitment to uphold the rule of law. On behalf of the courts in Sabah and Sarawak, I wish all of you and your family an enriching year of 2024, one filled with joy and peace. To those celebrating the Chinese New Year, a blessed Lunar New Year in advance. May God bless us all.

[40] Allow me to end my speech with a poem titled "Scales of Balance" written by an anonymous poet. It highlights the delicate nature of justice and portrays the struggle to maintain balance in the quest for justice:

In the court of life, scales sway,
Weighing truth, in light of day,
Each side heavy with its plea,
Seeking justice, to be free.

Blindfolded eyes, yet clear in sight,
Balancing wrong and right,
A constant fight, an endless quest,
In justice's test.

Fairness sought in every case,
In every time, in every place,
Scales of balance, firm and just,
In them, we trust.

Anonymous

Declaration

[41] With that, I declare the Legal Year 2024 for Sabah and Sarawak, open.

Thank you.

Justice in the Digital Age: Navigating Legal Challenges and Technological Innovations*

by

*The Right Honourable Sir Geoffrey Vos***

[1] It is a pleasure and an honour to be addressing the Malaysian Alumni Association of Lincoln's Inn here in Kuala Lumpur, and to see such a large proportion of the 1,435 Malaysian alumni of Lincoln's Inn present this afternoon.

[2] As I said on the video I sent you earlier in the year, at least three of your seven former Lord Presidents of the Supreme Court of Malaysia and your 10 Chief Justices of the Federal Court of Malaysia have been Benchers of Lincoln's Inn.

[3] Lord President Raja Azlan Shah (1982–1984) was a Bencher of Lincoln's Inn before he became King of Malaysia. Tun Arifin bin Zakaria, who was Malaysia's seventh Chief Justice between 2011 and 2017 was also a Bencher, as was his predecessor Tun Dato' Seri Zaki Tun Azmi, the sixth Chief Justice between 2008 and 2011, who is, of course, here tonight.

[4] This afternoon, I want to address a number of questions that are less historical, but are nonetheless of pressing relevance to all of us, lawyers and judges, arbitrators and mediators, operating against the backdrop of transformational technological advancements. What will dispute resolution look like in a digital age? What disputes will we actually need to resolve in the future? What will legal practice look like in a digital age? How will disputes be resolved when advances in artificial intelligence ("AI") have been fully adopted by the legal profession and the judges and the courts in which they operate. Will any of us be able to escape the technological revolution, as some back home in the United Kingdom ("UK") certainly imagine they may do?

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* Speech delivered to The Honourable Society of Lincoln's Inn Alumni Association Malaysia on September 14, 2023.

** Master of the Rolls and the Head of Civil Justice in England and Wales.

[5] Let me nail my colours to the mast straight away. I am a self-confessed techno-file. I abandoned using paper in any shape or form some five years ago now and I have no intention of returning to it. I may be regarded in England as a bit of an outlier, but I am sure that I am on the right track and that those who push back against the adoption of new technologies will, in the end, be shown to have been swimming against a tide that is of great benefit to lawyers, the provision of legal services, and, most importantly, the clients and litigants that our legal systems exist to serve.

[6] Let me be clear. I think that the legal community needs to do a great deal of careful thinking about how legal practice and dispute resolution can best be undertaken in a digital age, for the benefit of our communities.

[7] That thinking will need to take into account the large variety of new technologies that are becoming or are likely to become ubiquitous in every consumer, industrial and financial sector in the coming months and years. The new technologies that I am talking about include AI, distributed ledger technology, the introduction of central bank digital currencies, quantum computing, virtual reality, and decentralised web-3 technology.

[8] The thinking that needs to be done includes asking how the critical components of the rule of law can be preserved in our legal systems as these technologies change the way we work. I shall return to that point.

[9] Before concluding this introduction, let me also say that I do not believe in technology for technology's sake. It is absolutely critical that we scrutinise every technological innovation carefully to ascertain whether its adoption will actually save time and money and provide a better service. Some advancements may be of great interest, but of no immediate practical value to lawyers at least. For example, I am not sure just now how virtual reality headsets will help us resolve legal issues – for the moment at least. But let us keep an open mind on that point, as on everything else.

What will dispute resolution look like in a digital age?

[10] In England and Wales, we have spent the last six years creating what we now call our digital justice system. In time, it will come to

encompass all civil, family and tribunal cases, and will enable all court disputes to be resolved end-to-end online. There will be no paper, but, of course, cases that require a hearing will still, subject to what I shall say a bit later about automated decision-making, be heard before a judge either face-to-face or using a remote video conferencing platform where appropriate.

[11] In England and Wales, we have also now established an Online Procedure Rules Committee, which I am chairing, with the objective of providing governance and structure, not only for court-based digital justice, but also for the many pre-action online dispute resolution portals that are available to users either at very low cost or free of all charges.

[12] The vision, as I see it, is of a justice environment in which any individual or business can go online to an app or landing page. There, the individual or business concerned will be directed, probably with the assistance of AI, to the online advice or online portal that deals most specifically with their problem or dispute. So, if the person wants to claim damages for personal injuries, they will be directed, for example, to our existing official injury claims portal that has already dealt with more than 400,000 small personal injury claims without the need for the initiation of legal proceedings. If they have an employment problem, they will be directed to the Advisory, Conciliation and Arbitration Service (ACAS) portal where they can obtain free online advice and have their problem mediated, again often without the need for legal proceedings. The same applies in numerous other fields, such as the Housing Ombudsman dealing with claims for housing disrepair, the Financial Ombudsman dealing with financial services claims, private family disputes, employment claims and many others.

[13] The concept is that a single data set will be created which can, if the dispute is not resolved, be transmitted directly by application programming interface into the digital court dispute resolution process.

What disputes will we actually need to resolve in the future?

[14] Let me now ask you to consider what kinds of dispute will need to be resolved in the new technology-enabled era we are entering.

[15] The first thing to understand is that new technologies in general and AI in particular will change everyone's lives, not just the lives of

lawyers. AI is already used every time you look at your mobile phone – so this is not just about the future. The adoption of all the technologies I have mentioned will, however, generally be gradual, not instantaneous, because workers in every discipline have to get used to adopting new ways of working and new ways of solving their individual problems.

[16] There are few if any areas of human endeavour that will be unaffected. Teaching will be very different when good student essays can be written by large language models on almost any topic in seconds. Computer programming is revolutionised by generative AI, since it is able to write and check computer code far more quickly than any human programmer.

[17] Distributed ledger technology allows for immutable recording of data that will, in all likelihood, reduce the number of factual disputes that will arise for determination in court. It is pretty obvious that almost every financial, consumer and industrial sector will wish to adopt distributed ledger technology ("DLT"), since it will allow them to record for all time everything that occurs: every transaction, every payment, every temperature change, the speed of everything, the position of everything and much more. In such a situation, you can see why judges may have fewer factual decisions to make.

[18] Just two weeks ago, there was an article in the *London Times* that explained how fashion houses were using DLT to identify the unique and genuine nature of fashion clothes. That has already happened with non-fungible token or NFT works of art, and will in all probability have applications across the sectors.

[19] The second thing to consider when asking what kinds of dispute will need to be decided in future is how payments will be made. We can already see that cash is rapidly losing its attraction. Digital payment mechanisms will abrogate any argument about when and whether payment has been made. And one of the most advantageous potential governmental usages of DLT and digital payment mechanisms will be to allow the collection of tax at the same time as a transaction takes place. In the UK, our revenue collection service, His Majesty's Revenue and Customs, is considering whether VAT or sales tax can be collected automatically at the point of sale using DLT systems.

[20] Thirdly, the common law has developed to apportion blame between drivers of cars and road users, between professional advisers

and clients, and between doctors and hospitals in medical negligence cases. All these questions will change when AI is driving the cars and trains, professional advice is obtained by the use of AI. At that stage, the responsibility for accidents will need to be apportioned between the programmers, manufacturers and AI users rather than between natural persons.

[21] Fourthly, much of what needs to be decided by judges and courts these days is actually, in one form or another, about human decision-making. The entire law of negligence concerns whether what was done or decided by the doctor, the driver, the lawyer, or the manufacturer was something that no reasonable person could have done or decided. The law of judicial review concerns asking whether the decision made by a human government minister, local authority, policeman, or other official was a decision that was *Wednesbury* unreasonable – something that no reasonable decision-maker could have decided.

[22] What happens when all (or anyway many) of the decisions I have been talking about are made, not by humans, but by machines? Will that not change all the areas of law that I have been alluding to, and the kinds of cases that lawyers and judges will be concerned about?

[23] Automated decision-making is not in any sense futuristic. We already have algorithmic trading in financial services. We will shortly have smart fridges that will decide for us what food needs to be ordered for us. We already have smart automated vehicles and machines which decide for themselves how to go from *A* to *B*, and, more interestingly perhaps, what new parts or downloads are required to keep them operational. Alexa can already decide and order what we, as consumers, need with the minimum of human intervention.

[24] There is also no reason to suppose that the administrative decisions that affect all our lives will not, in future, be made in some, if not most, cases, by machines. We may in the future be questioning machine-made administrative decisions made about our pensions, our social security benefits, and our immigration status, even the sentences that are passed in criminal cases in court.

[25] Liability disputes will come to be more about who is responsible for the errors and omissions of AI systems, than whether a human driver was driving a car too fast.

What will legal practice look like in a digital age?

[26] First, lawyers are an essential part of the process of directing those with a dispute or problem to the right place for its speedy and effective resolution by a digital justice system. One of the biggest problems in UK society is that individuals do not really understand the legal nature of the problems they face. And those problems are often intimately interconnected with other problems that exacerbate them and make them more complex to resolve.

[27] Typically, an individual who has problems paying their rent and with their landlord trying to regain possession of their home may also have matrimonial problems, employment problems having lost their job, and health issues as well.

[28] You may be thinking that AI could be used to identify the issues and point out the path for resolution. That is true, but in many cases, legal advice will still be required even if it is delivered in an online environment.

[29] So, lawyers will certainly be very much part of the digital justice system. But how else will legal practice be affected by the changes I have mentioned? We no longer need to answer such questions ourselves. I fed the question into ChatGPT and received quite a lengthy answer within seconds.

[30] The question I asked ChatGPT was how it (being a large language model) could help a lawyer practising in London. It said that it could assist in nine areas. I have abbreviated what it said slightly, but in essence, it was as follows:

ChatGPT can assist:

1. **Legal research assistance:** While not a replacement for professional databases like Westlaw or LexisNexis, ChatGPT can provide quick answers, historical contexts, or overviews on various legal topics. …

2. **Document review:** While reviewing documents, lawyers can use ChatGPT to clarify the meaning of certain terms …, or to cross-reference facts or legal points. …

3. **Drafting assistance:** ChatGPT can assist in drafting or rephrasing certain parts of legal documents, contracts, letters, etc., ensuring they are clear and coherent. …

4. **Practice and training:** Junior lawyers or law students can use ChatGPT to test their knowledge, … or explore potential arguments.

5. **Client communication:** … ChatGPT can provide initial answers, which can then be elaborated upon or verified by the lawyer.

6. **Legal updates:** While ChatGPT's training only extends up to September 2021, it can provide background or context on legal principles or cases …

7. **Multilingual assistance:** … ChatGPT can assist in translating or understanding legal terms in multiple languages …

8. **Time management and productivity:** By automating … preliminary research or drafting standard language, lawyers can free up time for more … client interactions.

9. **Cost-effective:** … using AI for certain tasks can be more cost-effective than hiring additional staff …

[31] First, a word of caution. There are, of course, dangers for lawyers in relying on what they are told by ChatGPT. For a start, ChatGPT is not as it tells you up to date, since its data input stopped in September 2021. Secondly, my experience is that, whilst incredible and quick, it is not 100% accurate. The inaccuracies that creep in are hard to spot unless you have close familiarity with the subject. For example, the first time I asked ChatGPT for my own bio, I was told that I was called to the Bar by the Middle Temple, which I was not. The second time, it told me correctly that I had been called by the Inner Temple, but, had that been important, I would not have been able to identify the error. By the way, do not worry about my having been called by Inner Temple in 1977. I rapidly saw the error of my ways and joined Lincoln's Inn *ad eundem* in 1979.

[32] I am absolutely convinced, however, that lawyers will come very quickly to rely on AI in a number of fields, as ChatGPT says – legal research, document checking, contract drafting, to name but three. This may, as Chat GPT also suggested, "free up lawyer time for client engagement", but it may also lead to less legal work for paralegals and trainees. Clients will not be prepared to pay for teams of trainee lawyers to do what AI can do in minutes.

[33] It is important also to consider the way lawyers work. I have often wondered whether lawyers have something of an unhealthy

fixation with analogue programmes such as MS Word and PDF. They have, as yet, generally been reluctant to utilise machine-readable documentation that would have and could have already revolutionised their work. Many lawyers seem determined to ensure that the information that their documents contain should be created from scratch each time, missing out on the potential benefits of a machine-readable format.

[34] The benefits of machine-readable documentation are that you can obtain data from a far greater variety of sources, and that data fields offer you solutions at every stage, and allow you later to draw comprehensive data-driven conclusions from what has been done.

[35] Current generative AI is capable of accessing a large proportion of the data on the internet. That makes it obvious, I would have thought, that any litigation client would want to know, if they could, what it thought as to their prospects of success. The putative client would also obviously want to know what their human lawyers thought. Since the AI has access to more and different data than the humans, its opinion would at least be worth taking into consideration. It is also perhaps likely that specialist legal AIs, such as Spellbook, will provide more accurate and reliable predictions than unspecific programmes such as ChatGPT.

[36] As regards drafting and checking transactional documentation and contracts, machines are already being used to do this. They are incredibly good. Again, one may legitimately wonder why a client would pay a lawyer to draft a contract without the help of AI, when that assistance will save the lawyer time and effort. That will not mean the lawyer is redundant, because at the moment at least, human checking may still be regarded as a sensible precaution. But the time may well come when clients will have as much confidence in document checking undertaken by an AI rather than a human.

[37] You may think that I am painting a bleak outlook for young lawyers. I don't think so. Most of what the machines can do best is boring and repetitive. It is as well to remember that the client will still be human. And that clients will still need to understand their options in an increasingly complex and technical world. There will still be strategy and the unexpected, and there will still be disputes, even if as I have explained they will be of a different character.

How will disputes be resolved when advances in AI have been fully adopted by the legal profession and the judges and the courts in which they operate?

[38] As I see it, AI will be used at every stage of the digital justice system: in giving early legal advice, to diagnose the problem in simple cases, to enable everyone to be fully informed of every stage of the process that is being undertaken, to help people understand and interrogate complex sets of rules and instructions, and also, perhaps, to take simple decisions at different stages of the resolution process.

[39] Let me address the $64,000 questions. Will automated decision-making replace our judges? Perhaps the less draconian and more important question is whether there any scope for judicial decision-making by machines?

[40] I think there is, although controls will be required. First, it will be necessary for the parties to know what decisions are taken by judges and what by machines, and secondly, there will always need to be the option of taking a case to appeal to allow it to be scrutinised by a human judge.

[41] The limiting feature for machine-made decisions is likely to be the requirement that the users have confidence in that system. There are some decisions – like for example intensely personal ones relating to the welfare of children – that humans are unlikely ever to accept being decided by machines. But in other kinds of disputes, such as commercial and compensation disputes, parties may come to have confidence in machine-made decisions more quickly than many of you might expect.

[42] I always give the example of the doctor seeking to diagnose a melanoma. Surely, the patient would want to have the spot on their skin diagnosed by an AI that had seen millions of such spots, rather than a human doctor who had only seen a few hundred – even if human checks and balances remain vital.

Will any of us be able to escape the technological revolution?

[43] The answer is obviously not.

[44] But I want to return to something I said at the beginning about the hard thinking that needs to be done about how legal practice

and dispute resolution can best be undertaken in a digital age, for the benefit of those that our justice systems exist to serve, namely the business and citizens of our nations.

[45] That thinking will need, as I said, to take into account the wide variety of new technologies that are becoming or are likely to become ubiquitous. But it will also need to take into account the rule of law, and how the rule of law applies in this new technology-driven world.

[46] Lord Bingham famously identified the main features of the rule of law. He talked about: (a) the need for the law to be clear, predictable and intelligible; (b) the need for rights to be determined by law rather than discretion; (c) laws applying equally to all; public officials acting *intra vires*; (d) the protection of human rights; (e) the state providing effective and fair dispute resolution; and (f) the state adhering to international law.

[47] The rule of law is important because, if you have it, ordinary people have confidence that they will be fairly treated. Ordinary people will have confidence that the government will treat them fairly; their employers will treat them fairly; and the police, the local authority, the courts, big business, Amazon, Google and everyone else will treat them fairly.

[48] That public confidence is central to a successful society. Without it, people live either in fear or, at least, without the necessary motivation to be economically and socially productive.

[49] Each of these principles is even more applicable in the new era. But we need urgently to consider in detail how the principles I have mentioned actually work in a new AI-driven digital environment. The principles envisage administrative decisions being taken by humans, not machines. They envisage judicial decisions in court and not online. They do not consider at all the way in which online processes, social media, DLT and digital assets expedite and facilitate our lives.

[50] I do not pretend to have done this work. But I think it needs doing sooner rather than later. New technologies challenge orthodoxies on a number of levels, but the rule of law is all encompassing and cannot be sacrificed on the temple of modernisation. So, we need to be sure that, as lawyers and judges do things more quickly and differently, and as we embrace new technologies as we should, none of the justice

that we treasure, nor the independence of our judiciaries nor the rule of law itself, is lost or compromised. I am sure this can be achieved. But it will need serious legal thinkers to address the problem.

Conclusion

[51] So, let me try to draw some of the threads together. I hope I have not alarmed any of you too much.

[52] Lawyers and judges have always been slow to change and to adopt new ideas. That is good in one way, because the legal system provides crucial protections for the lives and liberties of our citizens. That said, the new technologies are all coming along at the same time and will challenge some of the old ways of working to which lawyers have been committed for so long.

[53] My plea to you all is to embrace the changes, to learn how the new technologies work and what they can do to improve your lives and the lives of your clients and those you serve as judges, arbitrators and mediators. Only if you do this will you be able to maintain the rule of law within the new automated machine-readable world into which we are moving.

Online Justice: Cross-Border Videoconferencing Hearings in ASEAN

by

*The Honourable Maria Filomena D Singh**

Introduction

[1] The disruption wrought by the COVID-19 pandemic (the "pandemic") brought untold challenges worldwide and spared no corner of the globe. Its effects pervaded all aspects of life, from the functioning of government to the operations of industry, down to the daily lives of every person. Necessarily, therefore, the functions of the various nations' legal systems were similarly affected.

[2] This upheaval forced drastic changes in the way we live our lives, many of which have legacies that will last long beyond the direst periods of the pandemic. It is hoped, however, that these changes might be for the better, that some changes might be for the best. One of the clearest ways that the world has responded to the challenges posed by the pandemic has certainly been to lean heavily, even more than before, on technology and the internet and the possibilities they present.

[3] The increasing intersection between the law and technology, and the bridging of the gaps between them, has undoubtedly been spurred by the necessities of responding adequately to the pandemic. When restrictions on travel and physical gatherings were rendered unavoidable due to the vector of transmission, the only way the world could avoid a complete standstill was to, in a manner of speaking, migrate to a digital world which the ravages of the pandemic could not reach.

[4] As jurists and legal practitioners, we collectively saw this shift to digital platforms in our own work. The rule of law is a cornerstone of our modern world, and upholding it necessitated finding ways to carry on despite the limitations and restrictions posed by the pandemic.

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[5] One of the ways in which judiciaries responded to the unique challenges of the pandemic was through the use of videoconferencing technology in judicial proceedings. Although such practices already existed prior to the pandemic, and had been used in various forms and degrees depending on the jurisdiction, the pandemic certainly prompted more widespread and more commonplace adoption and use than before.

Outline

[6] This article hopes to add a little insight into what a Model Rule for Videoconferencing Hearings ("Model Rule") might entail for the Association of Southeast Asian Nations ("ASEAN") judiciaries, given that this is currently already a work in progress.

[7] The Philippines' successful experience with a widespread adoption of videoconferencing technologies in judicial proceedings is presented briefly in order to show the process for how the adoption of such technologies proceeded in our own country, which necessarily will inform the inputs that the Philippine Judiciary hopes to leverage to assist in the task of crafting the Model Rule for ASEAN.

[8] Next, the proposal of the Philippines at the 10th Council of ASEAN Chief Justices ("CACJ") Meeting, and the CACJ's agreement to create a Working Group for the drafting of such a Model Rule is touched upon, to provide context for the work.

[9] Lastly, some of the various considerations of which the Philippine Judiciary is currently aware and are taking into account in crafting our inputs and contributions to such a Model Rule are discussed.

[10] This article concludes that clearly the work has only just begun, and there remains the engaging and interesting road to reach the end result of a finalised Model Rule that will earn the approval of and support from the ASEAN members.

The early Philippine experience

[11] Prior to the pandemic, the Supreme Court of the Philippines (the "SC PH") had already been exploring the use of technology generally, and adopting videoconferencing technologies in a judicial setting specifically, although the same was initially in far more limited circumstances and was not as widely resorted to.

[12] One of the earliest manifestations of the nascent emergence of the use of technology in the Philippine Judiciary was brought about by the passage of Republic Act No. 8792,[1] or the Electronic Commerce Act of 2000 ("ECA"). The ECA's objective was to "facilitate domestic and international dealings, transactions, arrangements, agreements, contracts and exchanges and storage of information through the utilization of electronic, optical and similar medium, mode, instrumentality and technology to recognize the authenticity and reliability of electronic documents related to such activities and to promote the universal use of electronic transaction in the government and general public."[2] The ECA also contained provisions regarding the legal recognition of electronic documents.[3]

[13] Thus, the SC PH accordingly crafted and released the Rules on Electronic Evidence,[4] which explored the possibility of providing "electronic testimony" whereby "court[s] may authorize the presentation of testimonial evidence by electronic means."[5]

[14] At around that time, the SC PH also implemented the Rule on Examination of a Child Witness.[6] This Rule allowed for "the testimony of [a] child [to] be taken by live-link television if there is a substantial likelihood that the child would suffer trauma from testifying in the presence of the accused, his counsel or the prosecutor" where "the trauma [is] of a kind which would impair the completeness or truthfulness of the testimony of the child."[7] This provision for live-link television clearly shows its age in today's vastly more modern setting.

[15] In a much more recent attempt to further introduce the use of videoconferencing technology for court proceedings in broader settings, the SC PH explored the use of videoconferencing in proceedings involving persons deprived of liberty ("PDLs"). Under

1 Republic Act No. 8792, or the Electronic Commerce Act of 2000 ("ECA"), available at https://www.officialgazette.gov.ph/2000/06/14/republic-act-no-8792-s-2000/ (last accessed June 25, 2023).
2 Ibid, s 3.
3 Ibid, ss 6–15.
4 Rules on Electronic Evidence, AM No. 01-7-01-SC, available at https://www.doj.gov.ph/files/rules on electronic evidence.pdf (last accessed June 25, 2023).
5 Ibid, r 10, s 1.
6 Rule on Examination of a Child Witness, AM No. 004-07-SC.
7 Ibid, s 25(f).

the relevant guidelines,[8] videoconferencing was allowed in cases where the physical presence in court of certain PDLs deemed "high-risk"[9] or "seriously-ill"[10] posed safety and health issues.[11] This still limited use of videoconferencing was pilot-tested in Davao City in 2019.[12]

Child of necessity

[16] When the pandemic made its way to our shores, there were a number of issuances made hoping to preliminarily address the pressing need to move judicial proceedings online given the physical restrictions.[13] These initial efforts eventually coalesced and culminated in the SC PH's issuance of the Guidelines on the Conduct of Videoconferencing[14] (the "VCH Guidelines").

[17] The VCH Guidelines greatly expanded the use and application of videoconferencing technology in Philippine court proceedings. It outlines the legal and operational requirements that would govern the conduct of trials through videoconferencing, referred to as videoconferencing hearings ("VCH"), and discussed the policies behind the same, as well as the general procedure for VCH, as applied to the pre-hearing, hearing proper, and post-hearing phases.

[18] Further discussion on certain portions of the VCH Guidelines will be provided in the context of how these might be adopted and presented to the CACJ Working Group for possible inclusion in the Model Rule.

[19] In our Judiciary, the success of the VCH Guidelines has been apparent, and the statistics are certainly heartening, for as of October 13, 2022, 1,139,720 VCHs had been conducted by Philippine

8 AM No. 19-05-05-SC, available at https://oca.judiciary.gov.ph/wp-content/uploads/2019/08/AM-Videoconferencing-Pilot.pdf (last accessed June 25, 2023).
9 Ibid, item III, No. 2.
10 Ibid, item III, No. 5.
11 Ibid, see "Whereas Clauses".
12 Ibid, item VI.
13 See Administrative Circular ("AC") No. 37-2020 dated April 27, 2020; OCA Circular No. 93-2020 dated May 4, 2020; AC No. 39-2020 dated May 14, 2020; and AC No. 41-2020 dated May 29, 2020.
14 AM No. 20-12-01-SC ("VCH Guidelines"), available at https://oca.judiciary.gov.ph/wp-content/uploads/2021/01/OCA-Circular-No.-209-2020.pdf (last accessed June 25, 2023).

courts across the country, with a success rate of 89.27 per cent, and this has resulted in the release of 132,916 PDLs, 2,120 of whom are minors.[15]

[20] This early success has sparked hopes that this will bring about a sea of change for the better in the way Philippine judicial proceedings are run.

[21] The SC PH Chief Justice Alexander G Gesmundo ("SC PH CJ Gesmundo"), speaking at the 10th CACJ Meeting in Kuala Lumpur, Malaysia, referred to the VCH Guidelines as a "child of necessity", which were issued to "ensure the uninterrupted and timely delivery of our court services despite the continuing threat of the COVID-19 virus."[16]

[22] Despite the inauspicious birth of the VCH Guidelines, they turned out to prove the adage that "necessity is the mother of invention" right. As observed by SC PH CJ Gesmundo, the Philippine Judiciary "has successfully adopted the VCH modality for all our courts, including the Supreme Court", and so "the Supreme Court is presently updating its Guidelines on VCH to transition the use of the rule to a post-pandemic world, making it a permanent device and option in every Filipino judge's trial toolkit, especially for the best interests of child witnesses, for enhanced victim protection and prevention of re-victimization, for easier access to counsel and even family for detained witnesses and parties; and, in general, for greater time and cost efficiency."[17]

[23] This wholehearted embracing of the power of technology to improve justice in all its aspects is a large part of the SC PH's reform efforts, which are encapsulated in the SC PH's Strategic Plan for Judicial Innovations 2022–2027[18] ("SPJI"). In the SPJI, greater leveraging of technology, including artificial intelligence (AI), is declared to be an integral part of our efforts at continual improvement in our functions.

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15 Rey G Panaligan, "PH Named Head of ASEAN Judiciaries to Review, Propose Guidelines on Video Conferencing in Courts", *Manila Bulletin* (November 8, 2022) ("Manila Bulletin Article"), available at https://mb.com.ph/2022/11/08/ph-named-head-of-asean-judiciaries-to-reviewpropose-guidelines-on-video-conferencing-in-courts (last accessed June 28, 2023).

16 Ibid.

17 Ibid.

18 Supreme Court of the Philippines' Strategic Plan for Judicial Innovations 2022–2027, available at https://sc.judiciary.gov.ph/3d-flip-book/spji/ (last accessed June 28, 2023).

In particular, the SPJI states that one of its four guiding principles is that of Technologically Adaptive Management, in that "[t]echnology must be the platform for running basic court systems and processes, foster creativity and innovation through design thinking and management, and drive sustainable growth and development in the courts. The limitless potentials of technology will be tapped to bolster efficiency, access to justice, accountability, and transparency."[19]

[24] Clearly, therefore, VCH as a modality in Philippine judicial proceedings is here to stay.

10th Council of ASEAN Chief Justices Meeting

[25] Given the SC PH's recognition of how adopting VCH could greatly improve the work of the Judiciary and seeing the possibility and opportunity for a concerted and aligned effort among the ASEAN members towards modernising the way in which all our courts function so as to benefit the region as a whole, the Philippines presented a proposal at the 10th CACJ Meeting, held in Kuala Lumpur, Malaysia. This proposal was for the development and adoption of a Model Rule on Videoconferencing, specifically aimed at the "adoption of common principles and guidelines in the conduct of videoconference hearings involving parties and witnesses outside the territory of a State where the action is pending, but still within the ASEAN."[20]

[26] At that meeting, members of the SC PH, including myself, spoke as to how such a Model Rule, while brought about primarily as a response to the pandemic, could serve as a permanent feature for the betterment of ASEAN judiciaries. Further, a Model Rule could hopefully also coordinate the direction of the ASEAN judiciaries in such a way as to facilitate cooperation between ASEAN courts and lead to more seamless cross-border judicial proceedings among the ASEAN members.

[27] The gist of the proposal, and the motivating idea behind it, are summed up nicely in the following passages which quote the words of SC PH CJ Gesmundo at the 10th CACJ Meeting:

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19 Ibid, p 9.

20 SC PH, "Philippine Supreme Court to Lead ASEAN Working Group on the Conduct of Videoconferencing Hearings" (November 7, 2022), available at https://sc.judiciary.gov.ph/philippine-supreme-court-to-lead-asean-working-group-on-the-conduct-of-videoconferencing-hearings/ (last accessed June 28, 2023).

> In his message last Nov. 4 to CACJ delegates and other participants, Chief Justice Gesmundo said "in the interest of consistency, efficiency, and mutual protection, therefore, a CACJ ASEAN protocol on the conduct of video conference hearings would be ideal."
>
> …
>
> "As our economic interests, educational pursuits, science, and technological advancements, and even our public health and environmental concerns intersect across our physical borders more and more, we will see an increase in transnational transactions, interactions and, predictably, legal conflicts. In the interest of consistency, efficiency, and mutual protection, therefore, a CACJ ASEAN protocol on the conduct of video conference hearings would be ideal," Gesmundo also told his counterparts in ASEAN.[21]

[28] This proposal of the SC PH found its culmination in a paragraph from the Kuala Lumpur Declaration at the 10th CACJ Meeting,[22] signed on November 4, 2022:

> 28. **THE AGREEMENT** to establish a new Working Group on the Conduct of Videoconferencing Hearings pursuant to the proposal by the Philippines, and for the said Working Group to be chaired by the Philippines.[23]
>
> (Emphasis in the original)

The Working Group for the Model Rule

[29] Pursuant to the agreement of the CACJ that the Philippines was to chair the Working Group on the Conduct of Videoconferencing Hearings, the SC PH proceeded to constitute an internal committee tasked to spearhead the necessary work.[24]

[30] One of the tasks undertaken by this committee has been to craft an initial or preliminary draft Model Rule ("preliminary Model Rule"),

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21 Manila Bulletin Article, see n 15 above.

22 A copy of the Kuala Lumpur Declaration is available at https://cacj-ajp.org/cacj-activities/declarations/kuala-lumpur-declaration/ (last accessed June 25, 2023).

23 Ibid, para 28.

24 SC PH Memorandum Order No. 08-2023, entitled "Creation of the Committee for the Council of ASEAN Chief Justices Working Group on the Conduct of Videoconferencing".

which we hope can serve as a useful starting point for the work of the ASEAN Working Group as a whole once constituted.

[31] Necessarily, the initial draft of the preliminary Model Rule that we hope to present to the Working Group is patterned closely after the SC PH's own VCH Guidelines. This is only natural considering that this "child of necessity" is one we are intimately familiar with as we have reared it, we have watched it grow and develop, are aware of the history and provenance behind its provisions, and have witnessed its usefulness and contribution to the betterment of our functions. We thus hope that the lessons we have learned from our own homegrown guidelines can result in our provision of useful inputs and valuable contributions to the Working Group as a whole.

[32] Certainly, however, there are any number of items and issues that would have to be taken account of in order to not only draft a Model Rule, but to craft one that garners regional support and adoption.

[33] In our current draft for the preliminary Model Rule, we emphasise that the Model Rule is non-binding and serves merely as a guide for the adoption or modification of rules governing VCH by the individual ASEAN members. That said, it is of course hoped that the portions of the actual Model Rule pertaining specifically to cross-border proceedings are adopted by the various ASEAN states, as the hoped-for integration and coordination across our countries is necessarily highly dependent on a mostly uniform adoption.

[34] Primarily though, and a common consideration in all efforts to craft a Model Rule or similar document, is the need to take into account the varying legal and regulatory frameworks of the ASEAN members. Further, there is also a need to determine the technological capacities and the existing use and breadth of adoption of technology among the ASEAN judiciaries, in order to more accurately gauge how the Model Rule can be as feasible as possible.

[35] Necessarily, these differences and distinctions between the ASEAN members would require a better understanding of such differences, and it is hoped that this understanding can be fostered cohesively once the Working Group has convened, and input from each of the ASEAN judiciaries can be gathered.

[36] Given, however, that we already hope to present the preliminary Model Rule to jumpstart the Working Group's discussions in an effort to make these more fruitful and focused, we have attempted to avoid the inclusion of matters that may be too dependent on individual national circumstances and have minimised the inclusion of items that may be better left as national policy choices, such as specific modes of technology, platforms, or applications to be used, or the rules on presentation of evidence that could vary heavily from jurisdiction to jurisdiction.

[37] As such, we have attempted to pare the preliminary Model Rule down, as much as possible, to its basics. In this exercise to identify the most essential provisions, we are guided by documents such as the European Commission for the Efficiency of Justice's ("CEPEJ") Guidelines on Videoconferencing in Judicial Proceedings,[25] which condense many of the considerations in videoconferencing down to those which are deemed most fundamental.

[38] The following is a short discussion based on the latest draft version of the preliminary Model Rule. Please note that the discussion here should be treated as purely academic and very much preliminary, given that these are still subject to change based on the further discussions of the SC PH's own internal committee, as well as, of course, the actual work undertaken by the CACJ Working Group itself.

[39] Firstly, videoconferencing hearings are currently defined as follows:

> (a) Videoconferencing hearings (VCH) are court hearings and proceedings, which include, but are not limited to, the taking of testimony, conducted through the use of videoconferencing technology, solutions and applications, as well as video, audio, and data transmission devices, to allow participants in different physical locations, including foreign jurisdictions, where applicable and proper, to simultaneously and synchronously communicate by both seeing and hearing one another. Reference to "a" VCH or "the" VCH is used to refer to particular or individual videoconferencing hearings.

25 This document was adopted by the CEPEJ at its 36th plenary meeting (June 2021), and a copy is available at https://edoc.coe.int/en/efficiency-of-justice/10706-guidelines-on-videoconferencing-in-judicial-proceedings.html (last accessed June 28, 2023).

(b) Participants in VCH include the presiding judicial officer, court personnel, litigants, counsels, testifying witnesses, interpreters, guardians and support persons for child witnesses, and members of the public, when allowed under this Model Rule. VCH includes proceedings where some or at least one of the participants is in-court and the others are participating remotely, as well as proceedings which are fully remote with none of the participants in-court.

[40] The foregoing, particularly paragraph (b), makes it clear that VCH can be conducted fully remotely, with no participants in court, as may be necessary.[26]

[41] On the general conduct of VCH, it is provided that this remains an alternative to in-court proceedings, which are still considered the primary mode in hearing cases.[27] VCH shall, as far as practicable, resemble in-court hearings, with the attendant dignity and solemnity, and with the perjury and contempt laws, as applicable in the jurisdiction, to govern.[28]

[42] Provisions for private communication in order to preserve attorney-client confidentiality are also made.[29] The occurrence of technical issues is also accounted for, with provisions such as a sufficient opportunity to test the technology and platforms in order to ensure meaningful and active participation,[30] and it is also provided that a VCH may be suspended when any technical issue tending to taint the regularity or fairness of the proceedings arises.[31]

[43] The publicity of VCH in order to observe the right to a public trial,[32] such as may exist in international or national law, is also included, though restrictions on access may of course vary among jurisdictions.

[44] Provisions specifically for support persons of child witnesses are also made,[33] given the need to provide additional protection and consideration for minors, particularly in cases where they may be

26 See VCH Guidelines, see n 14 above, item I (2)(a).
27 Ibid, item I(1)(a).
28 Ibid, item I(1)(c)
29 Ibid, item I(1)(e).
30 Ibid, item II(A)(2).
31 Ibid, item II(B)(10).
32 Ibid, item II(A)(5).
33 See Rule for Examination of a Child Witness, AM No. 004-07-SC, s 11 on Support Persons.

victims of abuse. This is also informed by our experience with our predecessor rule on testimony for child witnesses being provided by live-link television, as discussed previously.

[45] On the presentation of evidence,[34] as noted, this is left mainly to the ASEAN members to operationalise according to their specific legal framework.

[46] We now move on to some selected issues or considerations that have gone and are going into the drafting of the preliminary Model Rule, and which we believe will be highly pertinent for purposes of crafting the actual Model Rule itself.

Distinction between civil and criminal proceedings

[47] One of the primary features of the preliminary Model Rule is a distinction between criminal proceedings and civil proceedings.

[48] The initial draft takes into account concerns regarding issues of consent and the rights of persons with regard to criminal proceedings in particular, which can find basis in both international law, as well as the laws of many national jurisdictions.

[49] Thus, a clear delineation between civil and criminal proceedings, or more properly, criminal proceedings and all other proceedings, appears to be proper.

[50] In those proceedings that are not criminal in nature, with the definition of what constitutes a criminal case being left open to the various countries, the preliminary Model Rule allows for grounds when the court may conduct videoconferencing hearings on its own initiative,[35] and also when parties may move for it.[36]

[51] On the other hand, in criminal proceedings, the objection to a videoconferencing hearing by a party, usually the accused, which is premised on a right to confrontation of witnesses or similar rights that call for an in-court hearing, will forestall videoconferencing hearings. However, an override of such objection may be warranted by a compelling state interest[37] or public policy as determined by the

34 See VCH Guidelines, see n 14 above, item II(C).
35 Ibid, item II(1).
36 Ibid, item II(2).
37 Ibid, item I(2)(c).

court, which is a higher standard than that of merely involving the fair, speedy, and efficient administration of justice,[38] which is the general standard which a VCH should meet. Further, this determination should be clearly subject to appellate review.

[52] For instance, under Philippine law, the accused in a criminal case has a constitutional right, as found in the Bill of Rights, to, among others, meet witnesses "face to face":[39]

> (1) No person shall be held to answer for a criminal offense without due process of law.
>
> (2) In all criminal prosecutions, the accused shall be presumed innocent until the contrary is proved, and shall enjoy the right to be heard by himself and counsel, to be informed of the nature and cause of the accusation against him, to have a speedy, impartial, and public trial, to meet the witnesses face to face, and to have compulsory process to secure the attendance of witnesses and the production of evidence in his behalf. However, after arraignment, trial may proceed notwithstanding the absence of the accused: Provided, that he has been duly notified and his failure to appear is unjustifiable.[40]

[53] The Philippine Constitution was ratified in 1987, at a time when the internet and technology was not nearly in the advanced state it is in today. But we believe that with the appropriate safeguards and standards in the conduct of VCH, this right can still be deemed to be fully observed.

[54] We have also taken guidance from recommendations published by the International Commission of Jurists,[41] which helpfully summarises the need to distinguish civil from criminal proceedings:

> [I]nternational law clearly contemplates a right of the accused to be physically present for his or her criminal trial, and the right of a person arrested or detained on criminal charges to be physically

38 Ibid, item I(3)(b).

39 Philippine Constitution, Art III, s 14, para 2.

40 Ibid, Art III, s 14.

41 International Commission of Jurists, "Videoconferencing, Courts, and COVID-19: Recommendations Based on International Standards" (November 26, 2020), available at https://icj2.wpenginepowered.com/wp-content/uploads/2021/04/Universal-videoconferencing-courts-and-covid-Advocacy-2020-ENG.pdf (last accessed June 28, 2023).

> present for his or her initial hearing before the judge. The broader right of anyone deprived of liberty on any ground to challenge the lawfulness of his or her detention before a court may also imply the right to be brought physically before the court.
>
> Even if international law does not confer a right of individuals to be physically present for the type of hearing in question, if such a right is provided for by national law, then the question must also be considered whether the imposition of videoconferencing in the circumstances is permitted under national law and whether it is being applied in a manner that fully respects the right of the individual to confidential communication with their lawyer, as well as rights of non-discrimination and equal access to justice.
>
> In hearings other than those for which international law and standards contemplate a right of physical presence, the non-consensual imposition of videoconferencing on a judicial hearing may be permissible if it is based in law, non-discriminatory, time-limited and demonstrably necessary and proportionate in the local circumstances of the COVID-19 pandemic and the specific characteristics of the individual case, and is implemented with safeguards to address the other fair trial rights of the affected person.[42]
>
> (Citations omitted)

[55] It is clear, therefore, that a proper distinction between civil and criminal proceedings has to be made for purposes of the Model Rule, given the necessarily higher requirements to satisfy international law, and likely the national law of most jurisdictions, in criminal cases, where consent of the accused to VCH is not given.

Cross-border or transnational proceedings

[56] Possibly the foremost consideration for the Model Rule is that of achieving, as nearly as possible, the goal for streamlined ASEAN cross-border or transnational proceedings. However, these also appear to be the most difficult provisions to craft.

[57] A section of the preliminary Model Rule is dedicated to the appearance in VCH of participants who are located in a foreign jurisdiction, and how this might be accomplished. A potential means of establishing regional cooperation could be through a system that

42 Ibid, p 5.

processes requests from one jurisdiction to another, whereby a requested court can facilitate or oversee the participation of a videoconferencing participant located in its jurisdiction in a videoconferencing hearing of the requesting jurisdiction, through means such as allowing the participant to use any videoconferencing facilities that the requested court may have at its disposal.

[58] Primarily though, informed again by our own VCH Guidelines, the possibility of such cross-border proceedings is operationalised through the use of consular premises:

> 1. Videoconferencing from Philippine embassies or consulates. Litigants and witnesses who are Overseas Filipino Workers, Filipinos residing abroad or temporarily outside the Philippines, or non-resident foreign nationals who would like to participate or testify through videoconferencing may do so upon proper motion with the court where the case is pending. Such videoconferencing may be conducted only from an embassy or consulate of the Philippines.
>
> Philippine embassies and consulates shall conduct videoconferencing in accordance with the technical and operational standards laid out in these Guidelines.[43]

[59] While we have carried over provisions allowing for the use of consulates in the preliminary Model Rule, we are aware, as can be seen in Circulars of the Philippines' Office of the Court of Administrator,[44] that various countries — including the ASEAN member-states of Singapore, Vietnam, and Indonesia — have expressed certain procedures, restrictions, and reservations with regard to the use of VCH in consulates that they are hosting.

[60] Thus, there is clearly a need to create acceptable uniform regional rules regarding the conduct of VCH in another jurisdiction, including through the use of consular delegations, or, at least, to consolidate the necessary national procedures and facilitate coordination among the various ASEAN members.

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43 VCH Guidelines, see n 14 above, item IV(1).

44 See the Philippines' Office of the Court Administrator ("OCA") Circular No. 127-2022; OCA Circular No. 171-2022; OCA Circular No. 216-2022; OCA Circular No. 55-2023; OCA Circular No. 139-2023.

[61] Such an effort finds recognition in the publication of the United Nations Office on Drugs and Crime entitled "Manual on Videoconferencing: Legal and Practical Use in Criminal Cases"[45] published in 2017:

> Given the variety of national regulations on videoconferencing international cooperation is achieved through a combination of both formal and informal requests. More work is required in developing international protocols that ensure appropriate compliance is followed so that a requesting state can receive in a timely manner a response to a request.
>
> Although there is no consensus about the role of the consular delegations in international judicial cooperation, it is a fact that several countries grant broad functions by law to their consulate delegations. Some countries are very flexible about allowing foreign authorities to carry out a videoconference in their consulate for judicial purposes, and some of them do not even require communication beforehand. Meanwhile, other countries do not accept it at all. In between, we can find countries that accept it under certain circumstances. The problem arises when the foreign authorities proceed with the videoconference without any previous coordination with the national authorities. *Therefore, it is recommended to establish a clear international procedure for these cases, in order to find a balance between the needs of the requesting State and respecting the sovereignty of the host State. As a minimum it would be highly recommended that national authorities establish clear administrative regulations to all consulates in their country so as to avoid any misunderstandings.*[46]
>
> (Emphasis added)

[62] While it may be beyond the remit of the CACJ Working Group on the Conduct of Videoconferencing to come up with a binding instrument establishing a uniform ASEAN protocol with regard to the conduct of VCH within consular premises given that this necessarily implicates what many countries, the Philippines included, may consider as more of an executive rather than a judicial function, the

45 United Nations Office of Drugs and Crime, "Manual on Videoconferencing: Legal and Practical Use in Criminal Cases" (2017), available at https://www.unodc.org/documents/organized-crime/GPTOC/GPTOC2/MANUAL_VIDEOCONFERENCING.pdf (last accessed June 25, 2023).

46 Ibid, pp 144–145.

proposal to create a regional coordinating body premised on voluntary cooperation for cross-border VCH appears to be in keeping with the purpose of the Working Group.

[63] Thus, the preliminary Model Rule looks to include a proposal for the creation of a central authority as the regional system in charge of coordination of cross-border VCH among the jurisdictions of the ASEAN member-states. This central authority would be tasked with coordinating among points of contact in the ASEAN member-states, in order to, among others, come up with a consolidated document containing the positions of the various countries regarding the use of consular offices for the use of VCH. It is imagined that this might perhaps be patterned on or emulate the "Fiches Belges"[47] of the European Union and the European Judicial Network, which "gives practical information per Member State on measures requested through judicial cooperation within the framework of Mutual Legal Assistance or Mutual Recognition Instruments."[48]

Integration and recognition of existing ASEAN instruments and other international agreements

[64] In addition, the preliminary Model Rule attempts to take into account, explicitly, as needed, agreements such as the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters,[49] considering its clear application in criminal cases where VCH is intended to be conducted and one of the participants is within the jurisdiction of a fellow ASEAN Member State. While VCH may be the modality by which cross-border proceedings may be held, it is clear that other requirements which need to be observed should be integrated as seamlessly as possible with the Model Rule.

[65] Thus, it is worth noting that this Treaty states several times in various articles, namely, articles 11, 14, and 15 that "[n]othing

47 Available at https://e-justice.europa.eu/528/EN/fiches_belges (last accessed June 28, 2023).

48 United Nations Office of Drugs and Crime, "Manual on Videoconferencing: Legal and Practical Use in Criminal Cases", see n 45 above.

49 A copy is available at https://asean.org/wp-content/uploads/2021/01/20160901074559.pdf (last accessed June 28, 2023). See an overview on this Treaty from the ASEAN website, available at https://asean.org/our-communities/asean-political-security-community/rules-based-people-oriented-people-centred/treaty-on-mutual-legal-assistance-in-criminal-matters/ (last accessed June 28, 2023).

in this Article shall prevent the use of live video or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party for the purpose of executing this article if it is expedient in the interests of justice to do so",[50] and further, article 23, on Compatibility with Other Arrangements, provides that "Nothing in this Treaty shall prevent the Parties from providing assistance to each other pursuant to other treaties, arrangements or the provisions of their national laws."

[66] Any further international agreements, particularly those where not all ASEAN members are a party but remain necessary to take into consideration, will hopefully come to light through discussions in the Working Group.

Conclusion

[67] Clearly, the work has only just begun. It is fervently hoped, however, that together, the representatives of the ASEAN judiciaries in the CACJ Working Group on the Conduct of Videoconferencing are able to craft a Model Rule that is capable of addressing the various considerations, some of which I have attempted to discuss here, so as to pave the way for a more interdependent ASEAN, where justice can be more easily dispensed across borders.

50 Article 11 on Obtaining of Evidence, and see art 14 on Attendance of Person in the Requesting Party, and art 15 on Attendance of Person in Custody in the Requesting Party, of the ASEAN Treaty on Mutual Legal Assistance in Criminal Matters, where minor variations are made for this mostly uniform provision.

An Introduction to the 1980 Hague Convention and its Operation in England and Wales

by

*The Honourable Justice Alistair MacDonald**

Introduction

[1] It is undoubtedly the case that child abduction is harmful. The child is taken out of the family and social environment in which his or her life has developed.[1] In the jurisdiction of England and Wales, child abduction is also a criminal offence.[2] A study by Professor Marilyn Freeman entitled *Parental Child Abduction: The Long-Term Effects*[3] in 2014 found that a high proportion of those who had experienced child abduction as children reported suffering very significant effects from their abductions in terms of their mental health, and that these effects were ongoing into their adult lives very many years after the abduction. The study concludes that the effects of child abduction can be seriously negative and long-lasting.[4]

[2] The 1980 Hague Convention on the Civil Aspects of International Child Abduction[5] ("1980 Hague Convention") aims to protect children from the harmful effects of their wrongful removal or retention from their state of habitual residence and to establish procedures to ensure their prompt return to that state, as well as to secure protection for rights of access.[6] The 1980 Hague Convention seeks to secure that prompt return so that any dispute about the child's best interests, including custody, can be determined quickly

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* Deputy Head of International Family Justice for England and Wales.

1 Elisa Pérez-Vera, Explanatory Report, para 11.

2 Child Abduction Act 1984, s 1.

3 M Freeman, *Parental Child Abduction: The Long-Term Effects*, International Centre for Family Law, Policy and Practice (2014).

4 See also the Australian case of *In the Marriage of Murray and Tam* (1993) 16 Fam LR 982.

5 First proposed at a Special Commission in 1976.

6 Preamble to the 1980 Hague Convention. The provisions of the 1980 Hague Convention that deal with rights of access are beyond the scope of this article but are covered by Chapter IV of the Convention.

by the jurisdiction of the child's habitual residence. It is aimed at quickly restoring the status quo prior to the wrongful removal or retention, at deterring parents from seeking to dictate the forum for determining substantive welfare questions concerning the child by way of abducting the child[7] and preventing the establishment of legal and jurisdictional links for the child which are more or less artificial.[8] The Convention necessarily coexists with the rules of each contracting state on applicable law and on the recognition and enforcement of foreign decrees.[9]

[3] The Convention of October 25, 1980 on the Civil Aspects of International Child Abduction has 103 contracting states.[10] In circumstances where the 1980 Hague Convention is centred upon the idea of cooperation amongst authorities, it is designed to regulate only those situations that come within its scope and which involve two or more contracting states.[11]

[4] The perspective offered by this article is necessarily informed by the law and practice in the jurisdiction of the author. However, the article aims to provide a general introduction to the principles and operation of the 1980 Hague Convention, as well as dealing with some of the challenges presented in operating the Convention in a busy family law jurisdiction.

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7 Elisa Pérez-Vera, see n 1 above, at paras 10 and 16.

8 Ibid, para 15.

9 Ibid, para 39. Article 36 of the 1980 Hague Convention provides further that "Nothing in this Convention shall prevent two or more Contracting States, in order to limit the restrictions to which the return of the child may be subject, from agreeing among themselves to derogate from any provisions of this Convention which may imply such a restriction."

10 Not all accessions have been accepted by all states, as detailed in the Status Table for the 1980 Hague Convention. Article 38 states that "The accession will have effect only as regards the relations between the acceding State and such Contracting States as will have declared their acceptance of the accession. Such a declaration will also have to be made by any Member State ratifying, accepting or approving the Convention after an accession."

11 Elisa Pérez-Vera, see n 1 above, at para 37. The Convention falls to be interpreted by reference to the principles set out in the Vienna Convention on the Law of Treaties in order that the Convention can have the same meaning and effect under the laws of all contracting states (see *Re H (Abduction: Acquiescence)* [1998] AC 72).

The 1980 Hague Convention

Objects of the Convention

[5] Article 1 of the 1980 Hague Convention provides that the object of the Convention is to secure the prompt return of children wrongfully removed to or retained to the country with which the child has the closest link, so as to ensure it is that jurisdiction that makes the substantive decisions regarding the child's welfare where a welfare dispute arises.

[6] An understandable question for many when looking at the 1980 Hague Convention, and one that requires a clear answer, is why should the court in a country of which the child is not a national seek the return of that child in order to make welfare decisions about him or her? Why, for example, should a child born to a foreign parent and abducted to that parent's home jurisdiction be returned to England for decisions to be made about that child? The answer to these understandable questions lies in providing a clear statement of the fundamental principles underpinning the 1980 Hague Convention.

[7] Perhaps the most important principle for understanding the 1980 Hague Convention is the principle that it is in the best interests of the subject child for decisions about his or her welfare to be taken in the place with which he or she has the closest connection. The Pérez-Vera Explanatory Report on the 1980 Hague Convention states as follows in this regard:

> In a final attempt to clarify the objects of the Convention, it would be advisable to underline the fact that, as is shown particularly in the provisions of article 1, the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the question, i.e. of custody rights, should take place before the competent authorities in the State where the child had its[12] habitual residence prior to its removal; this applies as much to a removal which occurred prior to any decision on custody being

12 The impersonal description of the child as "it" in the 1980 Hague Convention and associated documents is unfortunate, but likely reflects the era in which it was drafted.

taken — in which case the violated custody rights were exercised *ex lege* — as to a removal in breach of a pre-existing custody decision.[13]

[8] Because it is in the best interests of the child for long-term welfare decisions to be informed by a wide range of factors concerning their actual physical, emotional and educational day to day life and their close relationships, the 1980 Hague Convention measures the closeness of the child's connection with a state not by reference to the child's nationality or parental nationality, but by reference to the child's habitual residence, to which concept I will come in more detail below.[14]

[9] It is further important to highlight that, in the circumstances, when a court in a contracting state orders the return of the child under the 1980 Hague Convention,[15] that order does no more than return the child to the jurisdiction the contracting states have agreed is best placed for making long-term decisions about the child's welfare. In circumstances where the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith to the jurisdiction best placed to decide his or her long-term future, a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time, pending the court of his or her habitual residence deciding the long-term welfare position. Where a return order is not a welfare decision, but one taken by reference to the terms of the Convention, such an order does not mean that the child will remain permanently in the state to which they are returned under the Convention. That will depend on the welfare decision made by the court in the contracting state of habitual residence.

[10] In the foregoing circumstances, at its heart the 1980 Hague Convention is best understood as a jurisdictional instrument rather than a welfare instrument. In the English case of *Re E (Children) (Abduction: Custody Appeal)*,[16] the United Kingdom ("UK") Supreme Court observed that proceedings under the Convention "are not proceedings in which the upbringing of the child is in issue. They are proceedings about where the

13 Elisa Pérez-Vera, see n 1 above, at para 19 and see para 34 referred to below.
14 1980 Hague Convention, Art 3.
15 Pursuant to Art 12 of the 1980 Hague Convention.
16 [2012] 1 AC 144.

child should be when the issue is decided." Subject to a limited number of narrowly drawn exceptions, which I shall come to below, the 1980 Hague Convention aims to protect children from the harmful effects of wrongful removal or retention by ensuring that it is the jurisdiction with which the child has the closest connection, the jurisdiction in which the child is habitually resident, that is the jurisdiction that makes the long-term welfare decisions in respect of the child.

Cardinal principles

(i) Wrongful removal or retention

[11] The 1980 Hague Convention becomes operative when a child has been wrongfully removed from the contracting state of habitual residence. In this regard, Article 3 of the 1980 Hague Convention provides as follows:

> **Article 3**
>
> The removal or the retention of a child is to be considered *wrongful* where –
>
> a) it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
>
> b) at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.
>
> The rights of custody mentioned in sub-paragraph a) above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

[12] To be wrongful therefore, the removal or retention of the child must be both from the child's contracting state of habitual residence and be in breach of rights of custody being exercised at the time of the removal. The Convention deals only with removals from the child's contracting state of habitual residence across an international frontier and retentions outside the child's contracting state of habitual residence.[17]

17 See *Re H; Re S (Abduction: Custody Rights)* [1991] 2 AC 476.

(ii) Habitual residence

[13] As stated, to be wrongful, the removal or retention must occur in the context of the child being habitually resident in the contracting state from which he or she was removed or retained immediately before that removal or retention.[18] In common with the other rules of jurisdiction, the meaning of habitual residence is shaped in the light of the best interests of the child, in particular on the criterion of proximity.[19] Proximity in this context means the practical connection between the child and the contracting state concerned.

[14] Habitual residence is a question of fact. Each jurisdiction will have its own legal principles applicable to the determination of habitual residence. In the jurisdiction of England and Wales, the question of fact falls to be determined by asking whether, having regard to all the relevant circumstances, the subject child has achieved a degree of integration in a social and family environment in the country in question sufficient for the child to be habitually resident there.[20] It is the stability of a child's residence as opposed to its permanence which is relevant, in the sense that it is the integration of the child into the environment rather than a mere measurement of the time a child spends there that is important when considering the degree of integration, the measure being qualitative and not quantitative.

[15] In the jurisdiction of England and Wales, habitual residence must be established on the basis of all the circumstances specific to the individual case. Factors that might be relevant include the duration, regularity and conditions for the stay in the country in question, the reasons for the parent's move to and the stay in that country, the child's nationality, the place and conditions of attendance at school, the child's linguistic knowledge, the family and social relationships the child has, whether possessions were brought, whether there is a

18 1980 Hague Convention, Art 3(a).

19 A general principle articulated, for example, in Preamble 12 of Regulation (EC) 2201/2003.

20 *A v A (Children: Habitual Residence) (Reunite International Child Abduction Centre intervening*) [2014] AC 1; *Re L (A Child) (Habitual Residence) (Reunite International Child Abduction Centre intervening)* [2014] 1 AC 1017; *Re LC (Abduction: Habitual Residence: Inherent Jurisdiction)* [2014] AC 1038; *Re R (Children)* [2016] AC 76; *Re B (A Child) (Reunite International Child Abduction Centre Intervening)* [2016] AC 606; and *Re A (A Child) (Habitual Residence: 1996 Hague Child Protection Convention)* [2023] EWCA Civ 659.

right of abode and whether there are durable ties with the country of residence or intended residence.[21] It is the *child*'s habitual residence which is in question and hence the *child*'s level of integration in a social and family environment which is under consideration when determining the question of habitual residence.

(iii) Rights of custody

[16] To be wrongful, the removal or retention must also be in breach of rights of custody being exercised at the time of the removal. Pérez-Vera observes as follows in this regard:

> … the requested State are not bound to order the return of the child if the person requesting its return was not actually exercising, prior to the allegedly unlawful removal, the rights of custody which he now seeks to invoke, or if he had subsequently consented[22] to the act which he now seeks to attack. Consequently, the situations envisaged are those in which either the conditions prevailing prior to the removal of the child do not contain one of the elements essential to those relationships which the Convention seeks to protect (that of the actual exercise of custody rights), or else the subsequent behaviour of the dispossessed parent shows his acceptance of the new situation thus brought about, which makes it more difficult for him to challenge.[23]

[17] The meaning of "rights of custody" under Article 5 of the 1980 Hague Convention includes rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence.[24] Whether rights of custody are being exercised is, again, a question of fact. The term "rights of custody" is established by the autonomous law of the 1980 Hague Convention. Thus, the question of whether "rights of custody" as defined by the 1980 Hague Convention *exist* in a given case falls to be determined by reference to the position

21 See *Re A (Area of Freedom, Security and Justice)* Case C-523/07) [2010] Fam 42 and *Mercredi v Chaffe* [2011] 2 FLR 515.

22 Consent is considered further below.

23 Elisa Pérez-Vera, see n 1 above, at para 12.

24 As Professor Lowe points out, when the Convention was drafted the question of who had custody was generally clear, but has subsequently become more complex as states have embraced more inclusive ways of ascribing responsibility for children following the breakdown of marriage or relationships (see N Lowe and M Nicholls, *International Movement of Children*, 2nd edn (LexisNexis, 2016)).

created by the law of the contracting state in which the child was habitually resident immediately before the removal or retention.

[18] In the jurisdiction of England and Wales, determining the question of the existence or otherwise of "rights of custody" is a two-stage process. First, what are the rights created or conferred by the law of the state in which the child was habitually resident immediately before the removal or retention? Second, do those rights created or conferred by the law of the state in which the child was habitually resident immediately before the removal or retention equate to "rights of custody" for the person in question having regard to the meaning of the term "rights of custody" as established by the autonomous law of the 1980 Hague Convention?[25]

[19] As to whether the rights created or conferred by the law of the state in which the child was habitually resident immediately before the removal or retention equate to "rights of custody" having regard to the meaning of the term "rights of custody" as established by the autonomous law of the 1980 Hague Convention, in *Re D (A Child)*[26] at [26] Baroness Hale observed that:

> The question is, do the rights possessed under the law of the home country by the parent who does not have the day to day care of the child amount to rights of custody or do they not?

[20] The courts in England and Wales recognise the existence of inchoate rights of custody under Article 5 of the 1980 Hague Convention. When considering whether inchoate rights of custody exist, the UK Supreme Court has held that the person asserting such rights must be undertaking the responsibilities, and thus enjoying the concomitant rights and powers, entailed in the primary care of the child. They must not be sharing those responsibilities with the person or persons having a legally recognised right to determine where the child shall live and how he or she shall be brought up and a person or persons must have either abandoned the child or delegated his or her primary care to them. Further, there must be some form of legal or official recognition of their position in the contracting state of habitual residence. There must be every reason to believe that, were they to seek the protection of the courts of that country, the status quo would

25 *Hunter v Murrow* [2005] 2 FLR 1119; *Kennedy v Kennedy* [2010] 1 FLR 728.
26 [2007] 1 AC 619.

be preserved for the time being, so that the long-term future of the child could be determined in those courts in accordance with his or her best interests, and not by the pre-emptive strike of abduction.[27]

[21] The UK Supreme Court has further recognised that, in support of the fundamental purposes of the 1980 Hague Convention, the courts of England and Wales have pushed at the boundaries in interpreting rights of custody, there being little enthusiasm for such an expansive view among a number of other state parties to the 1980 Hague Convention.[28]

(iv) Summary return

[22] Where a wrongful removal or retention for the purposes of Article 3 of the 1980 Hague Convention is established and, at the date of the commencement of the proceedings in the contracting state where the child is, a period of less than one year[29] has elapsed from the date of the wrongful removal or retention, the court *must* order the return of the child forthwith.[30] The courts in England and Wales have consistently held that the return is to a jurisdiction and not to a specific person.[31]

[23] Again, and to emphasise, in circumstances where the objective of the Convention is to ensure that a child who has been removed unilaterally from the country of his or her habitual residence in breach of rights of custody is returned forthwith to the jurisdiction best placed to decide his or her long-term future, a decision by the court to return a child under the terms of the Convention is, no more and no less, a decision to return the child for a specific purpose and for a limited period of time, pending the court of his or her habitual residence deciding the long-term welfare position.

27 *Re K (Abduction: Inchoate Rights)* [2014] 2 FLR 629.

28 Ibid at [3].

29 1980 Hague Convention, Art 12. Having regard to the time limit contained in Art 12, it is important in each case to establish the date of wrongful removal or wrongful retention.

30 The requirement to return the child "forthwith" has generally been interpreted to mean no delay should occur between the finding of wrongful removal or retention of the child and his or her return to the contracting state of habitual residence.

31 *Re A (A Minor) (Abduction)* [1988] 1 FLR 365.

The exceptions to summary return

[24] The mandatory duty to return the child following a finding of wrongful removal or retention is subject to a limited number of narrowly construed exceptions contained in Chapter III of the 1980 Hague Convention. In seeking to place those exceptions to summary return in their proper context, Pérez-Vera observes as follows in the Explanatory Report:

> It is thus legitimate to assert that the two objects of the Convention — the one preventive, the other designed to secure the immediate reintegration of the child into its habitual environment — both correspond to a specific idea of what constitutes the "best interests of the child". However, even when viewing from this perspective, it has to be admitted that the removal of the child can sometimes be justified by objective reasons which have to do either with its person, or with the environment with which it is most closely connected. Therefore the Convention recognizes the need for certain exceptions to the general obligations assumed by States to secure the prompt return of children who have been unlawfully removed or retained. For the most part, these exceptions are only concrete illustrations of the overly vague principle whereby the interests of the child are stated to be the guiding criterion in this area.[32]

[25] Pérez-Vera further makes clear in the Explanatory Report that, for the 1980 Hague Convention to be effective, the exceptions to summary return following a finding of wrongful removal or retention must be interpreted restrictively by contracting states:

> To conclude our consideration of the problems with which this paragraph deals, it would seem necessary to underline the fact that the three types of exception to the rule concerning the return of the child must be applied only so far as they go and no further. This implies above all that they are to be interpreted in a restrictive fashion if the Convention is not to become a dead letter. In fact, the Convention as a whole rests upon the unanimous rejection of this phenomenon of illegal child removals and upon the conviction that the best way to combat them at an international level is to refuse to grant them legal recognition. The practical application of this principle requires that the signatory States be convinced that they belong, despite

32 Elisa Pérez-Vera, see n 1 above, at para 25.

> their differences, to the same legal community within which the authorities of each State acknowledge that the authorities of one of them — those of the child's habitual residence — are in principle best placed to decide upon questions of custody and access. As a result, a systematic invocation of the said exceptions, substituting the forum chosen by the abductor for that of the child's residence, would lead to the collapse of the whole structure of the Convention by depriving it of the spirit of mutual confidence which is its inspiration.

(a) Settlement

[26] The first of the exceptions to summary return following a finding of wrongful removal or retention relates to the degree to which the child has become settled in the jurisdiction to which he or she has been abducted. Article 12(2) of the 1980 Hague Convention provides as follows with respect to the settlement exception:

> The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

[27] Thus, if the child has been within the jurisdiction for more than a year when the application under the 1980 Hague Convention is commenced, an exception to the requirement for summary return in the case of a wrongful removal or retention may arise if the child can be said to have become settled for the purposes of Article 12(2).

[28] In the jurisdiction of England and Wales, an unduly technical approach to the question of settlement is eschewed and a broad and purposive construction of what amounts to "settled in its new environment" is adopted. Settlement is taken to mean more than mere adjustment by the child to his or her new surroundings. The concept of "settlement" for the purposes of Article 12 involves three elements, namely physical settlement, emotional settlement and psychological settlement. The court is not only concerned with the present but also with the future. It must be shown that the present situation imports stability when looking into the child's future in the jurisdiction.[33]

33 In the American case of *Soucie v Soucie* (1995) SC 134 it was suggested that the question under Art 12(2) is whether the child is so settled in his or her new environment that the court would be justified in disregarding an otherwise

[29] Concealment of the child, or subterfuge by the abducting parent, will be a very important factor when considering the delay in bringing proceedings. The English and Welsh courts look critically at any alleged settlement that is built on concealment and deceit, as an abducting parent should not be able to rely on his or her success in hiding the whereabouts of the child in order to evade return of the child to the contracting state of his or her habitual residence.

(b) Consent or acquiescence

[30] Article 13 of the 1980 Hague Convention provides as follows with respect to the exception to summary return following a finding of wrongful removal or retention based on the consent or acquiescence of the person having care of the child:[34]

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –
>
> *a)* the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; …

[31] In the jurisdiction of England and Wales, evidence to establish consent must be clear, compelling and unequivocal.[35] It may be in writing or in documentary form or it can be deduced from the words and conduct of the wronged parent. Consent cannot be passive, but must be positive consent to the removal of the child. A third party cannot give consent on behalf of the parent even if under the law of the foreign state such consent is permissible. The means of proof will vary according to the circumstances of the case. Consent, or the lack

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mandatory requirement to return the child, thus overriding the clear duty to order return. In *State Central Authority v Ayob* (1997) 21 Fam LR, the court rejected the settlement exception in circumstances where after being removed from the USA, the child had spent an extended period in Malaysia before arriving in Australia.

34 It will also be seen that an exception to summary return following a finding of wrongful removal arises under Art 13 where the person, institution or other body having care of the child was not actually exercising their rights of custody at the time of the removal or retention. This will likely only apply where the parent in question has given up his or her caring role (see *Barbie v Barbie* CA (SC) 870/94).

35 *Re P-J (Abduction: Habitual Residence: Consent)* [2009] 2 FLR 1051.

of it, must be viewed in the context of the realities of family life, or more precisely, in the context of the realities of the disintegration of family life. It is not to be viewed in the context of, nor governed by, the law of contract. The burden of proving the consent rests on him or her who asserts it and, in this respect, the inquiry is inevitably fact-specific and the facts and circumstances will vary infinitely from case to case.

[32] An effective consent to removal can be given in advance provided it subsisted at the time of removal. Consent to the removal of a child may be valid even if it is dependent on a future event provided it is not too vague, uncertain or subjective and the facts at the time are not wholly or manifestly different to those prevailing at the time of removal, and may be conditional. Fulfilment of the condition must not depend on the subjective determination of one party. Consent to a removal in the future may be withdrawn but circumstances may result in it being too late to withdraw. A consent obtained by fraud or deception is unlikely to be regarded as valid.

[33] The ultimate question is a simple one even if a multitude of facts bear upon the answer. It is simply this: had the other parent clearly and unequivocally consented to the removal?[36]

[34] With respect to the exception of acquiescence, in the jurisdiction of England and Wales the question whether the wronged parent has "acquiesced" in the removal or retention of the child depends upon his or her actual state of mind. The court is primarily concerned not with the question of the other parent's perception of the applicant's conduct, but with the question whether the applicant acquiesced in fact. The subjective intention of the wronged parent is a question of fact for the trial judge to determine in all the circumstances of the case, the burden of proof being on the abducting parent. The trial judge, in reaching the decision on that question of fact, will be inclined to attach more weight to the contemporaneous words and actions of the wronged parent than to his or her bare assertions of intention. There is only one exception to this approach. Where the words or actions of the wronged parent clearly and unequivocally show and have led the other parent to believe that the wronged parent is not asserting or going to assert his or her right to the summary return of the child and

36 Ibid.

are inconsistent with such return, justice requires that the wronged parent be held to have acquiesced.[37]

[35] A parent cannot be said to have acquiesced in the unlawful removal or retention of a child unless he or she is aware of the act of removal or retention, is aware that it is unlawful and is aware, at least in general terms, of his or her rights against the other parent.[38] It is not a prerequisite for the establishment of the defence of acquiescence that a parent has correct advice or detailed knowledge of his or her Convention rights provided it is shown that he or she knew in general terms that he or she could bring proceedings. When considering written evidence of the parties' intentions, the written statements in question must be in clear and unambiguous terms in order to establish acquiescence. Delay, and in particular unexplained delay, in taking action can be indicative of acquiescence.[39] Importantly however, entering into a process of mediation will *not* ground a defence of acquiescence. Merely seeking to compromise matters by permitting the abducting parent to remain in the country to which he or she has taken the child provided that the wronged parent is satisfied as to other matters and issues between them has not been regarded as acquiescence for the purposes of the 1980 Hague Convention.

(c) Harm or intolerable situation

[36] Article 13(b) of the 1980 Hague Convention further provides as follows with respect to the exception to summary return following a finding of wrongful removal or retention, based on the exposure of the child to physical or psychological harm or otherwise placing the child in an intolerable situation:

> Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

37 *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72.
38 *Re S (Abduction: Acquiescence)* [1998] 2 FLR 115.
39 *Re H (Minors) (Abduction: Acquiescence)* [1998] AC 72. See also for example *W v W (Child Abduction: Acquiescence)* [1993] 1 FLR 211 and *Re D (Abduction: Acquiescence)* [1999] 1 FLR 36.

…

b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

[37] In England and Wales, the UK Supreme Court has held[40] that there is no need for Article 13(b) to be narrowly construed by the court as, by its very terms, it is of restricted application and that the words of Article 13 need no further elaboration or gloss. The burden of satisfying the terms of Article 13(b) lies on the person or institution or other body opposing return. The standard of proof is the ordinary balance of probabilities, but in evaluating the evidence the court will be mindful of the limitations involved in the summary nature of the process adopted under the 1980 Hague Convention. To satisfy Article 13(b) the risk to the child must be "grave". It is not enough for the risk to be "real". It must have reached such a level of seriousness that it can be characterised as "grave". Although "grave" characterises the risk rather than the harm, there is in ordinary language a link between the two.

[38] The Supreme Court further noted that the words "physical or psychological harm" are not qualified but do gain colour from the alternative "or otherwise" placed "in an intolerable situation". The court held that "intolerable" is a strong word, but when applied to a child must mean "a situation which this particular child in these particular circumstances should not be expected to tolerate". Article 13(b) looks to the future, and thus to the situation as it would be if the child were returned forthwith to his or her home country. That situation depends crucially on the protective measures which can be put in place to ensure that the child will not be called upon to face an intolerable situation when he or she gets home. Where the risk is serious enough, the court will be concerned not only with the child's immediate future because the need for protection may persist. This approach is dealt with in more detail below.

[39] Where the defence under Article 13(b) is said to be based on the anxieties of a respondent mother about a return with the child which

40 *Re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] 1 AC 144; and *Re S (A Child)* [2012] UKSC 10.

are not based upon objective risk to her, but are nevertheless of such intensity as to be likely, in the event of a return, to destabilise her parenting of the child to a point where the child's situation would become intolerable, the court will look very critically at such an assertion and will, among other things, ask if it can be dispelled. However, in principle, this situation can found the defence under Article 13(b), depending on the facts of the case.

(d) Child's objections

[40] Staying with Article 13 of the 1980 Hague Convention, the court may also refuse to order the summary return of the child following a finding of wrongful removal or retention if it finds that the child objects to being returned and the child has attained an age and degree of maturity at which it is appropriate to take account of the child's views. In the jurisdiction of England and Wales, the courts apply a two-stage test to determine whether the child's objections exception under Article 13 of the 1980 Hague Convention is made out.[41]

[41] First, a "gateway" stage. Namely, an examination of whether, as a matter of fact, the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of his or her views. This question is confined to a straightforward and fairly robust examination of whether the simple terms of the Convention are made out. The child's views have to amount to an objection before Article 13 will be satisfied. An objection in this context is to be contrasted with a preference or a wish.

[42] Second, a "discretion" stage. The objections of the child are not determinative of the outcome but rather give rise to a discretion. Once that discretion arises, the discretion is at large. The child's views are one factor to take into account at the discretion stage. The court must consider not only the nature and strength of the objections but a much wider range of other considerations, including whether they are authentic as opposed to the product of influence by the parent who has allegedly abducted the child, and the extent to which the objections coincide, or are at odds, with the child's welfare. There is no exhaustive list of factors to be considered. The court should have

41 *Re M (Republic of Ireland) (Child's Objections) (Joinder of Children to Appeal)* [2015] EWCA Civ 26.

regard to welfare considerations, in so far as it is possible to take a view about them on the limited evidence available.

[43] There is a relatively low threshold requirement in relation to the objections exception, the obligation on the court is to "take account" of the child's views. The court must give weight to Convention considerations and at all times bear in mind that the 1980 Hague Convention only works if, in general, children who have been wrongfully retained or removed from their country of habitual residence are returned, and returned promptly.

(e) Public policy

[44] The final exception to return following a finding of wrongful removal or retention is provided by Article 20 of the 1980 Hague Convention, which states as follows:

> The return of the child under the provisions of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.

[45] In the Explanatory Report, Pérez-Vera describes Article 20 as a "rather unusual in conventions involving private international law, and the exact scope of which is difficult to define."[42] It is not a commonly invoked provision and in England and Wales the provision has not been implanted. However, in *Re J (A Child) (Custody Rights: Jurisdiction)*,[43] Baroness Hale stated that "The importance of Art 20 is that it asks whether what might happen in the foreign country would be permitted under those fundamental principles were it to happen here."[44]

42 Elisa Pérez-Vera, see n 1 above, at para 31. Professor Lowe notes that whilst Art 20 is akin to public policy provisions found in other Conventions, it is deliberately differently worded, narrowing further the already narrow ground of public policy (see N Lowe and M Nicholls, *International Movement of Children*, 2nd edn (LexisNexis, 2016)).

43 [2006] 1 AC 80.

44 In *Re D (A Child) (Abduction: Rights of Custody)* [2007] 1 AC 619, Baroness Hale suggested that Art 20 is "given domestic effect" by the Human Rights Act 1998.

(f) Discretion

[46] Finally with respect to the scope and operation of the 1980 Hague Convention, even where an exception to summary return is made out on the evidence, the court retains a discretion to order the return of the child.[45]

[47] In deciding whether to exercise that discretion, in the jurisdiction of England and Wales the discretion is at large. The court is entitled to take into account the various aspects of the 1980 Hague Convention policy, alongside the circumstances which gave the court a discretion in the first place and the wider considerations of the child's rights and welfare. The Convention objectives do not necessarily carry more weight than other considerations. The further the case gets from the prompt return envisaged by the Convention, the less weighty the general Convention considerations will be in the exercise of the court's discretion. Where the court has concluded that the harm exception is made out it is, for reasons that are self-evident, not ordinarily appropriate to exercise the discretion in favour of a return order.

Meeting the challenges of the 1980 Hague Convention

[48] Having considered in summary the scope and operation of the 1980 Hague Convention, and some of the key principles underpinning that operation, it is important to acknowledge also some of the challenges that attend the implementation of the Convention.

The need for expedition

[49] Because Hague proceedings are only an intermediate step in the overall process of determining the child's welfare, and because delay in making decisions is ordinarily inimical to the welfare of the child, it is important that procedures under the 1980 Hague Convention operate efficiently and quickly. The sooner that issues of dispute regarding the child's welfare can be decided, the better for the child.

[50] Article 2 of the 1980 Hague Convention stipulates that "Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For

45 Whilst there has been some debate as to whether a discretion arises following a finding of settlement under Art 12(2), it is generally accepted that it does and that, therefore, a discretion arises in respect of each of the exceptions.

this purpose they shall use the most expeditious procedures available." Article 11 further stipulates, in effect, a six-week timescale for the determination of proceedings under the Convention by stipulating as follows:

> The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.
>
> If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request a statement of the reasons for the delay. If a reply is received by the Central Authority of the requested State, that Authority shall transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

[51] Complying with the tight timescales imposed by the Convention can be a major challenge for all jurisdictions, including our own. But it is vital that strenuous efforts are made to that end. In the English case of *In Re F (Children)*,[46] Lady Justice Black (as she then was) described the problems caused by delay in international child abduction proceedings as follows:

> Addressing the problem of delay in this country is challenging, in view of the large numbers of Hague Convention applications filed in our courts and the lack of readily available resources. However, we need to do everything possible to process these applications urgently. The disruption caused by a wrongful removal and an imposed return to the country of habitual residence is minimised if the whole episode is concluded within a matter of weeks. If more time goes by, life in the new country may start to seem to the children like their established pattern of existence, battle lines may become firmly entrenched with the other parent, and the scope for damage is infinitely greater.

[52] It follows that it is vital that the decision as to whether or not to return the child to his or her country of habitual residence is taken *quickly*. Extended procedural steps such as extensive disclosure and inspection of corroborating or exculpatory documentary evidence, and

46 [2016] EWCA Civ 1253.

the listing and conduct of a fact-finding hearing with oral evidence and cross-examination, are generally antithetic to that end, particularly in circumstances where much of the factual evidence involved may be in a foreign jurisdiction. A number of challenges flow from this need for expedition.

Jurisdiction and not welfare

[53] Within the context of the need expeditiously to re-establish the child's status quo, in order to enable determination of welfare issues in the jurisdiction of the child's habitual residence, detailed consideration of the child's best interests by the receiving state has long been held to be antithetic to the purpose of the 1980 Hague Convention. That purpose being to secure the *prompt* return of children wrongfully removed to, or retained in, any contracting state in order that the country of the child's habitual residence can determine any substantive welfare dispute concerning that child. It is accordingly vital to recall at all times that in proceedings under the 1980 Hague Convention the court is *not* dealing with the question of best interests.

[54] Against this, it is a well-established principle of international law that in making a decision about a child, the child's best interests are a primary consideration.[47] Further, the best interests of the child has an individual aspect to it, aimed at protecting the interests of a specific child.[48] Again, and in this context, an understandable question for many people looking at the 1980 Hague Convention, and one that also requires a clear answer, is how is the best interests principle accounted for when the 1980 Hague Convention must be applied with expedition by reference to a limited number of narrow exceptions, in order to determine summarily whether the child should be returned to his or her country of habitual residence?

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47 Article 3(1) of the United Nations Convention on the Rights of the Child ("UNCRC") provides that "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

48 R Schuz, "The Hague Child Abduction Convention and Children's Rights" (2002) 12(2) *Transnational Law & Contemporary Problems* 393 at 400; UNCRC General Comment No. 14 (2013) notes at [14] that Art 3(1) "implies that the best interests of a child must be assessed individually".

[55] The need to ensure that the court is not dealing with the question of best interests when determining whether to order summary return under the 1980 Hague Convention does *not* mean that best interests are disregarded entirely. Whilst the decision to order summary return, or not, is not itself a welfare decision, best interests are "baked into" the Convention framework under which that decision is made.[49]

[56] It would be unrealistic not to recognise that the reconciliation of the policy and purpose of the 1980 Hague Convention with the best interests principle presents challenges. However, it is also not accurate to say that the Convention does not account for the principle of the child's best interests. As Pérez-Vera notes:

> … the dispositive part of the Convention contains no explicit reference to the interests of the child to the extent of their qualifying the Convention's stated object, which is to secure the prompt return of children who have been wrongfully removed or retained. However, its silence on this point ought not to lead one to the conclusion that the Convention ignores the social paradigm which declares the necessity of considering the interests of children in regulating all the problems which concern them. On the contrary, right from the start the signatory States declare themselves to be "firmly convinced that the interests of children are of paramount importance in matters relating to their custody"; it is precisely because of this conviction that they drew up the Convention, "desiring to protect children internationally from the harmful effects of their wrongful removal or retention".[50]

[57] Thus, the preamble to the Convention states that the interests of children are of paramount importance in matters relating to their custody, i.e. in relation to the substantive decision that falls to be made once the issue of jurisdiction has been resolved using the mechanism provided by the summary process of the 1980 Hague Convention.

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49 In UNCRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (Art 3, para 1) CRC/C/GC/14 at [68], the UN Committee on the Rights of the Child encourages the ratification and implementation of the conventions of the Hague Conference on Private International Law, including the 1980 Hague Convention, which facilitate the application of the child's best interests and provide guarantees for its implementation in the event that the parents live in different countries.

50 Elisa Pérez-Vera, see n 1 above, at para 23.

[58] The 1980 Hague Convention is not directed to the specific welfare matters in dispute, but rather the proper forum for the resolution of those matters. Once again, it is ordinarily in children's best interests for questions concerning his or her welfare to be decided in the forum where the child is integrated into a family and social environment. In this context, where the entire rationale of the Convention is based on the underlying principle that the child's best interests are ordinarily best served by a prompt return to the court of habitual residence, the jurisdiction of the child's habitual residence being ordinarily the forum best suited to determine the welfare merits of the case, it can be seen that the best interests principle is, in fact, one of the foundational pillars of the 1980 Hague Convention. In this way, a return order made under the Convention takes account of the child's best interests, even though the decision is not itself a welfare decision.[51] The UK Supreme Court expressed the position thus in *Re E (Children) (Abduction: Custody Appeal)*[52] as follows:

> The premise is that there is a left-behind person who also has a legitimate interest in the future welfare of the child: without the existence of such a person the removal is not wrongful. The assumption then is that if there is a dispute about any aspect of the future upbringing of the child the interests of the child should be of paramount importance in resolving that dispute. Unilateral action should not be permitted to pre-empt or delay that resolution. Hence the next assumption is that the best interests of the child will be served

51 It must be acknowledged that it has been suggested that this assertion is not consistent with the individual aspect of the best interests principle, aimed at protecting the interests of a specific child (see R Schuz, "The Hague Child Abduction Convention and Children's Rights" (2002) 12(2) *Transnational Law & Contemporary Problems* 393 at 400) and is an assertion that requires re-evaluation in circumstances where it is argued that the demographic of those engaging in child abduction has changed markedly since the Convention was drafted from abduction by a non-custodial abductor to abduction by the child's primary caregiver, sometimes in circumstances of alleged domestic abuse. For further discussion, see A De Ruiter, *40 years of the Hague Convention on Child Abduction: Legal and Societal Changes in the Rights of a Child*, European Parliament Policy Department for Citizens' Rights and Constitutional Affairs (2020), para 3.1. It might also be argued that an increasingly interconnected worldwide population and increasing levels of population movement has had an effect on the drivers underpinning the phenomenon of child abduction.

52 [2012] 1 AC 144.

> by a prompt return to the country where she is habitually resident. Restoring a child to her familiar surroundings is seen as likely to be a good thing in its own right.

[59] The Convention further treats the child's best interests as an implicit primary consideration in circumstances where the Convention expressly recognises certain narrowly defined situations when the child should not be returned as set out above, namely in circumstances of grave risk of harm, objection on the part of the child, the consent or acquiescence of the parents or the settlement of the child.[53] As Pérez-Vera again notes:

> … paragraphs 1b and 2 of the said article 13 contain exceptions which clearly derive from a consideration of the interests of the child. Now, as we pointed out above, the Convention invests this notion with definite content. Thus, the interest of the child in not being removed from its habitual residence without sufficient guarantees of its stability in the new environment, gives way before the primary interest of any person in not being exposed to physical or psychological danger or being placed in an intolerable situation.[54]

[60] To take one of the exceptions as an example, as discussed Article 13(b) of the Convention recognises that it is not in a child's best interests to return to a country in which they will be at grave risk of suffering physical or psychological harm or otherwise placed in an intolerable situation. In this way, a decision to refuse to return order on the grounds that Article 13(b) is satisfied takes account of the child's best interests, even though the decision itself is not a welfare decision. The same can be said for each of the other exceptions contained in the 1980 Hague Convention.

Robust case management

[61] The need to deal expeditiously with cases proceeding under the 1980 Hague Convention also requires the court to ensure that cases proceed from application to final hearing quickly. Every state will have its own procedures for ensuring the tight management of proceedings under the Convention. It is not the intention of this article to hold out the process adopted by England and Wales as "the best"

53 See the decision of the German Constitutional Court in *C&G v Decision of OLG Hamm* January 18, 1995, 35 ILM 529 (1996).

54 Elisa Pérez-Vera, see n 1 above, at para 29.

or otherwise definitive. The aim is simply to highlight the approach adopted in England and Wales in order to try and stay as close as possible to the six-week time limit implicit in Article 11. In particular, in England and Wales the courts apply bespoke Practice Guidance tailored to proceedings under the 1980 Hague Convention issued by the President of Family Division of the High Court.[55]

[62] The analytical process in child abduction cases under the 1980 Hague Convention is highly structured. By applying the cardinal principles of case management the court can more easily ensure that the court has before it all of the evidence and argument the court requires to determine the narrow issues under the 1980 Hague Convention within the six-week time limit. In particular, rigorous, structured issue identification, case management of evidence and timetabling of hearings by specialist judges at the earliest opportunity, and the use of mediation and judicial liaison, has been demonstrated in England and Wales to be a tool for mitigating delay where resources are finite and under increased pressure. It is productive to consider three of these aspects in a little more detail, namely specialist judges, mediation and judicial liaison.

Concentrated domestic jurisdiction

[63] The jurisdiction of England and Wales operates a concentrated jurisdiction for dealing with applications under the 1980 Hague Convention. This means that the jurisdiction to hear proceedings under the 1980 Hague Convention at first instance is concentrated in 19 High Court judges sitting in the Family Division of the High Court. Simpler cases under the Convention may be dealt with by Deputy High Court judges sitting in the Family Division.

[64] Limiting the determination of cases under the 1980 Hague Convention to the Family Division of the High Court, coupled with legal services provided through independent lawyers, the automatic provision of public funding for applicants close liaison with the Central Authority designated under the Convention, has led to cases being determined more quickly (although delays can still occur).

55 *Practice Guidance Case Management and Mediation of International Child Abduction Proceedings* (March 1, 2023).

[65] A further advantage of the jurisdiction being concentrated in a small group of specialist judges in a superior court of record are the development of a specialist body of judges who are expert in dealing quickly with proceedings under the 1980 Hague Convention and who are experienced in consistently applying the core concepts of the Convention, including those of habitual residence, rights of custody and grave risk of harm. In addition, hearings can be allocated more quickly and case managed more effectively in a concentrated jurisdiction, judicial continuing education can be targeted, judicial communications can be more effectively achieved between the domestic court and the relevant judge in the contracting state of habitual residence. A concentrated jurisdiction more readily results in the development of a pool of lawyers, both solicitors and barristers, who specialise in Convention cases.

Mediation

[66] It is, of course, far better if parents can reach agreement on whether or not the child should be returned to the jurisdiction of their habitual residence. This can result in more sustainable outcomes and, importantly, less emotional trauma for the child arising out the dispute between his or her parents.[56]

[67] Our Family Procedure Rules include a requirement to encourage the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure, and the obligation imposed by our Family Procedure Rules to consider whether non-court dispute resolution is appropriate at every stage of the proceedings, applies to international child abduction proceedings.[57] In these circumstances, a key element of the robust approach to case management taken in England and Wales is encouraging the parties

56 Article 7(c) of the 1980 Hague Convention contains an obligation that Central Authorities take, either directly or through intermediaries, all appropriate steps to secure the voluntary return of the child or to bring about the amicable resolution of the issues in the case.

57 Family Procedure Rules 2010 ("FPR 2010"), r 1.4(2)(f) provides that case management includes encouraging the parties to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure, and FPR 2010, r 3.3(1) imposes the obligation to consider whether non-court dispute resolution is appropriate at every stage of the proceedings.

to use a non-court dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure.

[68] Within this context, following consultation with judges, lawyers and government agencies, the Family Division of the High Court of England and Wales and a charity, Reunite,[58] introduced a court-based Child Abduction Mediation Scheme at the Royal Courts of Justice in London.[59] The aim of the Scheme is to ensure that parties engaged in child abduction proceedings are able, in an appropriate case, to access a mediation service as an integral part of the court process and in parallel with the proceedings.

[69] The Scheme operates in accordance with the terms of an appendix to the case management Practice Guidance issued by the President of the Family Division, as discussed above, which sets out how the Scheme will operate, how it will assess suitability of cases for mediation, how it will deal with safeguarding issues such as domestic violence and how the outcome of the mediation is to be communicated to the court. Having regard to the need to deal with cases under the 1980 Hague Convention expeditiously, and to ensure that mediation does not delay the determination of proceedings if mediation is not successful, the Scheme operates in parallel with, but independent from, the proceedings. If the mediation breaks down or is not successful the case is ready for trial shortly thereafter.

[70] Participation in the Child Abduction Mediation Scheme is voluntary and without prejudice to the parties' right to invite the court to determine the issues between them. An unwillingness to enter into mediation will not have an effect on the outcome of the proceedings. However, the Practice Guidance does require that the parties or the parties' representatives be in a position to address the court on the question of mediation at the relevant hearing, to enable the court to consider the appropriateness of such directions. Where parties agree to enter into mediation, the court will give any directions required to facilitate the mediation. The mediation will proceed with the aim of completing that mediation within the timescales dictated by the Convention. Where the mediation is successful, the resulting

58 Reunite are recognised as the leading UK charity specialising in international parental child abduction and the movement of children across international borders.

59 Mediations can also be conducted remotely.

Memorandum of Understanding will be drawn up into a consent order for approval by the court.[60] If the mediation is not successful, the court will proceed to determine the application.

[71] Challenges to facilitating mediation remain. For example, parents may be unaware of mediation as an alternative to the court process, support from the legal profession for mediation is not yet universal and questions remain as to who pays for the mediation. There are also geographical and cultural challenges to be overcome in the context of the multinational nature of Hague Convention proceedings.

International judicial liaison

[72] In circumstances where the 1980 Hague Convention is centred upon the idea of cooperation amongst competent authorities in the contracting states, it is vital that there are effective routes of communication and cooperation as between those competent authorities. At state level, the primary route of communication is between the Central Authorities[61] of each contracting state, established to administer the operation of the Convention in those states. Article 13 of the Convention requires the judicial and administrative authorities of the country to which the child has been taken to take account of information concerning the child provided to them by the Central Authority in the jurisdiction from which the child has been removed when considering the provisions of that Article. Article 30 of the Convention provides that information provided by a Central Authority shall be admissible in the courts or administrative authorities of the contracting states.

[73] However, in addition to the Central Authorities, there exists a judicial communication network, called the International Hague

60 Figures available for January to October 2019, immediately prior to the Covid-19 pandemic, demonstrated that 56% of cases mediated led to an agreement without the need for a final hearing.

61 Article 6 of the 1980 Hague Convention provides that "A Contracting State shall designate a Central Authority to discharge the duties which are imposed by the Convention upon such authorities." and Article 7 states that "Central Authorities shall co-operate with each other and promote co-operation amongst the competent authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.". Article 7 gives a non-exhaustive list of the responsibilities of Central Authorities.

Network of Judges (the "IHNJ"). The IHNJ is comprised of 137 judges from 86 contracting states.[62]

[74] The purpose of this cross-jurisdictional judicial network is to engage in cross-border dialogue between judiciaries in different jurisdictions in order to promote the aims of the Convention and to support its effective and consistent operation, to promote effective family justice through debate, discussion and understanding and to advance the achievement of better outcomes for children involved in individual cases under the Convention.

[75] The concept of judicial liaison also has its proper limits. International judicial liaison is not intended to be a substitute for obtaining legal advice, a means to avoid having to seek expert evidence as to foreign law or procedure, a mechanism for judges to settle welfare disputes or a means of making submissions to a foreign court. In the English case of *Re B (A Child)*,[63] the Court of Appeal observed as follows:

> … the role of the Judicial Network falls short of describing a mechanism for obtaining binding rulings from the requested Network Judge. The emphasis is upon the practical aspects of resolving international cases, including the provision of "information as to the law", rather than upon obtaining concluded free-standing determinations on matters of jurisdiction or status … the focus of the work of the Network itself, is upon achieving the exchange of information and cooperation on the practicalities of a case. Nowhere does the Guidance suggest that the Network Judge should give authoritative rulings or legal advice.

[76] In the foregoing context, international judicial liaison through the IHNJ is a core aspect of the effective case management of proceedings under the 1980 Hague Convention in the jurisdiction of England and Wales. The benefits of the IHNJ are considerable.

[77] The IHNJ contributes to the effective, expeditious and safe resolution of proceedings under the Convention by ensuring that the jurisdictions involved exchange information relevant to the case under consideration, including information regarding protective measures

62 At present, the IHNJ for England and Wales are Lord Justice Moylan and Mr Justice MacDonald.

63 [2013] EWCA Civ 1434.

available in the requesting contracting state. The IHNJ is relatively flexible in terms of the subject-matter that can be covered. The network permits a wider, general discussion of the practical operation of the 1980 Hague Convention and the legal issues that arise therefrom. In circumstances where the Hague Conventions do not benefit from a supranational court, and where Special Commissions are held every six years, the IHNJ allows such general operational and legal matters to be debated more regularly, thereby increasing the chances of a cohesive and consistent approach being taken to the operation of the Conventions internationally. Finally, in circumstances where each of the members of the IHNJ tends to be heavily engaged and experienced in the family law field, the IHNJ allows the exchange of that experience internationally and the development of further expertise.

[78] As recognised above, there is a tension created in the context of judicial liaison by the need to maintain at all times fidelity to due process and by the fact that it is the judge seised of the proceedings who is the sole arbiter of the outcome. In these circumstances, the cardinal principles of judicial communication are that such communications must be transparent and must not undermine the independence of each of the respective judges and jurisdictions. Accordingly, the key principles of application for judicial liaison within this context are as follows:[64]

(a) The role of the Network Judge is discharged in the context of the principle of international comity and respect for the rule of law.

(b) Every judge engaging in direct judicial communications must respect the law of his or her own jurisdiction and that of the jurisdiction communicated with.

(c) When communicating, each judge seised should maintain his or her independence in reaching his or her own decision on the matter at issue and communications must not compromise the independence of the judge seised in reaching his or her own decision on the matter at issue.

(d) Unless good reason not to involve the parties is demonstrated, the parties must be aware that judicial communication is taking place and be provided with an account of those communications.

64 See HCCH, *Emerging Guidance Regarding the Development of the International Hague Network of Judges* (2013).

(e) A record is to be kept of communications and it is to be made available to the parties.

(f) Judicial communication should not encompass the substantive merits of the individual case.

Addressing allegations of harm in a summary context

[79] The need for the court to determine proceedings under the 1980 Hague Convention expeditiously can create significant challenges where a case proceeding under the 1980 Hague Convention involves serious and/or complex allegations of harm to the child, either directly or by reason of the conduct of one parent towards the other.

[80] The exception under Article 13(b) of the 1980 Hague Convention based on a grave risk of physical or psychological harm or an otherwise intolerable situation, dealt with above, will often require the court to consider competing assertions regarding whether the conduct of a left-behind parent satisfies the criteria for that exception to apply. Having regard to the terms of Article 13(b), the allegations that the court may be required to consider and reach a conclusion on in that context will be at the upper end of a scale of seriousness, namely the type of conduct that is capable of giving rise to a grave risk of physical or psychological harm to a child or otherwise placing that child in an intolerable situation.

[81] Thus, the court may be faced with disputed allegations of serious domestic abuse and coercive or controlling behaviour,[65] of physical, sexual or emotional abuse of the subject child, of drug and alcohol misuse or of persistent criminal behaviour. The court's decision as to whether such conduct has occurred and, if so, whether it satisfies the terms of Article 13(b), will have profound consequences for the child.[66] An erroneous decision may result in a child being returned

65 For a comprehensive account of the challenges presented by the operation of the 1980 Hague Convention in the context of domestic abuse see, for example, M Kaye, "The Hague Convention and the Flight from Domestic Violence: How Women and Children Are Being Returned by Coach and Four" (1999) 13 *International Journal of Law, Policy and Family* 191 at 192; MH Weiner, "International Child Abduction and the Escape from Domestic Violence" (2000) 69 *Fordham Law Review* 593–706 at 637–639.

66 See again M Freeman, *Parental Child Abduction: The Long-Term Effects*, International Centre for Family Law, Policy and Practice (2014).

to a harmful environment or, conversely, in a child being kept from their country of habitual residence without justification.

[82] A court engaged in a domestic case in such circumstances would ordinarily conduct a fact-finding exercise to the applicable standard or proof after hearing evidence and, thereafter, to apply the best interests test in the context of the facts found as the court's primary (or under the law of England and Wales, the paramount)[67] consideration. Such an approach is, however, inimical to concluding a case under the 1980 Hague Convention within six weeks.[68] How then to deal with these challenges within a system (comprising judges, lawyers and welfare professionals) used to the fact finding followed by evaluation of welfare paradigm.

[83] The solution adopted in England and Wales to resolve the tension created by the need to adopt a summary process in pursuance of the cardinal aims of the Convention and the need for the court to come to decisions for the child that have a robust procedural and forensic foundation in the context of disputes of fact regarding questions of physical or psychological harm to, or otherwise intolerable situations for that child, is first to assume that the risk that is said to ground the exception under Article 13(b) will operate to its maximum extent in the country of return.

[84] It is important to appreciate that, in assuming the maximum level of risk, an evaluative assessment of the evidence is *not* rendered redundant. The assumption made by the court in respect of risk is not a bare one. Rather, the assumptions made with respect to the maximum level of risk must comprise reasoned and reasonable assumptions based on a summary evaluation that will include consideration of all the available relevant evidence before the court. That evaluation will consider the nature, detail and substance of the allegations as a whole, albeit it will usually do so on the papers rather than having heard oral evidence. The court will look critically at the underlying allegations and the evidence supporting and detracting from them, and make only such assumptions about the

67 Children Act 1989, s 1(1).

68 HCCH, *1980 Child Abduction Convention: Guide to Good Practice: Part VI, Article 13(1)(b)* (2020), para 52.

level of risk as appear to the court to be reasonable and justified on all the material before it.[69]

[85] Having made reasoned and reasonable assumptions as to the risk at its highest, the court then asks itself whether there are sufficient protective measures available in the receiving jurisdiction to meet that assumed maximum risk, such that the subject child will not be exposed to a grave risk of physical or psychological harm or otherwise be placed in an intolerable situation if returned.[70] The answer to that question will be driven by the nature of the grave risk that has been established and it is the nature of the grave risk that will dictate what are, and are not, proper protective measures. Within this paradigm, emphasis is placed on the provisions of the 1980 Hague Convention that create a system of cooperation and information exchange amongst the judicial and administrative authorities of the contracting parties. The principle of international comity is likewise relied on.[71]

[86] This approach does not amount to a two-stage test. Rather, the question of whether Article 13(b) has been established requires a consideration of all the relevant matters, including protective measures. It is an approach that seeks, albeit in a considered and reasoned manner, to treat the risk relied on by the abducting parent as formally established and concentrates instead on the often (but not always) less contentious and easier to resolve question of whether the risk that has been assumed can be addressed sufficiently to avoid the circumstances Article 13(b) is intended to safeguard against. The approach represents an attempt to balance the summary procedure necessary to ensure that delay does not obstruct the primary aim of

69 Ibid, para 40 states that the question posed in this regard is "Are the facts asserted by the person, institution or other body which opposes the child's return of sufficient detail and substance that they could constitute a grave risk that the return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation?"

70 This approach was affirmed by the UK Supreme Court in *Re E (Children) (Abduction: Custody Appeal)* [2012] 1 AC 144 and is the solution adopted in HCCH, *1980 Child Abduction Convention: Guide to Good Practice: Part VI, Article 13(1)(b)* (2020).

71 The 1996 Hague Convention can also in some circumstances support the operation of the 1980 Hague Convention. For example, subject to the terms of the 1996 Convention, an order made under Art 11 of that Convention can have extra-territorial effect. As such, it can secure a valuable "soft landing" for children whose return to their home country is ordered under the 1980 Hague Convention.

the Convention with the need to ensure that the deployment of that summary process does not result in the court placing the child at grave risk of harm if disputed allegations regarding parental conduct adverse to the welfare of the child are true. The balance is achieved by concentrating on the protections available to meet any grave risk of harm, rather than on disputed questions of fact regarding the nature and extent of any such risk.

The voice of the child

[87] A further challenge in meeting the need for expedition under the 1980 Hague Convention can be ensuring that the child's voice is properly heard in what is, again, a summary process. Article 12 of the UNCRC requires state parties to assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting him or her, the views of the child being given due weight in accordance with the age and maturity of the child.

[88] In the jurisdiction of England and Wales, in *Re D (A Child)*[72] Baroness Hale provided the following, seminal, articulation of the importance of listening to children in the context of litigation that touches and concerns their lives:

> There is a growing understanding of the importance of listening to the children involved in children's cases. It is the child, more than anyone else, who will have to live with what the court decides. Those who do listen to children understand that they often have a point of view which is quite distinct from that of the person looking after them. They are quite capable of being moral actors in their own right. Just as the adults may have to do what the court decides whether they like it or not, so may the child. But that is no more reason for failing to hear what the child has to say than it is for refusing to hear the parents' views.

[89] A year later, in *Re M & Anor (Children) (Abduction: Rights of Custody)*,[73] Baroness Hale stressed that the aims of Article 12 of the UNCRC should be given greater emphasis in cases concerning a child's objection under Article 13 of the 1980 Hague Convention.

72 [2007] 1 AC 619.
73 [2007] 3 WLR 975.

[90] If the principles contained in Article 12 of the UNCRC are to be complied with in proceedings under the 1980 Hague Convention, then the concept of hearing the "voice of the child" must be more than an intangible, conceptual or abstract notion. The child must have a proper, practical chance to participate. However, once again, it is also vital that delay is avoided and the summary nature of the Convention proceedings is preserved having regard to the central aim of the Convention.

[91] In this context, a practical and prompt method or combination of methods for hearing the voice of the child must be found in order to resolve the tension between the necessarily summary nature of the Hague Convention proceedings whilst satisfying the demands of Article 12 of the UNCRC that enshrines the right of children to participate in all decisions that affect them.[74]

[92] The case management Practice Guidance used in England and Wales makes clear that, where the application and supporting evidence indicate that it will be appropriate for the child to be heard during the proceedings (either because the "child objection" exception under Article 13 is relied on or it is otherwise appropriate for the child to participate in the proceedings), the court should give case management directions to facilitate this. In the jurisdiction of England and Wales, in every case under the 1980 Hague Convention, at the first hearing there must be an enquiry into whether the child is to be given an opportunity to be heard in proceedings having regard to his or her age and degree of maturity, and if so how. This question falls to be asked in all cases proceeding under the 1980 Hague Convention and not just in those in which reliance is placed on the child objections exception under Article 13.[75]

[93] Of course, to be in a position to adopt this two-stage approach, the judge has to have a mechanism for hearing the child's objections that can be brought to bear quickly. In the jurisdiction of England and Wales, the primary method by which a child may be heard during

74 For a further account of the judicial challenges relating to hearing children in 1980 Hague Convention proceedings, see for example, The Hon Mr Justice MacDonald, "Hearing the Children's Objections – Some Perspectives from a Judge Hearing Cases in England and Wales" in HCCH, *The Judges' Newsletter on International Child Protection*, Vol XXII (2018), pp 45–49.

75 *Re F (Abduction: Child's Wishes)* [2007] 2 FLR 697.

the proceedings comprises a report from an officer from a specialist High Court social work team,[76] who are expert at working quickly and accurately to ascertain the child's views as soon as the court asks them to, and are able to complete reports within a timescale that does not prejudice the six-week time limit.

[94] In a small number of cases, the court will also consider giving the child party status with legal representation. Once again, this is done quickly, with the lawyer for the child expected to prepare the case in time for a final hearing within the six-week deadline. A meeting between the judge and the child is also possible,[77] but remains less common at this time. The product of such a meeting will not constitute evidence. However, judges are generally willing to meet children as part of a process of ensuring the subject child meets the person who is making decisions about them and to familiarise the child with the court process of which they are the subject.

Conclusion

[95] One of the features of the modern world has been a far greater movement of people across international boundaries for reasons of education, economics and safety. This has resulted in the demographic of families within given jurisdictions becoming increasingly diverse in terms of the nationality of their constituent elements. One consequence of this is a concomitant increase in the number of family disputes that involve parents originating from different national jurisdictions. In line with this changing demographic, the courts in England and Wales have seen a marked increase over recent years in the volume of cases of alleged child abduction.

[96] Within this context, the 1980 Hague Convention constitutes an important international private law instrument for addressing the issue of child abduction by providing a coherent framework within which contracting states can attempt to achieve an outcome that is both expeditious and that rests on sound forensic foundations; one that establishes an acceptable equilibrium between the best interests

76 The High Court Team of the Children and Family Court Advisory and Support Service (Cafcass) performs this function in England and Cafcass Cymru performs this service in Wales.

77 Guidelines for Judges Meeting Children Who are Subject to Family Proceedings [2010] 2 FLR 1872.

of the child requiring decisions as to his or her welfare to be made in the state of his or her habitual residence and the need to deny return where necessary to protect the best interests of the child.[78] As eloquently expressed in the Explanatory Report by Elisa Pérez-Vera:

> The Convention's true nature is revealed most clearly in these situations: it is not concerned with establishing the person to whom custody of the child will belong at some point in the future, nor with the situations in which it may prove necessary to modify a decision awarding joint custody on the basis of facts which have subsequently changed. It seeks, more simply, to prevent a later decision on the matter being influenced by a change of circumstances brought about through unilateral action by one of the parties.

78 E Sthoeger, "International Child Abduction and Children's Rights: Two Means to the Same End" (2011) 32 *Michigan Journal of International Law* 511.

Pillars, Beams and Gems in the Rules of Court 2012

by

*Mr. Tee Geok Hock**

1. Introduction

[1] With the policies, rules and principles of civil procedure embedded at various parts of the voluminous rules in the Rules of Court 2012 ("ROC 2012"), it is often difficult for lawyers to clearly see and understand what are the main policies and important principles in civil proceedings.

[2] Law students pass their examination paper on civil procedure, then embark on their law practice with the realisation that there is so little of the civil procedure they have learned in law school. Lawyers practise laws for several decades until retirement, still left with the lingering feeling that there is much of civil procedure which he/she has not fully grasped. Having completed four decades of law practice with rather constant touch of civil procedure, I still feel that I am one of such lawyers.

[3] This article invites the readers to view the ROC 2012 from a different perspective to see the civil procedure from another angle in an attempt to better understand and appreciate them. It is hoped that whatever little I can share in this short article will be of some assistance to those who seek to learn from a different perspective of civil procedure.

[4] This perspective being advocated here is to focus on main policies and important features of the civil procedure by identifying and understanding the pillars of civil procedure (i.e. the core principles and main underlying policies of the civil procedure), the beams of civil procedure (i.e. the specific and important parts of civil procedure which strengthen and complement the pillars), and find the gems of civil procedure (i.e. the particular parts which make the rules of court useful and efficient). The pillars of civil procedure are crucial for a

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smooth and efficient operation of the rules of civil procedure so that consideration of a specific part of civil procedure would be carried out in the context and light of the relevant core principle and/or main underlying policy of the civil procedure.

2. Reasons for understanding the main policies and core principles

[5] As far as I can understand, the primary function of civil procedure is to prescribe a set of rules to regulate and facilitate the smooth and orderly management, conduct and disposal of civil proceedings in court as part of the administration of justice in a manner which, in the context of the overall system, is just, expeditious and economical.

[6] Briefly, the ROC 2012 can be categorised under three broad groups, namely:

(a) provisions which apply *generally* to various types of civil proceedings, i.e. Order 1 to Order 66;

(b) provisions which apply to *specific types* of civil proceedings under specific statutes, i.e. Order 67 to Order 88; and

(c) miscellaneous provisions, i.e. Order 89 to Order 94.

[7] Express or implicit in the ROC 2012 are some main policies and underlying core principles which are embodied in or which permeate through the fabrics of various individual parts of the ROC 2012.

[8] A proper understanding of the main policies and underlying features of the ROC 2012 is important in determining and deciding on questions of procedural principles especially where there seems to be competing demands or requirements by various main policies and underlying principles. In many cases involving questions of procedure, the court's role is to strike a fair and proper balance between the various main policies and underlying features so as to promote or preserve the integrity and smooth functioning of the overall system of administration of justice as a whole while doing justice to the parties in the particular case in accordance with such balance and in the context of the overall system of the administration of justice.

[9] There is judicial *dictum* that the law should not be compartmentalised.[1] This general principle is jurisprudentially correct

1 See *National Carriers Ltd v Panalpina Ltd* [1981] 2 WLR 45, HL at 75F.

and is consistent with logic and good sense. Although this statement was made in relation to a principle of law, it is respectfully submitted that it should apply similarly to principles and rules of civil procedure.

[10] There are types of procedural matters which are governed by a specific part of the court rules, and there are also types of procedural matters which are regulated or affected by several parts of the court rules. More importantly, there are some core principles and main policies of the civil procedure, though they are not expressly stipulated in the ROC 2012, which permeate the fabrics of various procedural rules.

[11] Jurisprudentially, the main policies and core principles of the procedural rules stated in one part of the ROC 2012 should not be invariably held to be applicable only to one topic or subject-matter in the ROC 2012 but not applicable to other topics or subjects-matters in other parts of the ROC 2012. The question on a topic of procedure under one specific part of the ROC 2012 should not invariably be considered in isolation as if it merely concerns that topic without having any bearing or relevance to the other parts of the ROC 2012.

[12] Often times, the question on a topic of civil procedure can have an impact on the overall system of administration of justice envisaged under the ROC 2012 which also embodies other concepts and policies. The question on that topic should be viewed and considered in light of the various policies and underlying features of civil litigation under the ROC 2012 so that the overall administration of justice would not be prejudiced thereby. For example, consideration of the regard to justice under Order 1A in a particular application in civil proceedings should not be taken to the extent of exclusion of considering the policy of expeditious disposal of cases, principles of natural justice, the need to save time and costs, fair conduct of trial and the requirements of an adversarial system.

[13] In exercising the discretion in a particular case which involves an interplay and interaction of competing demands of the main policies and features of the rules of court, a balance has to be struck by the court so that the furtherance of one main policy or feature in a subject-matter in the particular case does not have the effect of defeating or unduly prejudicing another main policy or feature which pertains to the same subject-matter in the same case or similar cases. The need to consider a particular topic of procedure in light of the other topics (including

the regard to justice in Order 1A) in the ROC 2012 was also discussed by the Court of Appeal in *Vellasamy Ponnusamy v Gurbachan Singh*.[2]

[14] Application of the rules and principles of civil procedure to the particular facts of a case may at times be an exercise in striking a fair and proper balance between the parties' procedural rights and substantive rights as well as between competing policies and underlying principles laid down in different parts of the rules of procedure. In some cases, the application of the relevant principle of civil procedure to the facts of the cases can be simple and straightforward, while in other cases the application of the relevant principle of civil procedure to the facts of the cases may turn out to be rather complicated and tedious.

[15] The pillars that I have found in the ROC 2012 include:

(1) rules of natural justice as a first pillar of civil procedure (see Part 3 below);

(2) regards to justice as a second pillar of civil procedure (see Part 4 below);

(3) court-controlled system of administration of justice as a third pillar of civil procedure (see Part 5 below); and

(4) adversarial system as a fourth pillar of civil procedure (see Part 6 below).

3. Rules of natural justice as a first pillar of civil procedure

[16] A person who has combed through the entirety of the ROC 2012 will have no difficulty in noticing that the words "natural justice" do not appear anywhere in the express provisions of the ROC 2012.

[17] Although the ROC 2012 does not expressly refer to the principles of natural justice, it has been held by the apex courts that the principles of natural justice apply to civil proceedings and the decision-making process in the courts.

[18] In *B Surinder Singh Kanda v Government of the Federation of Malaya*,[3] the Privy Council held that there are two twin pillars of natural justice, i.e. the rule against bias and the right to be heard. Under the right to

2 [2020] 7 CLJ 512.
3 [1962] 1 MLJ 169.

be heard, a party has a right to know the nature, material particulars and extent of the case against him/her and must be given a reasonable opportunity to answer the case.

[19] The Court of Appeal as a matter of general principle in *Nirwana Construction v Pengarah JKR Negeri Sembilan ("Nirwana Construction")*[4] held that the rules of natural justice apply to the court's conduct of the trial.

[20] The gist of the principle decided by the Court of Appeal in *Nirwana Construction* is that where a trial judge has refused to allow a party's counsel to cross-examine the witness on a specific factual issue, the trial judge by principles of natural justice cannot thereafter make an adverse finding against that party on such specific factual issue and use such finding as a relevant factor to decide against that party. Any such adverse finding in such situation constitutes a denial of the reasonable opportunity to answer the case – a breach of the second pillar of the rules of natural justice.

[21] During the earlier years, there were not many judicial pronouncements on the importance of natural justice in civil proceedings. It was only a few years ago that our apex court has brought home the role and importance of natural justice as a main pillar of civil procedure.

[22] Recently, the importance of natural justice in the conduct of court proceedings has been clearly restated by the Federal Court in *CIMB Investment Bank Bhd v Metroplex Holdings Sdn Bhd* ("*CIMB v Metroplex*")[5] and recently in *Datuk Seri Anwar Ibrahim v Govt of Malaysia & National Security Council ("Anwar Ibrahim v Govt of Malaysia & Anor")*.[6]

[23] In *CIMB v Metroplex* the Federal Court, among others, observed that in *Badiaddin bin Mohd Mahidin v Arab Malaysian Finance Bhd*[7] the Federal Court held that a breach of the rules of natural justice is a ground for the court to invoke the very limited jurisdiction of a court to have its orders declared as void.

4 [2008] 4 MLJ 157, CA at 167, [8], *per* Gopal Sri Ram JCA.
5 [2014] 6 MLJ 779; [2014] 9 CLJ 1012.
6 [2021] 6 CLJ 1.
7 [1998] 1 MLJ 393.

[24] In essence, what the Federal Court decided in *CIMB v Metroplex* is that a material breach of natural justice in the course of trial or decision-making is a ground for setting aside an earlier final decision of the court, but mere irregularity in the sense of breach of a rule of court or of practice is not a sufficient ground for such setting aside.

[25] In *Anwar Ibrahim v Govt of Malaysia & Anor*, the Federal Court in the review application held, among others, that the rules of natural justice apply to the hearing of an appeal in court, and therefore each party in the appeal or suit has the right to be informed of any point adverse to him that is going to be relied on by the judge and to be given an opportunity of stating what his answer to it is. In that case involving the appellant's challenge of the constitutionality of an Act of Parliament, the parties at the High Court took the common stand that the constitutional question should be answered and hence the issue of *locus standi* was left abandoned. In the appeal before the Court of Appeal, the issue of *locus standi* was not raised by the court or by any party and was therefore not argued. When the appeal came before the Federal Court, the issue of *locus standi* and academic question were not argued by the parties and the Federal Court also did not raise the issue of *locus standi* for the parties to address the court. In the majority decision of the Federal Court, the appeal was dismissed primarily on the ground of lack of *locus standi*. When the matter came up in the review application, the Federal Court set aside the earlier decision of the Federal Court on the ground of material breach of the rules of natural justice.

[26] The *ratio decidendi* of the Federal Court's decision in *Anwar Ibrahim v Govt of Malaysia & Anor* is that where the sole or principal ground of decision of the court is on a point which was not raised or argued by the parties and also not posed by the court for the parties' counsel to be given a reasonable opportunity to address the court on such point, the decision would be set aside for material breach of natural justice.

[27] It goes without saying that what the Federal Court decided on the principle regarding the natural justice in the conduct of court proceedings is not limited to appeal, as it applies similarly to the conduct of trial at the court of first instance and also to hearings of applications and important procedural steps prior to the trial.

[28] Principles of natural justice are also to be followed when the court considers whether or not to accept an expert witness's opinion regarding a particular matter. In *Abdul Halim bin A Tambi v Yong Kim Moon & Ors ("Abdul Halim Tambi")*,[8] the trial judge relied solely or principally on a vague statement in the plaintiff's specialist report and awarded a very substantial amount for future nursing care although the plaintiff's specialist was not called to testify in court. In setting aside this award on appeal, the High Court held that:

> It is contrary to the principle of natural justice for the Court to accept an expert witness' vague statement of possible contingency in future or to give an open room for the expert to surprise the opposite counsel by withholding the basis and reasons for such opinion until the *viva voce* cross-examination at the full trial.

[29] Likewise, any non-compliance with a court procedural rule which embodies or encapsulates the principles of natural justice or part thereof cannot be salvaged by the provisions for reprieve in Order 1A (regard to justice) and Order 2 r 3 (non-compliance with rules a mere irregularity).

[30] Apart from the judicial pronouncements, there are also implicit application of principles of natural justice to specific situations in the court rules as exemplified in Order 10 (service of originating summons), Order 15 r 5 (court may order separate trials if joinder may embarrass or delay the trial or is otherwise inconvenient), Order 15 r 13A (notice of action to non-parties) and Order 18 (pleadings).

[31] In discussing the applicability of the rules of natural justice to the conduct of judicial proceedings, the Federal Court in *Anwar Ibrahim v Govt of Malaysia & Anor*[9] in paragraph [64] of the judgment recognised that the primary objective of the principles of pleadings is to fulfil the rules of natural justice.

[32] Underlying the rationale of the Federal Court's recent decision in *Goh Teng Whoo v Ample Objectives Sdn Bhd*[10] which decided that service of originating process by AR registered post must be evidenced by the AR card signed by the defendant himself and not another

8 [2021] 1 LNS 234.
9 [2021] 6 CLJ 1, see n 6 above.
10 [2021] 4 CLJ 348.

person, is the requirement of the second pillar of natural justice that the defendant himself has the right to know the case against him and be given a reasonable opportunity to answer the case. Receipt of the originating process by another person, even if such recipient were his relative or housemate, does not fulfil the natural justice requirement of right to be heard.

[33] The importance of adherence to the principles of natural justice was restated recently by our Federal Court in the case of *Dr Lourdes Dava Raj Curuz Raj v Dr Milton Lum Siew Wah & Anor ("Dr Lourdes Dava Raj")*.[11] In that case the Federal Court held that an adverse order issued by the court against a person without him being notified of proceedings initiated against him is a nullity and ought to be set aside. It was held that where a medical practitioner, in an application for judicial review and in a subsequent appeal against the order made therein, has not been made a party either to the application or the appeal in court, and has not been heard in both court proceedings, but yet a court order was made that he was guilty of a breach of professional doctor-patient confidentiality, the court order has clearly breached the rules of natural justice and ought to be nullified. Such a court order, in further consonance with the sacrosanct right to be heard, may still be nullified even when the court proceedings in question have already come to an end. It can be seen that the procedural doctrines of *functus officio* and *res judicata* could not operate as a bar for the Federal Court to set aside the court order which was issued in contravention of the principles of natural justice. In the Federal Court's judgment delivered by Nallini FCJ, it was held that Order 53 r 4(2) on the need to serve the judicial review application on all persons directly affected by the application is for fulfilment of natural justice and that non-compliance with such procedural rule is fatal, thereby rendering the court order a nullity.

[34] With the Federal Court's judgments in these four recent decisions and the implicit application of principles of natural justice to specific situations in the court rules, it should now be reasonably clear that the principles of natural justice permeate every material aspect of the civil proceedings. In other words, the principles of natural justice apply at the beginning of the suit, i.e. service of the originating process (for example, *Goh Teng Whoo* case), at the interlocutory stages (including pleadings, interlocutory applications, etc.), in the course of counsel's

11 [2020] 9 CLJ 192.

cross-examination of witnesses and submissions (for example, *Nirwana Construction*), in the trial judge's conduct of the full trial (for example, *Dr Lourdes Dava Raj*), in considering whether or not an expert's opinion should be accepted (for example, *Abdul Halim Tambi*'s case) and in the process of hearing or decision-making including appeals (for example, *Anwar Ibrahim v Govt of Malaysia & Anor*).

[35] For judges and litigants, it is important to bear in mind that the principles of natural justice apply to every stage of civil proceedings in court. Whatever material procedural step or direction or process of decision that is made should comply with the requirements of natural justice.

[36] Interestingly, in a thick and voluminous civil procedural code embodied in the ROC 2012, the principles of natural justice, which are not expressly mentioned anywhere in the express provisions of the ROC 2012, are indeed the most important and overriding rules and principles of civil procedure.

[37] In discussing the principles of natural justice, it is also pertinent to make some additional observations regarding the application of natural justice to the rules of pleading and its exceptions as to, hopefully, clear the doubt and confusion surrounding them.

[38] It is settled law that the rules of pleading are in line with the fundamental rule of natural justice, i.e. the right to be informed of any adverse point so that one has the opportunity of stating the answer.[12]

[39] Doubts and confusion in connection with the interrelated topics of pleadings and natural justice often arise due to the exceptional situations where the court decides on a point or matter which is not expressly pleaded.

[40] According to decided cases, where the evidence has been adduced on an unpleaded matter but parties have addressed the matter at the trial or hearing, the court may decide on the issues including the unpleaded matter based on evidence which has been satisfactorily presented and developed in the proceeding without objection and

12 *Muniandy & Anor v Muhammad Abdul Kader & Ors* [1989] 2 MLJ 416 at 418; *Wisma Punca Emas Sdn Bhd v Dr Donal R O'Holohan* [1987] 1 MLJ 393; *Ginstern Corp (M) Sdn Bhd & Anor v Global Insurance Co Sdn Bhd* [1987] 1 MLJ 302; *Tan Ah Chim & Sons Sdn Bhd v Ooi Bee Tat & Anor* [1993] 3 MLJ 633.

which has not caught the affected party by surprise.[13] It is important to note that this latitude is permissible where such departure from the rules of pleading did not cause any material contravention of the principles of natural justice or occasion any substantial miscarriage of justice in that the affected party has been, or is deemed by procedural law as having been, accorded the reasonable opportunity to know the case against him and to answer the case in such exceptional situations.

[41] However, such latitude cannot be extended to situations where the non-compliance with the rules of pleading has caused or is considered by the court as having caused material contravention of the principles of natural justice or having occasioned any substantial miscarriage of justice.

[42] Situations where the non-compliance with the rules of pleading has caused or is considered by the court as having caused material contravention of the principles of natural justice or having occasioned any substantial miscarriage of justice include:

(a) material facts vital to support the claim were not pleaded, hence party is not allowed to succeed in its claim based on unpleaded material facts: *AmBank (M) Bhd v Luqman Kamil*;[14]

(b) the unpleaded matter sought to be relied upon is materially inconsistent with the pleaded case of the party: *Samuel Naik Siang Ting v Public Bank Bhd*;[15] and

(c) in *Iftikar Ahmed Khan v Perwira Affin Bank*,[16] the Federal Court stated that it is most damaging to our administration and system of justice if parties are allowed to plead a certain complaint, lead evidence on another and the court decides on something entirely different. The Federal Court held that it was erroneous for the plaintiff to plead damages for breach of contract but the court awards damages for the tort of conversion.

13 See *Boustead Trading (1985) Sdn Bhd v Arab Malaysian Merchant Bank* [1995] 3 MLJ 331, FC; *Syarikat Perniagaan Ketua Kampung Kuala Selangor v Zakaria Husin* [1985] 2 MLJ 287, SC; *KEP Mohammed Ali v KEP Mohammed Ismail* [1981] 2 MLJ 10 at 11–12; *Siti Aishah v Goh Cheng Hwai* [1982] 2 MLJ 124 at 125; *Playing Cards Sdn Bhd v China Mutual Navigation* [1980] 2 MLJ 182.

14 [2012] 3 MLJ 1, FC.

15 [2015] 6 CLJ 944.

16 [2018] 1 CLJ 415.

[43] When the principles of natural justice are considered in light of the vitiating criterion of "has occasioned a substantial miscarriage of justice" in Order 2 rr 2(1) and 3 of the ROC 2012, the appellate courts' decisions on the rules of pleading and the exceptions to the rules of pleading fall in line and do not conflict with principles of natural justice in the context of the ROC 2012.

4. Regards to justice as a second pillar of civil procedure

[44] This pillar of civil procedure is expressly embodied in Order 1A (regard to justice) and Order 2 (effect of non-compliance with rules). The importance of these two Orders as a pillar in the ROC 2012 can be inferred from their being placed at the forefront of the ROC 2012.

[45] Order 1A was added to codify the *dicta* of the Federal Court in *Megat Najmuddin Dato' Seri (Dr) Megat Khas v Bank Bumiputra Malaysia Bhd*,[17] and the Court of Appeal in *United Malayan Banking Corp Bhd v Ernest Cheong Yong Yin*[18] and *Maril-Rionebel v Perdana Merchant Bankers*.[19]

[46] The twin features of Order 1A and Order 2 are the statutory recognition of the maxim that procedural rules ought to be the handmaids and not the master.

[47] This is also confirmed by Justice Vernon Ong in his article "The Silent Threat: Human Trafficking and Migrant Smuggling Procedures Through the Eyes of the Courts"[20] in under the sub-heading "Procedural law as part of access to justice"[21] in the following words:

> [28] The principle that the purpose of procedural law is to facilitate access to justice was articulated by the Indian Supreme Court in *The State of Punjab v Shamlal Murari & Anor* in the following words:
>
> > "… Procedural law is not to be a tyrant but a servant, not an obstruction but an aid to justice. It has been wisely observed that procedural prescriptions are the hand-maid and not the mistress, a lubricant, not a resistant in the administration of justice."

17 [2002] 1 CLJ 645, *per* Mohtar Abdullah FCJ.
18 [2001] 2 CLJ 31, *per* Ahmad Fairuz JCA.
19 [2001] 4 MLJ 187 at 195D–H.
20 July [2023] JMJ 108.
21 Ibid, at p 116.

[48] The application of Order 1A to the facts of particular cases is often difficult and can become a subject of much contention. At one extreme end of the spectrum by excusing every non-compliance would result in wanton and widespread defiance of the court rules, while at the other extreme end of the spectrum by punishing every non-compliance as fatal would result in turning the court rules into the master. With a view to avoiding either of the extremes, a balance has to be struck in the application of Order 1A to the facts of each case.

[49] Order 2 r 3 lays down the balance to be struck by providing that non-compliance with a court rule by itself is not objectionable "unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both." This can be considered to be a well-drafted provision with a fair and reasonable balance to be struck in each case.

[50] In other words, Order 2 r 3 recognises that non-compliance with a court rule is fatal or objectionable if it has occasioned either a substantial miscarriage of justice or an incurable prejudice. Incurable prejudice is a prejudice which cannot be cured by either an amendment or an appropriate order for costs or both.

[51] It sounds easy to state the gist of the balance laid down in Order 2 r 3. However, the application of this balance to the facts of particular cases may often be difficult and complex.

[52] The ROC 2012 does not provide specific guides on the detailed steps and process of arriving at the balanced decision as to whether excusing or punishing a non-compliance with a particular court rule in a fact-situation of a particular case should lead to a conclusion whether or not the non-compliance has "occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both".

[53] A better understanding of the pillars of civil procedure may probably facilitate our task in arriving at the balanced decision as to whether excusing or punishing a non-compliance with a particular court rule in a fact-situation of a particular case should lead to a conclusion whether or not the non-compliance has "occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs or both".

5. Court-controlled system of administration of justice as a third pillar of civil procedure

[54] The concept of a court-controlled system of administration of justice is embodied in Order 34 (pre-trial case management by court). Daily, the courts through their judges and registrars exercise the powers of case management over civil cases.

[55] Order 34 has elaborate provisions on the court's control over civil proceedings. It also provides for extensive powers upon the court to control and manage the steps and proceedings in court suits.

[56] As laid down in the heading of Order 34 and in Order 34 r 1(1)(b), the primary objective of having a court-controlled system of administration of justice is "to secure the just, expeditious and economical disposal" of civil proceedings in courts.

[57] Order 34 should probably be read with the guidance given by Lord Woolf MR in *Biguzzi v Rank Leisure plc ("Biguzzi")*[22] and by our Federal Court in *Tan Geok Lan v La Kuan @ Lian Kuan ("Tan Geok Lan")*.[23]

[58] In *Biguzzi*, Lord Woolf MR explained the policy behind a court-managed system of administration of justice in the following words:

> Under the court's duty to manage cases, delays such as have occurred in this case, should, it is hoped, no longer happen. The court's management powers should ensure that this does not occur. But if the court exercises those powers with circumspection, it is also essential that parties do not disregard timetables laid down. If they do so, then the court must make sure that the default does not go unmarked. If the court were to ignore delays which occur, then undoubtedly there will be a return to the previous culture of regarding time limits as being unimportant.
>
> There are alternative powers which the courts have which they can exercise to make it clear that the courts will not tolerate delays other than striking out cases. In a great many situations those other powers will be the appropriate ones to adopt because they produce a more just result. *In considering whether a result is just, the courts are not confined to considering the relative positions of the parties. They have*

22 [1999] 1 WLR 1926 at 1933–1936.
23 [2004] 3 MLJ 465; [2004] 2 CLJ 301.

> *to take into account the effect of what has happened on the administration of justice generally. That involves taking into account the effect of the court's ability to hear other cases if such defaults are allowed to occur. It will also involve taking into account the need for the courts to show by their conduct that they will not tolerate the parties not complying with dates* for the reasons I have indicated.

[59] In the context of the ROC 2012 with the court-controlled system of administration of justice as a main feature and policy of the civil procedure, justice is not confined to consideration of what is just or fair to the particular litigant in the isolated case at hand but is also to be considered in light of the effect on the overall system of administration of justice. There are occasions when the interest of the overall system of administration of justice overrides and prevails over the individual right or interest of the particular litigant in the case at hand.

[60] However, this does not mean that the litigants in a particular case have no say whatsoever on the manner and procedure for the conduct of their particular case at all.

[61] Where the parties have mutually agreed on the manner and limited scope of the trial and such agreement is not contrary to any law or court rules, the trial judge should accept such agreement in pursuance of the Order 34 objective of securing an expeditious and economical disposal of the action. The Federal Court in *Tan Geok Lan*[24] recognised and approved the parties' mutually-agreed manner and limited scope of trial as still valid and binding in the context of court-controlled system of administration of justice.

[62] The substance of the Federal Court's decision in *Tan Geok Lan* can probably be summarised thus. Although the control of civil proceedings is in the hands of the trial judge, it is not objectionable in principle for the trial judge under appropriate circumstances to accept the parties' mutually-agreed procedure for disposal of civil proceedings. Where the parties' mutually-agreed procedure serves the purpose of expeditious and economical disposal of civil proceedings and none of the terms of the agreement are contrary to or in breach of any law or the ROC 2012 or any other rules and the agreement is agreed to and accepted by the court, it cannot be said that the parties' agreed procedure is tantamount to dictating to the

24 Ibid, at [8] and [9].

court as to how it should conduct the proceedings. A final decision of the court made in accordance with such mutually-agreed procedure is valid and binding upon the parties in the suit. In such a case of the parties' mutual agreement as to procedure, it is still within the discretion of the trial judge whether to accept or reject the mutually-agreed procedure, and whether or not to accept it with or without variation or amendment by the judge.

[63] The objective to secure just, expeditious and economical disposal of civil proceedings is also expressly stipulated in other parts of the ROC 2012 including Order 14 r 6 (which incorporates Order 34 rr 1 and 5 by reference), Order 34 r 2(2) and 2(2)(i), and Order 28 r 4(3).

[64] As this objective is part of a pillar of the court rules, a party who seeks reliefs in the court should act and conduct himself in such a manner and with diligence so that his/her civil proceeding fits in with the objective of just, expeditious and economical disposal of civil proceedings.

[65] In line with such objective, a party who seeks a discretionary remedy or relief which has the effect of temporarily suspending or stopping other civil proceedings pending in various courts should act promptly so that the discretionary remedy or relief he obtains would not defeat or substantially prejudice the objective of just, expeditious and economical disposal of many other civil proceedings pending in the courts. Specific application of this criterion may include application for judicial management, application for scheme of arrangement or restructuring, and the like. An applicant in such a case should act promptly in approaching the court for a discretionary relief and not wait until there are already numerous civil suits filed against the applicant, unreasonably expecting the court to grant a discretionary relief which has the effect of defeating the objective of just, expeditious and economical disposal of civil proceedings in connection with numerous other suits pending in the various courts.

[66] The court-managed system of administration of justice was the policy adopted in light of the tremendous increase in the number, size, length and complexities of the court cases over the last two decades or so at a time of increasing sophistication in our society and escalating litigiousness of our society. With such tremendous increase in the workloads of the courts in Malaysia as well as in other countries, the modern legal systems in various countries including Malaysia have placed more emphasis on computerisation as well as court-managed

system of administration of justice in order to maintain a smooth and efficient system of administration of justice.

[67] Both computerisation and court management are essential to achieve a smooth and efficient administration of justice in a legal system in our modern society. The switch of policy from a party-controlled system to a court-managed system has enabled the Malaysian courts to clear the past backlog of cases and is still necessary to enable the courts to clear the existing backlog of cases, though the backlog is not as serious as it was two decades ago.

[68] With the precious limited manpower and resources of the courts and the tremendous increase in the case workloads, litigants are no longer allowed the luxury of dragging their feet in the course of court proceedings. One very important factor in the court-managed system of administration of justice is that litigants are not allowed to waste the precious limited time and resources of the courts. Thus, Order 34 was enacted to empower the courts to manage the cases towards smooth, expeditious and fair disposal of cases.

6. Adversarial system as a fourth pillar of civil procedure

[69] We have inherited the adversarial system of administration of justice, though the original old and rigid features of the adversarial system have been slightly toned down over the decades. Still, our system of administration of justice is basically adversarial in nature.

[70] The adversarial system of administration of justice has been recognised by apex courts: see Zaki Tun Azmi CJ's decision in *Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor* ("*Pacific Forest Industries Sdn Bhd*")[25] and the House of Lords in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corp Ltd*.[26] See also the role of a judge in a common law trial in *Pacific Forest Industries Sdn Bhd* (*per* Zaki Tun Azmi CJ) and *Jones v National Coal Ltd*.[27]

[71] An aspect of an adversarial system is that a litigant has to take the initiative to present or defend his own case, and should not expect the judge to advocate or argue his case or defence by deciding on a point or issue which the litigant himself does not want to raise. A trial

25 [2009] 6 CLJ 430 at 437–438, [14]–[17].
26 [1981] 2 WLR 141 at 152H and 153E–G.
27 [1957] 2 QB 55 at 63.

judge in an adversarial system cannot take over the counsel's task of examining or cross-examining the witnesses. As a relaxation from the rigid adversarial rule, the trial judge is allowed by section 165 of the Evidence Act 1950 to put questions or order production of documents.

[72] In *Anwar Ibrahim v Govt of Malaysia & Anor*,[28] the Federal Court among others explained in paragraphs [65] and [66] the limits and procedural safeguards to the appellate court's power of posing new questions on appeal in the context of an adversarial system of administration of justice.

[73] In exceptional occasions when the court raises a point of law which has not been argued by the parties, the first step must always be to have the matter thoroughly explored by adversarial means, as regards not simply the merits of the new question but also the propriety of entering upon it at all. In the adversarial system of administration of justice, the court cannot of its own initiative raise a point of law or an argument and decide on it without having first allowed the parties the reasonable opportunity of arguing for or against it by adversarial means.

[74] Section 165 of the Evidence Act 1950 states as follows: "The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:", subject to two limitations stated in the provisos thereto.

[75] However, bearing in mind the basic nature of the trial being adversarial, the trial judge's questions to the witnesses should not be numerous or excessive. In an adversarial system of justice, coupled with the principles of natural justice, as a general rule each party's counsel is to be given the liberty to examine or cross-examine the witness further in connection with the judge's questions and the witness's answers thereto. As such, as a matter of prudent practice, after asking questions and receiving answers from a witness

28 [2021] 6 CLJ 1, see n 6 above.

pursuant to section 165 of the Evidence Act 1950, the trial judge should ask every party's counsel whether or not the counsel has any questions arising from the questions posed by the judge to the witness and the witness's answers thereto, and if the counsel elects to ask further questions, the opportunity should be given for such questions arising.

[76] In the court rules, there are provisions which are based on the concept of an adversarial system of administration of justice. For example, the court rules allow judgments in default to be entered including those in Order 13 (judgment in default of appearance) in cases where the defendants do not bother to enter appearance after having been duly served with the originating processes, Order 19 (judgment in default of pleadings) where a defendant defaults in filing his defence, and Order 35 (order upon failure of a party to appear at trial) where a party does not attend the trial despite being notified of the trial date. In such situations, the defendant is considered as having refused to participate in the court proceeding or failed to avail himself of the reasonable opportunity to defend the case against him, and the adversarial system of justice does not allow the defendant's default to obstruct the administration of justice for the plaintiff.

7. Congruent and competing requirements of the pillars

[77] In some factual scenarios, only the requirements of one pillar of civil procedure are relevant to the matter at hand, and hence it is comparatively simple to decide whether or not a non-compliance with a court rule should or should not be fatal in such factual scenarios.

[78] In other factual scenarios, the requirements of two or more pillars of civil procedure are relevant and such requirements may be congruent with each other. There is therefore no difficulty in deciding whether or not a non-compliance with a court rule should or should not be fatal in such factual scenarios.

[79] Nonetheless, there may at times be factual scenarios where the requirements of two or more pillars of civil procedure exert competing demands which are relevant to the matter at hand, and it would be a difficult and complicated decision whether or not a non-compliance with a court rule should or should not be fatal in such factual scenarios.

[80] In exercising the discretion in a particular case which involves an interplay and competing demands of the main policies and features of the rules of court, a balance has to be struck by the court so that the furtherance of one main policy or feature in a subject-matter in the particular case does not have the effect of defeating or unduly prejudicing another main policy or feature which pertains to the same subject-matter in the same case or similar cases.

8. Beams and gems in the civil procedure

[81] In a building, beams form structures which hold and strengthen the pillars, and gems are embedded in the structures, walls and ceilings to decorate and adorn the building, thereby enhancing its beauty and glamour. Likewise, but for different objectives, embedded in parts of the civil procedural rules are beams and gems which enhance the structural integrity, efficiency and usefulness of the court rules.

[82] The beams that I have found in the court rules include:

(1) rules for smooth and orderly disposal of court cases (see Part 9 below);

(2) rules with self-preservation mechanism in interim measures and preservation of status quo (see Part 10 below);

(3) rules which accommodate the reality of and imperfections in human life (see Part 11 below);

(4) rules to promote just, expeditious and economical disposal of civil proceedings (see Part 12 below);

(5) rules to promote and facilitate saving of time and costs and for avoiding conflicting decisions (see Part 13 below); and

(6) rules which protect or preserve the sanctity and utility of the final outcome of the civil proceedings (see Part 14 below).

[83] Gems are embedded in parts of the beam structures of the court rules. Where relevant or expedient, additional highlights and points on some of the gems are also made under the discussion relating to the respective beams where they are found.

9. Rules for smooth and orderly disposal of civil cases

[84] Rules for smooth and orderly disposal of civil cases include the rules in Order 12 r 4 (time limited for appearing), Order 13 (judgment in default of appearance), Order 13 r 8 (setting aside judgment in default, balance with natural justice), Order 14 (summary judgment), Order 14 r 4 (leave to defend where there is triable issue or some other reason to be a trial), Order 18 r 22 (trial without pleadings), Order 22B (offer to settle), and Order 34 r 2(2)(a) (mediation).

[85] A fair and orderly manner of taking evidence and conducting a full trial are also set in advance for the parties to follow. These rules include Order 33 (mode of trial), Order 34 r 10 (automatic directions in personal injury action), Order 38 (evidence: general), Order 40 (court expert), and Order 40A (experts of parties).

[86] Timeframes for taking various steps of the civil proceedings are also laid down by the various parts of the court rules.

[87] Of the gems embedded in smooth and orderly disposal of civil cases, it is probably worthwhile to pay some additional attention to Order 22B (offer to settle), Order 28 r 4 (directions in originating summons), and Order 34 r 2(2)(a) (mediation).

Order 22B: Offer to settle as a rough gem

[88] Order 22B provides for offer to settle as a mechanism to encourage settlement without full trial.

[89] Over my four decades of law practice, I have not seen or heard of any incident of a litigant making a pre-trial offer to settle pursuant to Order 22B. My own experience is not unique, as my conversations with practitioners of law also point toward the same scenario. Of the court judgments, judgments which state that an Order 22B offer to settle was made are also rare. When I recently keyed in the search on CLJ online judgments under the description "O 22B", only one case surfaced, namely the case of *Razali Mohamed Saad v CIMB Bank Bhd*[29] which mentioned that an offer to settle was made under Order 22B. Of a similar search done on Lexis Advance online judgments, only two cases stated that an Order 22B offer was made: *Dr Gurmail*

29 [2014] 1 CLJ 123.

Kaur Sandhu Singh v Dr Teh Seong Peng & Anor[30] and *Hasnul Hanis bin Badrul v Allianz General Insurance Co (M) Bhd*.[31] In view of rarity of its use in practice, this mechanism of offer to settle in its existing state is described here as a rough gem – one which needs polishing and refinements before it can effectively serve its function of encouraging and reducing backlog of full trials.

[90] The cause of such rarity is probably because: (a) there is insufficient incentive for a litigant to make such offer to settle and also the fear concerning the trial judge's knowledge about the existence of such offer which may subtly influence the court's final decision; and (b) there is insufficient deterrence for a litigant to unreasonably reject such offer to settle, as the cost implication for improper rejection under the existing court rules is minimal or insignificant in the context of litigation involving big sums of money in dispute.

[91] In order to incentivise a litigant to make an offer to settle and to discourage the claimant from wanton or unreasonable rejection of the offer to settle, it may be necessary or expedient to introduce additional features to incentivise the defendants to make realistic Order 22B offers to settle and to deter or discourage the plaintiffs from unreasonably rejecting realistic offers to settle. The attraction and incentive for making the Order 22B offer to settle and the adverse consequences of unreasonable rejection of realistic Order 22B offers to settle should probably be beefed up in the event that the judgment sum awarded in the final judgment is less than the amount of the offer to settle.

The gem in Order 28 r 4: Hybrid procedure for originating summons

[92] The Order 28 originating summons procedure is very much more expeditious and economical than the writ procedure which usually entails full trials.

[93] A prudent and meaningful use of the originating summons procedure instead of full trial by writ action can help to clear the backlog of cases more expeditiously and economically.

[94] While promoting the objective of expeditious and economical disposal of civil proceedings, Order 28 does not go to the extreme or

30 [2014] 11 MLJ 843.
31 [2018] 9 MLJ 747.

excessive extent of doing so at the expense of justice. A balance of a general nature is struck in Order 5 r 4(1) which stipulates that the originating summons as a mode of commencement of civil proceedings is appropriate for cases in which the sole or principal question at issue is or is likely to be a question of law or cases in which there is unlikely to be any substantial dispute of fact.

[95] The presence of the alternative limb "or *principal* question at issue is or is likely to be … question of law" (emphasis added) in Order 5 r 4(1)(a) shows that the question of law does not have to be the sole question at issue. In Order 5 r 4(1)(b) the use of the phrase "*substantial* dispute of fact" (emphasis added) shows that there may be cases where there is a dispute of fact but the dispute of fact is not substantial in the context of the particular case, in which case the commencement by originating summons is also the appropriate mode.

[96] The legislative intent of encouraging the use of the originating summons procedure to resolve disputes is made more evident in Order 28 r 4 where a specific and detailed balance is struck between disposal by affidavit evidence alone and disposal by a combination of affidavit evidence and oral evidence.

[97] The provisions in Order 28 r 4 in the originating summons proceedings are:

> (2) … the Court shall give such *directions as to the further conduct* of the proceedings as it thinks best adapted *to secure the just, expeditious and economical disposal* thereof.
>
> (3) Without prejudice to the generality of paragraph (2), the Court shall, at as early a stage of the proceedings on the originating summons as appears to it to be practicable, *consider whether there is or may be a dispute as to fact and whether the just, expeditious and economical disposal of the proceedings can accordingly best be secured by hearing the originating summons on oral evidence or mainly on oral evidence and, if it thinks fit, may order that no further evidence shall be filed and that the originating summons shall be heard on oral evidence or partly on oral evidence and partly on affidavit evidence, with or without cross-examination of any of the deponents*, as it may direct.
>
> (4) Without prejudice to the generality of paragraph (2), and subject to paragraph (3), the Court may give directions as to

the filing of evidence and as to the attendance of deponents for cross-examination and any other directions.

(Emphasis added)

[98] Under Order 28 r 4, the court should not rush into converting the *entire* originating summons proceedings into a writ action when there is a dispute of fact. Instead, the court is to determine whether, notwithstanding the dispute of fact, the just, expeditious and economical disposal of the proceedings can accordingly best be secured by one of the following modes or hybrid modes:

(a) entirely oral evidence; or

(b) partly on oral evidence and partly on affidavit evidence.

[99] In carrying out such determination, the court has to assess the number of facts in dispute as compared with the number of relevant issues and undisputed facts in the entire case, extent of cross-examination of deponents needed and the likely length of time required for the cross-examination of deponents on the factual dispute as compared to the likely length of the writ trial. The determination is akin to comparison of two modes of trial and see which mode of trial better serves the objective of just, expeditious and economical disposal of the suit at hand. It goes without saying that a trial by writ action will be slower and more costly, and therefore in some situations, full trials by writ actions do not serve the objective of expeditious and economical disposal when compared with trials by hybrid mode of affidavit plus cross-examination of deponents. Hence, the essential analysis in the determination is to assess whether or not a trial by hybrid mode of affidavit plus cross-examination of deponents would be just in the circumstances within the meaning and context of the triplet criteria of "just, expeditious and economical disposal" in the ROC 2012.

[100] Where the court comes to the determination that notwithstanding the dispute of fact, the just, expeditious and economical disposal of the proceedings can accordingly best be secured by proceeding partly on oral evidence and partly on affidavit evidence, the court should issue directions under Order 28 r 4 for cross-examination of deponents to hear the oral evidence on the relevant factual dispute, and thereafter for closing submissions.

[101] This approach in such category of cases would fit in better with the main objective of just, expeditious and economical disposal of the proceedings instead of converting the entire proceeding into a writ which entails full trial and usually reopening of factual issues for more disputes, lengthier examination and cross-examination of witnesses at trial.

[102] The utility of the Order 28 r 4 hybrid mode of just, economical and expeditious disposal of civil proceedings depends on the better appreciation of Order 28 r 4 by courts of first instance and their ability to strike the proper balance on the facts of each case, as well as the appellate court's better appreciation of Order 28 r 4 so as to avoid excessive or unnecessary interference with the exercise of procedural discretion by courts of first instance. In considering matters of such nature, one should understand the litigants usual propensity and/or the advocates and solicitors general tendency to dislike shorter trials or modes of disposal due to extraneous reasons unrelated to the objective of just, economical and expeditious disposal of civil proceedings.

Rough gem in Order 34 r 2(2)(a): Mediation

[103] Under Order 34 r 2(2)(a), the court at a pre-trial case management may direct the parties to go for mediation in accordance with any practice direction for the time being issued.

[104] This mechanism of mediation in its existing state is described here as a rough gem – one which needs polishing and refinements before it can effectively serve its function of encouraging amicable settlement and reducing backlog of full trials.

[105] The practice directions for the time being issued is Practice Direction No. 2 of 2022, Practice Direction On Mediation. Under paragraph 5 of the said Practice Direction, mediation may be carried out where: (a) the judge is of the view that the matter can be settled by mediation and the parties agree to refer to mediation; or (b) the parties apply to the court to refer to mediation. In other words, reference to mediation must be by mutual agreement of the parties in the action, and the court has no power to compel the parties to go for mediation.

[106] Apart from that, there is the Mediation Act 2012 in Malaysia. Mediation under the Mediation Act 2012 is not a compulsory process.

The Act does not apply to mediation conducted by courts, and it does not oblige parties to mediate before litigation or arbitration.

[107] As Order 34 r 2(2)(a) cross-refers to the practice direction in force, the effect of Practice Direction No. 2 is that without the consent or agreement of the parties, the court cannot direct that the mediation is compulsory. However, even if the parties attend the mediation sessions, it is still entirely up to the parties whether or not they want to make any meaningful negotiation or to conclude with a settlement.

[108] Under mediation, case management directions pursuant to Order 34 in its existing provisions read with Practice Direction No. 2 of 2022, there is nothing to prevent or deter the parties from going through the formal motion of attending a mediation meeting and later reporting to the court that no settlement can be achieved, and thereafter the court suit will proceed to trial. There is no implication whatsoever for any party if the mediation fails to achieve settlement due to whatever a party does or omits to do during the mediation. For parties who have made up their minds to litigate all the way in court, attendance at mediation meetings will not facilitate a settlement without trial. Such litigants need some carrot and stick mechanism to be in place before they would sincerely and seriously discuss and negotiate towards an amicable settlement without trial. Usually, such category of litigants are also the parties who lock horns in lengthy and protracted trials.

[109] It is probably necessary to make it mandatory for lengthy writ cases to go through mediation before the writ actions can be set down for full trial.

[110] When the parties negotiate sincerely and seriously in a mediation, there may be a majority of items and issues where they can agree upon but eventually the mediation does not successfully end with a full and final settlement because they cannot agree on one or two item or issues. In such situation, which probably happens most of the time, all efforts in the negotiation and the consensus on the agreed majority of items and issues are thrown down the drain when the parties at the full trial reopen all items and issues for trial without any cost implication or any adverse financial consequence.

[111] To resolve this problem, one probable approach is that the mediator shall record in writing, countersigned by the respective parties, the items and issues mutually agreed upon by the parties during the mediation and then such mediation record shall automatically serve as an Order 22B offer to settle with the same costs and interest implications as an offer to settle. This new mechanism also would have a much better prospect of incentivising litigants to mutually agree on various items and issues as much as possible and of encouraging a claimant to accept realistic offers made during the mediation, thereby materially contributing towards reduction of case backlogs. Even if the deemed Order 22B offer to settle is not accepted by the offeree, the cost and interest implication may also serve as an influential factor to drive the litigants towards narrowing down the items and issues in dispute so as to avoid the adverse implications later.

10. Self-preservation mechanism in interim measures and preservation of status quo

[112] Claimants do not want to go to a tribunal, spend much time and incur much expense to get an award or judgment which in all likelihood would be a mere paper judgment with no real prospect of recovery of judgment sums.

[113] In order to make the court's system of administration of justice useful and meaningful, the court rules have some provisions on interim measures for discovery of documents and interrogatories as well as interim preservation of status quo pending trial.

[114] Interim measure or preservation of status quo includes rules in Order 22A (interim payment), Order 24 (discovery), Order 24 r 8 (discovery only where necessary for fair trial or for saving costs), Order 26 (interrogatories), Order 26 r 1(3) (interrogatories to be ordered only where necessary for fair trial or for saving costs), subject to privilege against disclosure (Order 24 rr 5(2) and 13(2), Order 26 r 5), and Order 29 (interlocutory injunctions, interim preservation of property).

[115] These rules on interim measures and interim preservation play an important role in making sure that the litigation process is not an exercise in futility but is a useful and meaningful dispute resolution process which yields real fruits and results.

11. Rules to accommodate the reality of and imperfections in human life

[116] While formulating a set of rules for regulating the procedure of civil proceedings, the court rules do not overlook the imperfections of human beings and the vicissitudes of life.

[117] The English Court of Appeal in the case of *Gale v Superdrug Stores plc*[32] expressly recognises that "the administration of justice is a human activity and cannot be made immune from error …" and that "the object of the courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights." Millett LJ in his judgment recognised "When a litigant or his adviser makes a mistake, justice requires that he be allowed to put it right, even if this causes delay and expense, provided that it can be done without injustice to the other party". The English Court of Appeal recognised that this principle applies even if the error or mistake was made carelessly or negligently by a litigant or his solicitor, as the administration of justice cannot be made immune from human error.

[118] However, the abovementioned case was decided prior to the enactment of case management and court-controlled system under our Order 34 of the ROC 2012. While some aspect of the general principle in that case may still be applicable, the importance of the court-controlled case management under Order 34 must not be overlooked, as has been emphasised by the Federal Court in the recent case of *Hong Leong Finance Bhd v Low Thiam Hoe & Anor Appeal*.[33] This decision of the Federal Court is also an illustration of how the main policy of court-controlled case management affects the application of procedural rules and principles in relation to amendment of writ and pleadings. It also emphasises the need to strike a fair and proper balance between two competing policies and underlying principles of the court rules, i.e. latitude for amendment out of regard for justice and the court-controlled system of administration of justice.

[119] When it comes to amendment of pleadings to add a cause of action or relief after the expiry of the limitation period, Order 20 r 5 of the ROC 2012 strikes the statutory balance between the latitude for amendment of pleadings and the likely prejudice to the opposite

32 [1996] 3 All ER 469 at 477–478.
33 [2016] 1 MLJ 301; [2015] 8 CLJ 1.

party. Any amendment after the expiry of the limitation has to fall within one of the statutorily permitted exceptions under Order 20 r 5 before the court has the power to allow it. This is an illustration of the statutory balance between the main policy of regard for justice (Orders 1A and 2) and fair play and natural justice (Order 20).

[120] The court-controlled case management system and the limited availability of the court's precious manpower and resources has also gained prominence in recent years. If an application for amendment to pleadings is made at the eleventh hour of a full trial which has been set down for several days, allowing such belated amendment would cause the court's trial time of several days to be thrown away and wasted. The court should not entertain such belated application for amendment because of the policy behind the court-controlled system under Order 34.[34] The interests of other litigants in the long queue for getting full trial dates would be prejudiced by such belated amendment application, and the overall system of administration of justice would suffer if such belated amendment application were allowed to cause wastage to the full trial dates of the court.

[121] The impact of the delay, dereliction and irresponsible conduct of a litigant in a particular case also has to be viewed in light of the overall context of the system of administration of justice: see the *dictum* of Lord Woolf MR in *Biguzzi*.[35] Lord Woolf MR's *dictum* is particularly illuminating as he was the head of the committee in charge of the reform of the English court rules on court-controlled system of administration of justice.

[122] In such exceptional situation where the overall interest of the administration of justice prevails over the interest of the individual litigant, any injustice (if any) to the applicant would be borne by himself (if the delay is caused by himself) or be visited upon the negligent solicitor (if the delay is caused by the solicitor's negligence). In such exceptional situation and in the overall perspective, it is not unjust to expect the author of the delay to bear the consequences of such delay. One such example of the High Court's rejection of a very

34 See *Sunway PMI-Pile Construction Sdn Bhd v Pembenaan Chan & Chua Sdn Bhd* [2003] 5 CLJ 63; *Tan Geok Lan v La Kuan @ Lian Kuan* [2004] 3 MLJ 465; [2004] 2 CLJ 301 and *Lim Ban Kay @ Lim Chiam Boon & 11 Ors v Chong Chuan Long & 8 Ors* [2015] AMEJ 674; [2015] 1 LNS 327.

35 [1999] 1 WLR 1926, see n 22 above.

late application for amendment is *Astana Modal Sdn Bhd v BS Testing Laboratory Sdn Bhd & Ors*.[36]

[123] In considering the question of delay, the court would have to assess the *qualitative* aspects of delay including the context of the case, the impact of delay on the trial or hearing date set by the court, the date when the court can hear the matter, and *not merely its quantitative* aspect (i.e. the duration of delay). For example, if the court's earliest available date for full trial for the particular case is 12 months from today in a situation where a litigant has delayed in the filing of bundles of documents or witness statements, in that he/she had filed them last week instead of three months ago which was previously directed, it would probably be contrary to the main features and underlying policies of civil procedure to bar the litigant from relying on the said documents at the full trial merely on the ground of late filing.

[124] Rules which accommodate shortcomings, inadvertence or errors of human beings include Order 20 (amendment of pleadings and documents), Order 3 r 5 (extension of time), Order 15 r 6 (misjoinder and non-joinder of parties), and Order 41 r 4 (use of defective affidavit).

[125] In considering whether or not the shortcoming, inadvertence or error in the circumstances of a particular case ought to be accommodated or excused, the court has to view the matter in light of the pillars (i.e. main policies and core principles) of the court rules. It is doubtful that the court would be so indulgent as to accommodate and excuse a non-compliance caused by human shortcoming, inadvertence or error if that would defeat or contradict a pillar of the court rules. Contravening a rule of court which is lesser than a pillar of the court rules would, in principle and by rational reasoning, probably afford a comparatively stronger justification to be excused for non-compliance with it.

[126] Inasmuch as there are court rules to accommodate human imperfections on the part of litigants and their solicitors, there is also a court rule which caters for the residual contingency of the inability on the part of the draftsmen of the court rules to foresee all possible scenarios and details in connection with procedural rules.

36 [2021] MLJU 182.

[127] This contingency is stipulated as inherent powers of the court under Order 92 r 4 to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.

[128] Various cases have illustrated the application of the inherent jurisdiction and powers of the court. The recent decision of the Federal Court in *Stone World Sdn Bhd v Engareh (M) Sdn Bhd*[37] held to the effect that natural justice and substantive statutory prohibition are not the exhaustive list of exceptions to the *functus officio* rule: see paragraphs [77] to [79] of the judgment wherein the Federal Court seemed to further extend the exceptions to the *functus officio* rule to situations of illegality and fraud.

[129] There is also recognition in the ROC 2012 that errors, inadvertence and imperfections are not the exclusive by-products of litigants and solicitors. Order 20 r 11 expressly provides that "Clerical mistakes in judgment or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court by a notice of application without an appeal."

12. Rules to promote just, expeditious and economical disposal of civil proceedings

[130] The phrase "just, expeditious and economical disposal" of civil proceedings appears a number of times in the express provisions of the ROC 2012. It can be found in Order 14 r 6 (which incorporates Order 34 rr 1 and 5 by reference), Order 34 rr 1(1)(b), 2(2) and 2(2)(i), and Order 28 r 4(3).

[131] The triplet criteria of "just, expeditious and economical disposal" is the cornerstone of the court-managed system of administration of justice.

[132] What is just in a particular case in the context of civil proceedings must be viewed in light of the overall system of administration of justice and not merely in isolation for a litigant in that particular case: see, for example, the *dictum* of Lord Woolf MR in *Biguzzi*.[38]

[133] The word "just" in the phrase "just, expeditious and economical disposal" of civil proceedings coveys the concept of justice in the

37 [2020] 9 CLJ 358.
38 [1999] 1 WLR 1926, see n 22 above..

context of the overall system of administration of justice and not justice in an isolated or absolute sense. In *Asean Security Paper Mills Sdn Bhd v Mitsui Sumitomo Insurance (Malaysia) Bhd*,[39] Zaki Tun Azmi PCA (later CJ) explained the meaning of justice in the following words:

> [44] Now, "justice" is a very wide and general term … In our system, the court's function is to hear and decide to the best of its ability, honestly, and after carefully considering all the evidence adduced before it, makes a decision. Based on its findings and applying the law as the judge understands, he arrives at his conclusion. That to my mind, in the context of this case, is justice. The decision may not be accepted by the unsuccessful party. But that is the best that an honest and an impartial judge can decide.

The abovementioned *dicta* was quoted with approval by the Federal Court in *Kerajaan Malaysia v Semantan Estates (1952) Sdn Bhd*.[40]

[134] The need for justice in the triplet criteria "just, expeditious and economical disposal" is to be balanced with the need for expeditious and economical disposal of civil proceedings.

[135] As part of the triplet criteria, there are express rules which facilitate and serve the expeditious and economical disposal of civil proceedings. Examples include Order 14A (disposal of case on point of law), Order 18 r 19 (summarily striking out writ or pleadings), Order 18 r 22 (trial without pleadings), Order 22B (offer to settle), Order 28 (originating summons), Order 34 r 10 (automatic directions in personal injury action), Order 33 rr 2 and 5 (trial of and disposal based on preliminary questions or issues), and Order 40 (court expert).

[136] Of the gems for expeditious and economical disposal of civil proceedings, Order 14A (disposal of case on point of law) and Order 33 rr 2 and 5 (trial of and disposal based on preliminary questions or issues) deserve some further discussion here.

Gem in Order 14A: Disposal of case on point of law

[137] From the provisions of Order 14A and the decisions of the Federal Court in *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and*

39 [2008] 6 CLJ 1.
40 [2019] 2 CLJ 145.

Another Appeal ("*Thein Hong Teck*")[41] and *Director of Forests, Sarawak & Anor v Racha Urud & Ors and Other Appeals ("Director of Forests, Sarawak v Racha Urud"),*[42] and the Court of Appeal's decision in *Dato' Sivanathan a/l Shanmugam v Artisan Fokus Sdn Bhd* ("*Dato' Sivanathan a/l Shanmugam*"),[43] the following principles can be gleaned:

(1) Order 14A is only applicable to determination of questions of law: Order 14A r 1;

(2) the question of law must be suitable for determination *without the full trial* of the action: Order 14A r 1(1)(a);

(3) such determination of question of law will *finally* determine the *entire* cause or matter or *any* claim or issue therein: Order 14A r 1(1)(b);

(4) the prerequisites in items (1) to (3) above are cumulative prior conditions to be fulfilled before this Order 14A procedure can be invoked: *Dato' Sivanathan a/l Shanmugam*;

(5) the word "may" at the beginning of Order 14A r 1 gives the court the discretion whether or not to invoke the Order 14A procedure even if the three prerequisites are fulfilled;

(6) where there is a dispute by the parties as to the relevant facts, Order 14A is not applicable: *Thein Hong Teck* and *Director of Forests, Sarawak v Racha Urud*;

(7) Order 14A should not be used to determine questions which are based on hypothetical, ambiguous or fictitious facts: *Thein Hong Teck* and *Director of Forests, Sarawak v Racha Urud*;

(8) the question of law or construction to be determined by the court under Order 14A should be stated or formulated in clear, careful and precise terms, so that there should be no difficulty or obscurity: *Director of Forests, Sarawak v Racha Urud*; and

(9) where the issues of disputed fact are interwoven with legal issues raised, it will be undesirable for the court to split the

41 [2012] 2 MLJ 299; [2012] 1 CLJ 49.
42 [2017] 5 CLJ 389.
43 [2016] 3 MLJ 122; [2015] 2 CLJ 1062.

legal and factual determination: *Thein Hong Teck* and *Director of Forests, Sarawak v Racha Urud*.

See paragraph [18] of the High Court's judgment in *Ong Siang Pheng v Millenium Mall Sdn Bhd*.[44]

[138] As the wording in Order 14A r 1(1)(a) and (b) suggests, the primary objective of Order 14A is to confer upon the court a discretionary power to finally dispose of the action without a full trial by way of determination on the suitable question(s) of law. Read with Order 34 r 1(1) of the ROC 2012, which also lays down the policy and/or fundamental feature of managing civil cases towards *just*, *expeditious* and *economical* disposal, the court in the first stage of an Order 14A application which has fulfilled the three prerequisites will also have to consider the degree of likelihood that the determination of the question(s) of law would avoid the necessity of a lengthy and protracted full trial. The phrase "or any claim or issue" in subrule 1(b) of Order 14A cannot be interpreted in isolation and out of context. In other words, the determination of a question of law is to be resorted to only where it would or is likely to result in substantial savings in time and costs of a full trial. The expression "is or is likely to" suggests that the court does not have to be satisfied that there will certainly be savings in time and costs of full trial; a likelihood of savings in time and costs of full trial is sufficient to justify the exercise of the discretion to order a disposal under Order 14A.

[139] If the determination of a question of law will finally determine a selected "claim or issue" in the action, the court still has to consider the effect of the final determination on the selected claim or issue on the remaining claims and issues pleaded in the same action. Where the final determination of the selected claim or issue would render unnecessary the full trial of *all or overwhelming majority* of the other pleaded claims and issues, the court should order an Order 14A disposal of the action in line with the primary objective of their expeditious and economical disposal of civil proceedings. However, where the full trial of *all or the overwhelming majority of* the pleaded claims and issues in the action would still be necessary irrespective of the outcome of the final determination on the selected claim or

44 [2021] 1 LNS 868.

issue, then it is inappropriate or undesirable to proceed with the Order 14A procedure.

[140] In most cases, it is highly probable that a party will appeal against the court's decision on a question of law determined under the Order 14A procedure. Where the selected claim or issue represents only one of the many or several pleaded claims and issues, an appeal against an Order 14A determination of the selected claim or issue is likely to result in a stay of execution of the court decision and/or stay of trial of the action pending the outcome of the appeal pursuant to the principle decided by the Federal Court in *Kosma Palm Oil Mills Sdn Bhd & Ors v Koperasi Serbausaha Makmur Bhd*.[45] As such, the final determination of the selected claim or issue would in effect delay or stall the disposal of the entire action instead of accomplishing the Order 14A intended objective of expeditious and economical disposal without the necessity of a full trial. In a nutshell, the court's discretion in ordering an Order 14A disposal has to be exercised in the factual context of each particular case even if the three prerequisites are fulfilled.

[141] If the Order 14A procedure is properly and efficiently invoked by the courts of first instance and there is few or no excessive or overzealous appellate interferences of the exercises of this discretionary power, Order 14A can probably contribute towards a meaningful shortening of the lengthy full trials in writ actions thereby facilitating the reduction in the backlog of writ trials.

Gem in Order 33 rr 2 and 5: Trial and disposal based on preliminary questions or issues

[142] A perusal of the provisions in Order 33 rr 2 and 5 does not show the prohibition of trial of preliminary question which involves a factual dispute. Order 33 r 2 expressly provides that "The Court may order any question or issue …, whether *of fact* or law or *partly of fact and partly of law* … to be tried before … the trial of the cause or matter" (emphasis added). Order 33 r 5, which flows from and is related to Order 33 r 2, provides thus, "If it appears to the Court that the decision of any question or issue arising in

45 [2004] 1 MLJ 257; [2004] 1 CLJ 239.

a cause or matter and tried separately from the cause or matter *substantially disposes of the cause or matter or renders the trial of the cause or matter unnecessary*, it may dismiss the cause or matter or make such other order or give such judgment therein as may be just" (emphasis added).

[143] Order 33 rr 2 and 5 and Order 34 r 1(1) of the ROC 2012 are complementary to each other in that both are intended to serve the primary objective of facilitating just, expeditious and economical disposal of civil actions. When Order 33 rr 2 and 5 are read together in light of their primary objective it appears that the following points can be gleaned therefrom:

(1) preliminary or separate trial of question under Order 33 r 2 may be for any one or more of the following categories of questions:

(a) question of fact;

(b) question of law; or

(c) question partly of fact and partly of law, i.e. mixed question of fact and law.

(See the express wording in Order 33 r 2);

(2) preliminary or separate trial of question under Order 33 r 2 should be ordered where it appears to the court that it would facilitate the just, expeditious and economical disposal of the action (Order 33 r 2 read with Order 34 r 1(1));

(3) where it appears to the court that a decision of a question would substantially dispose of the cause or matter or renders the trial of the cause or matter unnecessary, the court should order a preliminary or separate trial of the question under Order 33 r 2 (Order 33 r 2 read with r 5);

(4) the question or issue for preliminary or separate trial under Order 33 r 2 is not limited to pleaded issues, as it can be "raised by pleadings or otherwise"; and

(5) the question or issue for separate trial can be tried before, at or after the trial of the cause or matter (Order 33 r 2).

[144] The *dicta* in the Court of Appeal's judgments in *Majlis Peguam v Raja Segaran a/l Krishnan ("Majlis Peguam v Raja Segaran")*[46] and *Hiap Soon Hong Sdn Bhd v Leopad Assets Sdn Bhd* ("*Hiap Soon Hong*")[47] seemed to suggest that the Order 33 rr 2 and 5 procedure should not be resorted to where the question or issue for preliminary or separate trial involves any *factual* dispute.

[145] On the surface, there appears to be a contradiction between the abovementioned points in paragraph [143](1) and the passages of the Court of Appeal's judgment quoted in paragraph [144] above. However, all judgments are to be read in the context of the factual matrix of the case, as explained by the House of Lords in *Quinn v Leathem*,[48] Viscount Simon in *Harris v DPP*[49] and Lord Diplock in *Mutual Life & Citizens' Assurance Co Ltd & Anor v Clive Raleigh Evatt*.[50] Bearing such approach in mind, the *ratio decidendi* of a judgment is to be extracted from the factual context of the case.

[146] In the *Hiap Soon Hong* case, the Court of Appeal basically followed the *dicta* of the previous Court of Appeal decision in *Majlis Peguam v Raja Segaran* where after citing in support the cases of *Newacres Sdn Bhd v Sri Alam Sdn Bhd ("Newacres Sdn Bhd")*[51] and *Arab Malaysian Finance Bhd v Meridian International Credit Corp Ltd London*,[52] the Court of Appeal held that for Order 33 r 2 of the Rules of the High Court 1980 to apply, the issues in a case should be clear and not riddled with complexities and the facts should not be in dispute.

[147] In *Newacres Sdn Bhd*[53] the facts were rather peculiar. In that case, the High Court at the opening of the trial allowed a party's counsel to argue on two preliminary questions (said to be questions of law) without any Order 33 r 2 application. The Court of Appeal held as follows:

> The ambit of O. 33 r. 2 RHC 1980 was discussed by the Court of Appeal in the case of *Petroleum Nasional Bhd v. Kerajaan Negeri Terengganu*

46 [2005] 1 MLJ 15; [2004] 4 CLJ 239.
47 [2018] 1 LNS 664.
48 [1901] AC 495 at 506.
49 [1952] 1 All ER 1044 at 1050D.
50 [1971] AC 793 at 802D–F.
51 [1991] 3 MLJ 474; [1991] 3 CLJ 2781.
52 [1993] 3 MLJ 193; [1993] 4 CLJ 307.
53 [1991] 3 MLJ 474; [1991] 3 CLJ 2871, see n 51 above.

& Another Appeal [2003] 4 CLJ 337. Delivering the judgment of the Court of Appeal, Mohd Noor Ahmad JCA (as His Lordship then was) held at p. 352:

> "*Order 33 r. 2 of the RHC states that the Court may order any question or issue arising in the cause or matter, whether of fact or law or partly of fact and partly of law,* … The Federal Court in *Palaniappa Chettiar v. Sithambaram Chettiar & Ors* [1981] 1 LNS 156; [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents were upheld, that concludes the whole proceedings and it would be unnecessary to try the other issues. In *SI Rajah & Anor v. Dato' Mak Hon Kam & Ors (No. 1)* [1994] 1 CLJ 207, Lim Beng Choon J, after considering a large number of authorities on the ambit of O. 33 r. 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations …"

[148] The points stated in paragraph [143] above regarding the ambit of Order 33 rr 2 and 5 found support from and/or are consistent with the following decided authorities which also include the Court of Appeal's decisions:

(a) Lim Beng Choon J's judgment in *SI Rajah & Anor v Dato' Mak Hon Kam & Ors (No. 1) ("SI Rajah v Dato' Mak")*[54] which, after reviewing the various decided authorities, summarised the principles on Order 33 r 2 as follows:

> … one thing is clear and that is that unlike the former O. 34 r. 2 of the English Rules of Supreme Court 1965 which is *in pari materia* with our former rule … which only empowered the Court to try questions of law by way of a special case stated, *the present O. 33 r. 2 is wider in terms for it is also applicable to questions of fact or questions partly of fact and partly of law …* However that may be, in deciding whether to allow the preliminary questions to be raised at the trial the Court must bear in mind the following observations enunciated in the aforementioned cases:
>
> (1) As a general rule, the Court will exercise its power under O. 33 r. 2 to order a preliminary question to be tried if and only

54 [1994] 1 CLJ 207.

if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go on trial as a whole.

(2) Notwithstanding the general rule, an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit.

(3) Preliminary points of law have been described as too often treacherous short cuts but where it is a trial of so-called preliminary issues of fact, the justification to allow the trial of such issues is even harder to discern.

(4) In any event a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue – see *Allen v. Gulf Oil Refining Ltd.* [1980] QB 156.

(b) The Court of Appeal in *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu*[55] held:

> Order 33 r. 2 of the RHC states that the Court may order any question or issue arising in the cause or matter, *whether of fact or law or partly of fact and partly of law*, …

At the same page of the reported judgment, the Court of Appeal also quoted with approval the four observations made by Lim Beng Choon J in *SI Rajah v Dato' Mak*,[56] as quoted in subparagraph (a) above. After having quoted with approval the four observations of Lim Beng Choon J, the Court of Appeal added:

> Those are the applicable principles to an O. 14A application and to the alternative application made pursuant to O. 33 r. 2. However, the outcome of their applications will depend very much on the facts of each case.

(c) In *Daud Arshad & Ors v FELCRA Bhd*[57] the Court of Appeal, in a judgment delivered by Tengku Maimun JCA (now CJ),

55 [2003] 4 CLJ 337 at 352.
56 [1994] 1 CLJ 207, see n 54 above.
57 [2019] 9 CLJ 443.

quoted and approved the statement of principle in *Karen Isabel Wilfed v Dyana Shila Vasanthan*[58] that notwithstanding a delaying application the pertinent and crucial factor to consider is whether the preliminary issue will result in a substantial saving of time and expenditure: see paragraphs [4] and [23].

(d) In *Lim Thiam Huat & Anor v MBf Holdings Bhd & Anor and Other Appeals*[59] the Court of Appeal, in a judgment delivered by Abdul Rahman Sebli JCA (now CJSS), specifically recognised that Order 33 r 2 can apply to a *preliminary question of fact* if the four observations of Lim Beng Choon J in *SI Rajah v Dato' Mak* are followed: see paragraphs [17]–[20].

[149] A closer examination of the provisions in Order 33 r 2 supports the proposition that the Court of Appeal's decisions quoted in paragraph [148] regarding the applicability of Order 33 r 2 to preliminary questions of fact are more in line with the express wording of Order 33 r 2. The result is that Order 33 r 2 can be resorted to for preliminary trial of a question of fact to dispose of the action justly, expeditiously and economically.

[150] The factors and considerations stated in paragraphs [138] to [141] above in relation to the Order 14A procedure are also similarly applicable to the Order 33 r 2 procedure.

[151] The Order 33 r 2 procedure is also considered as a gem for promoting the efficiency and expeditious administration of justice by shortening the unnecessary length of full trials of writ actions if it is properly and efficiently invoked by the courts of first instance and there is few or no excessive or overzealous appellate interference with the exercise of this discretionary power.

13. Rules to promote and facilitate saving of time and costs and for avoiding conflicting decisions

[152] There are court rules prescribed with the objective to save time or costs or to avoid conflicting decisions in cases involving common parties, common issues or inter-related reliefs.

58 [2014] AMEJ 0185; [2014] 4 CLJ 737.
59 [2018] 1 LNS 678.

[153] Examples of such category of court rules include those stipulated or implied in rules including Order 4 (consolidation of causes or matters (not express, but case law)), Order 15 r 1 (joinder of causes of action), Order 15 r 3 (counterclaim against additional parties), Order 15 r 4 (joinder of parties), Order 15 r 12 (representative proceedings), Order 16 (third party and similar proceedings), and Order 57 (transfer of proceedings).

[154] The yardstick of saving time or costs also gains prominence in other court rules including Order 24 rr 8 and 13 (saving costs as a ground for ordering discovery), Order 25 r 1(3) (saving costs as a ground for ordering interrogatories), etc.

[155] Avoiding conflicting decisions in courts on the same or similar matter or issues is an important aspect of maintaining the public confidence in the system of administration of justice.

[156] Where there are two or more civil suits pending before different courts or judges which involve the same or similar matter and/or issues and there is a risk of conflicting decisions or findings of fact, the courts at the application of a party will make an order of consolidation or transfer so as to avoid conflicting decisions.

[157] Avoidance of risk of conflicting decisions on same or similar issues is a very important criterion in the management and organisation of civil suits for trial or hearing. *Jaya Sudhir Jayaram v Nautical Supreme Sdn Bhd*,[60] was an appeal against the High Court's refusal to consolidate two suits filed in different divisions of the Kuala Lumpur High Court. The Court of Appeal allowed the appeal and ordered the consolidation of the two suits filed in different divisions of the Kuala Lumpur High Court. The main points of the Court of Appeal's decision were: (a) the main purpose of consolidation is to save costs and time; (b) consolidation will not usually be ordered unless there is some common question of law or fact bearing sufficient importance in proportion to the rest; (c) an extremely important consideration in an application for consolidation is whether there would be inconsistent judgments pronounced by two courts if no consolidation is ordered; and (d) it would be unjust to both parties to allow their respective claims to go before two different judges whose decisions may conflict

60 [2019] 6 CLJ 292.

with each other, and this probable outcome must be avoided at all costs: see paragraphs [11] and [13] of the judgment.

[158] In considering a transfer of a civil suit so that two related suits can be heard by the same judge, avoidance of risk of conflicting decisions is also a very important factor. The High Court in *Sivasubramaniam Sivayogarajasingam & Anor v Saumian Sivayogarajasingam & Ors*[61] transferred a civil suit in Shah Alam High Court to another judge in Shah Alam High Court for the four interrelated suits with common issues to be heard by the same judge so as to avoid conflicting decisions by different judges.

14. Rules which protect or preserve the sanctity and utility of the final outcome of the civil proceedings

[159] For the system of administration of justice in the courts to be effective as the peaceful means of finally resolving disputes between litigants in a civilised society instead of the return to the anarchy of a lawless society, the orders and judgments of the courts must be respected and obeyed by the litigants and the affected parties.

[160] Towards this end, the court rules have provisions for the enforcement and execution of court orders and judgments and to punish persons who deliberately or intentionally defy the court orders.

[161] The ROC 2012 provides for various modes of execution of court orders and judgments. These include writs of execution (Order 46), writ of possession of immovable property (Order 45 r 2), writ of delivery of movable property (Order 45 r 4), writ of seizure and sale in respect of monetary judgment (Order 47 rr 1 to 5), writ of prohibitory order against immovable property (Order 47 rr 6 and 7), seizure of securities (Order 47 rr 8 and 9), garnishee proceedings (Order 49), charging order on stocks and dividends (Order 50 rr 2 to 9), stop notice (Order 50 rr 10 to 14), appointment of receivers (Order 51), and committal (Order 52).

[162] Order 51A (rateable distribution) provides for fair and equitable distribution of the proceeds of execution of court judgment among the creditors including judgment creditors. However, the court rules, being a form of subsidiary legislation, are subject to the overriding

61 [2023] 7 CLJ 929.

provisions in the relevant Acts of Parliament to the contrary regarding priority of debts.

15. Special-purpose rooms in the building

[163] Now we come to the specific procedures in Orders 67 to 88 of the ROC 2012. These specific procedures are analogous to special-purpose rooms in a building.

[164] These specific procedures are in respect of different and special procedures stipulated for civil proceedings taken under the various specific Acts of Parliament in respect of which the Rules Committee have seen it appropriate or expedient to prescribe differently from or to supplement the general provisions for civil proceedings in Orders 4 to 66.

[165] Examples include Order 67 (reciprocal enforcement of judgments under the Reciprocal Enforcement of Judgments Act 1958), Order 69 (arbitration proceedings under the Arbitration Act 2005), Order 70 (admiralty proceedings under statutes pertaining to admiralty), Orders 71 and 72 (probate proceedings under the Probate and Administration Act 1959), Order 73 (proceedings by and against the government pursuant to the Government Proceedings Act 1956), etc.

[166] It is trite that parties in a specific type of civil proceeding have to follow the specific court rules in the relevant part of Orders 67 to 88 that are applicable to the respective type of civil proceeding, and that insofar as the specific type of civil proceeding is concerned, the specific provisions in the relevant Order prevail over the general procedural provisions in Orders 4 to 66.

[167] It is where the specific Order for that type of civil proceeding is silent that there can be room for application of the general procedural rules in Orders 4 to 66 or part thereof to the civil proceeding under the specific Act of Parliament. In this exclusionary explanation, I have not mentioned Orders 1 to 3 because it is my considered opinion that Orders 1 to 3 also apply to the specific types of civil proceedings. Moreover, unless the specific Order expressly and clearly provides to the contrary, the special procedure under the specific Orders 67 to 88 are also regulated by the four pillars of the ROC 2012.

[168] In this connexion one must bear in mind that the court rules, being a form of subsidiary legislation, are subject to the overriding provisions in the relevant Acts of Parliament to the contrary. Hence,

the provisions in Orders 66 to 88 of the ROC 2012 have to be read in light of the substantive provisions in the relevant Act of Parliament relating to or applicable to the same subject-matter.

16. Reconciliation and interaction between the various pillars and beams of the ROC 2012

[169] Application of the rules and principles of civil procedure to the particular facts of a case may at times be an exercise in striking a fair and proper balance between the parties' procedural rights and substantive rights as well as between competing policies and underlying principles laid down in different parts of the rules of procedure.

[170] In some cases, the application of the relevant requirements of civil procedure to the facts of the cases may turn out to be rather complicated or tedious when the relevant requirements stem for competing demands between different pillars and/or beams of civil procedure. Faced with such difficult scenario, one probably has to call in aid the principles of interpretation of statute when doing the exercise of striking a fair and proper balance.

[171] An important principle of interpretation of statute is that the Legislature does not legislate in vain, and the interpretation of words in a section of the statute should not to the extent render redundant or superfluous other words used in another section in the same statute.[62] In *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors*,[63] the Supreme Court held that all words in a statute are to be considered; on the presumption that the Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment and it is presumed that if a word or phrase appears in a statute it was put there for a purpose. See also the judgment of the Privy Council decision in *Enmore Estates v Darsan*[64] to the same effect. See also the Federal Court's decision in *Orchard Circle Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Ors*.[65]

62 *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35; [1985] 1 CLJ 511; [1985] CLJ (Rep) 122, *per* Eusoffe Abdoolcader SCJ, following *Southwest Water Authority v Rumbles* [1985] 2 WLR 405, HL at 411.

63 Ibid.

64 [1970] AC 497 at 506.

65 [2021] 1 MLJ 180; [2021] 1 CLJ 1 at [34], [35], and [50]–[54].

[172] Jurisprudentially, there is no reason for not applying such principles of statutory interpretation to the ROC 2012.

[173] A particular court rule has to be read together with the pillars, core principles and other provisions of the court rules. It cannot be read in isolation to the extent of contravening a pillar or core principle of the ROC 2012.

[174] The application of a pillar or core principle cannot be to the extent of *substantially* defeating or stultifying another pillar or core principles of the court rules, unless the pillar or core principle is the *overriding* pillar or core principle applicable to the matter at hand.

[175] From the decisions of the appellate courts, natural justice has become the *overriding* pillar of the rules of court. Any contravention of the principles of natural justice in a material or significant extent in the course of court proceeding or decision-making process would render the judgment or order derived therefrom to be liable to be set aside for breach of natural justice. No other contrary pillar or rule to the contrary can serve to salvage the judgment or order from being set aside on ground(s) of material breach of natural justice.

[176] Apart from principles of natural justice, one must not think that all the provisions of the ROC 2012 are merely procedural rules *simpliciter* and nothing more. Although the majority of the provisions in the ROC 2012 are merely procedural rules, there are also provisions in the ROC 2012 which have expressly or impliedly a foundational or core principle, or even a substantive law requirement.

[177] An example is the Order 89 summary process of recovery of possession of immovable property which has incorporated the substantive law requirement that only a trespasser *ab initio* can be summarily evicted, and therefore non-compliance with this requirement would bring the proceeding outside the ambit of this summary process or contrary to the very foundation for this summary process.[66]

[178] Where there is a contravention of the foundation or core principle underlying the relevant court rule or a substantive law

66 See decisions in *Bohari bin Taib v Pengarah Tanah Galian Selangor* [1991] 1 CLJ (Rep) 48; [1991] 1 MLJ 343, FC; *Salim bin Ismail & Lain-Lain v Lebbey Sdn Bhd (No. 2)* [1997] 1 CLJ 102, CA; *Lee Wee Choong & Anor v Teh Ching Yan & Anor* [2018] 1 LNS 1997, CA.

embodied in the relevant court rule, the provisions of Orders 1A and 2, and Order 15 r 6(1) cannot be called in aid by an applicant for Order 89 relief where the defendants or affected persons are not trespassers *ab initio*.

[179] Similarly, where an express requirement in the relevant provision of the ROC 2012 lays down the foundation or core principle upon which the court can consider whether or not to exercise a specific discretionary power of the court, the non-compliance would also be regarded as fatal to an application to the court to exercise such discretionary power under the said provision.

[180] Viewed in the context of the entirety of the ROC 2012, the regard to justice to a party should not be done to the extent of causing a substantial miscarriage of injustice to the other party or prejudice to the other party which cannot be compensated by costs or cannot be remedied by amendment (see Order 2 r 3).

[181] Where the non-compliance with a court rule is of the nature or to the extent of nullifying the foundation or core principle for the court's exercise of discretionary power under the particular rule, the defaulting party cannot avail itself of Order 1A or Order 2 r 3 to excuse such non-compliance. For example, the necessity to prove unsuccessful efforts to serve the writ as a mandatory prerequisite for extension of writ (*Duli Yang Maha Mulia Tunku Ibrahim Ismail lbni Sultan Iskandar AI-Haj v Datuk Captain Hamzah Mohd Nor*);[67] the necessity for the plaintiff's specific averment in affidavit that in the deponent's belief there is no defence to the claim in an application for summary judgment (*National Co for Foreign Trade v Kayu Raya Sdn Bhd*);[68] necessity for proof that the occupiers of land were trespassers *ab initio* in a suit under Order 89 for summary possession (*Juta Permai Sdn Bhd v Mohd Zain bin Jantan*);[69] etc. Such relevant requirement forms the foundation or core principle upon which the court is to consider whether or not to exercise its discretionary power, and the absence of such foundation or core principle resulting from a failure to comply with such requirement would be fatal to an applicant's respective application to the court.

67 [2009] 4 CLJ 329, FC.
68 [1984] 2 MLJ 300, FC.
69 [2001] 2 MLJ 322.

[182] It appears that the golden thread that can be derived from the various decisions of the apex court on this topic is that where the non-compliance with a provision of the ROC 2012 touches the core principle or underlying foundation of administration of justice, such non-compliance would be regarded as fatal, i.e. as having occasioned a substantial miscarriage of justice or prejudice which cannot be compensated by costs or amendment within the meaning of Order 2 r 3.

[183] As a corollary, where a non-compliance with a provision of the ROC 2012 constitutes a contravention of the foundation or core principle upon which the court can consider whether or not to exercise a specific discretionary power of the court, the non-compliance would also be regarded as fatal to an application to the court to exercise such discretionary power under the said provision.

[184] Likewise, the regard to justice under Order 1A to a party should not be done to the extent of defeating the policy and/or foundation of the court-controlled system of administration of justice or stultifying the need for expeditious disposal of court cases, and these countervailing policies have led to court decisions to the following effects:

(a) that eleventh-hour attempt to postpone trials would not be entertained by the court save in good or exceptional circumstances: see *Lee Ah Tee v Ong Tiow Pheng*,[70] *Demag (M) Sdn Bhd v Greenlinx Sdn Bhd*,[71] and *Assunta Hospital v Thanalakshmi Ayasamy Iyer*;[72]

(b) that a defiance of a valid and proper peremptory order to take procedural steps would justify invoking Order 34 powers of the court: see *Syed Omar Syed Mohamed v Perbadanan Nasional Bhd*,[73] *Koh Heng Jin @ Koh Heng Leong v Gan Kooi Ann*,[74] *Zainal Effendi Mohd Daud v Suruhanjaya Perkhidmatan Awam*,[75] *Ngoi Thiam Woh v Maxwell, Kenion, Gowdy and Jones*,[76] and *Md Amin bin Md Yusoff & Anor v Cityvilla Sdn Bhd*;[77] and

70 [1984] 1 MLJ 107, FC.
71 [2012] 5 MLJ 687 at 696; [2012] 9 CLJ 49, CA.
72 [2019] 1 LNS 1442, *per* Tun Majid J.
73 [2012] 9 CLJ 557, FC.
74 [2015] 1 LNS 1244, CA.
75 [2004] 1 CLJ 642.
76 [2002] 3 MLJ 341.
77 [2004] 3 CLJ 88.

(c) that want of prosecution of civil case would justify dismissal of a suit: see *Birkett v James*,[78] *Datuk Samy Vellu v Karpal Singh*,[79] *Toh Hock Thye v Toh Chwee Biow*,[80] and *Southern Empire Development Sdn Bhd v Tetuan Shahinuddin & Ranjit & 2 Ors*,[81] etc.

[185] Hence, in exercising the discretion in a particular case which involves an interplay of competing demands of the main policies and features of the rules of court, a balance has to be struck by the court so that the furtherance of one main policy or feature in a subject-matter in the particular case does not have the effect of defeating or unduly prejudicing another main policy or feature which pertains to the same subject-matter in the same case or similar cases.

17. Closing observations

[186] Needless to say, this article by itself will not be able to enable an average reader to forthwith leapfrog to a higher level of skill and finesse in the law and practice of civil procedure. An average reader has to practise the procedural law diligently and for a considerable period of time in order to achieve a higher level of skill and finesse in the law and practice of civil procedure

[187] Nevertheless, this article is aimed at giving an average reader an introduction to the rules of civil procedure from a different perspective with the hope that such perspective would make the otherwise dull subject of civil procedure a little bit interesting and lively to the readers.

[188] It is hoped that those who are handling the tasks of designing and constructing the building can complete and maintain a building with strong pillars and beams, adorned with gems of shining lights and glamour.

[189] Of course, the designers and builders of the building are at liberty to add to or enhance the gems of the building from time to time so as to further adorn the completed building.

78 [1977] 2 All ER 801, HL.
79 [1989] 3 MLJ 493.
80 [1982] 1 MLJ 152; [1981] 1 LNS 143.
81 [2014] 1 LNS 195, HC.

Arbitration: The Overstated Case for Party Autonomy

by

*Prashanto Chandra Sen**

Introduction

[1] As an alternative to litigation, arbitration remains the jewel in the crown. India was amongst the first signatories to the New York Convention.[1] However, leading jurists like Fali S Nariman have bemoaned the loss of *l'esprit del arbitrage* – the spirit of arbitration – which is to achieve justice with cooperation. In the 10th Annual Goff Lecture,[2] Nariman complained that "Arbitration has lost that lightness of touch that characterize its early manifestations: … If private awards were intended for the parties alone (as they should be) they would be relatively short, the conclusions and main reasons being presented in a simple format."[3]

[2] Yet, the draw of arbitration remains undiminished. It remains a preferred mode of dispute resolution for commercial matters at an impressive rate of 91%.[4] Relevant to this high degree of preference, is the perception of party autonomy as the essence of the arbitral process,

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1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (adopted June 10, 1958, entered into force on June 7, 1959), 330 UNTS 3 ("New York Convention"), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/new-york-convention-e.pdf.

2 Fali S Nariman, "The Spirit of Arbitration: The Tenth Annual Goff Lecture" (2000) 16(3) *Arbitration International* 261–278, available at https://academic.oup.com/arbitration/article-abstract/16/3/261/321110.

3 Ibid.

4 PricewaterhouseCoopers LLP, "Corporate Attributes and Practices Towards Arbitration in India" (2013), available at https://www.pwc.in/assets/pdfs/publications/2013/corporate-attributes-and-practices-towards-arbitration-in-india.pdf.

endowing it with distinct advantages over traditional litigation. The courts perceive it as an effective method to unclog courts from its burgeoning arrears.

[3] In Indian jurisprudence, while numerous decisions consistently underscore the inherent nature of party autonomy in arbitration, there is a notable absence of allusion to state control in the process and the extent to which it may exist. In the present article, I would like to emphasise on this aspect of arbitration. This issue has become important, particularly after the major amendments made to the Arbitration and Conciliation Act of 1996 (the "1996 Act") in 2015. An important amendment made to the 1996 Act was, *inter alia*, the addition of the Fifth Schedule based on the International Bar Association Guidelines on Conflict of Interest in International Arbitration 2004 (the "IBA Guidelines").[5] This was to be a guide in determining whether circumstances exist which give rise to justifiable doubts as to the independence and impartiality of an arbitrator. The 246th Report of the Law Commission of India which preceded the amendments emphasised that party autonomy cannot be exercised in disregard of the principles of fairness and impartiality.[6] A threshold of fairness and impartiality was necessitated regardless of the agreement between the parties. This focuses back to the essential nature of the arbitration process, the nature of autonomy enjoyed by it, and the nature of state control of the process.

[4] I argue that party autonomy is not detached from state control. The adjudication process in an arbitral proceeding is a facet of sovereign function, albeit with elements of party autonomy.

[5] In international commercial arbitration, the relationship with state control is reflected in the debate between the seat theory and delocalised arbitration. Under the seat theory, an arbitration was required to be anchored in a national law. Delocalised arbitral procedures would be "floating in the transnational firmament unconnected with any

5 IBA Guidelines on Conflicts of Interest in International Arbitration (2004), available at https://www.trans-lex.org/701000/_/iba-guidelines-on-conflicts-of-interest-in-international-arbitration-2004/.

6 Law Commission of India, "Amendments to the Arbitration and Conciliation Act, 1996" (Law Com No. 246, 2014), para 57, available at https://indiacorplaw.in/wp-content/uploads/2014/08/Report246.pdf.

municipal system of law.[7] In domestic arbitration in India, the issue of state control remains unexplored. It finds expression, in some measure, in concepts such as fairness of arbitral procedure or the setting aside of an award on grounds of public policy. Yet, it has never been explicitly acknowledged or elaborated upon. Party autonomy has remained the defining feature.

[6] The first part of the article will highlight how in international commercial arbitration, state control has been emphasised through the adoption of the seat theory – which required an international arbitration to be anchored in some legal system. The opposing theory was that of delocalised arbitrations which viewed international arbitration as unattached to any particular legal system and forming an autonomous system. Internationally as well as in India, the seat theory was adopted. This was a clear endorsement of the principle that international arbitrations cannot be independent of state control. In the landmark judgment of *Bharat Aluminium Co (BALCO) v Kaiser Aluminium Technical Services* ("*BALCO*"),[8] the Supreme Court of India gave a ringing endorsement to the seat theory.

[7] The second part of the article deals with domestic arbitration in India. There are two aspects of the arbitral process wherein the facet of state control is apparent. Firstly, independence and impartiality of arbitrators, and secondly, immunity of arbitrators. These specific issues will exhibit the interstices which compel realisation of the foundational state control which permeates the arbitral process. This section will rely primarily on English law to both give a wider and comparative perspective on these issues.

[8] The third part of the article deals with Indian case law under the 1996 Act and its party autonomy and state control. The analysis under this section will discuss the jurisprudence both before and after the introduction of the 2015 amendment[9] to the 1996 Act. In doing so, it will highlight the principles evolved by the Supreme Court of India on the issue of independence and impartiality of arbitrators post the 2015 amendment.

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7 *Bank Mellat v Helsinki Technichi SA* [1989] QB 291.

8 2012 (9) SCC 552.

9 The Arbitration and Conciliation (Amendment) Act 2015, available at https://prsindia.org/files/bills_acts/acts_parliament/2015/the-arbitration-and-conciliation-(amendment)-act,-2015.pdf.

[9] The fourth part of the article will deal with immunity of arbitrators and the relevance and extent of state control reflected in this concept.

[10] The fifth part of the article deals with recent developments in Indian law where courts have had to confront the interplay between party autonomy and state control. This has arisen in the issue of appointment of arbitrators and also in the kinds of disputes an arbitrator can resolve.

[11] In conclusion, the article emphasises that there is need for proper recognition of state underpinning of the arbitral process. State control should be seen as complementary to the arbitral process which enriches arbitration and improves access to justice through arbitration.

[12] The Indian case law relating to the setting aside of awards and the relevance of state control has not been covered in this article for two reasons. One is that the setting aside of an award is a stage after the arbitration process is over. This article is confining itself to state control and the arbitral process. The second is that the dynamics of state control resonates in judicial consciousness when dealing with the issues of setting aside of awards. This is because public policy considerations arise. This has not been the case as far as arbitral procedure is concerned where the principle of party autonomy has seduced legal reasoning.

State control of international arbitration under the seat theory

[13] A difference in attitude has developed between the common law and the French civil law on what would be the fundamental basis of international commercial arbitration.[10] The French view is that an international arbitration award is not "anchored in any legal order", "but is a decision of international justice, whose validity must be determined with regard to the rules applicable in the country where its recognition and enforcement are sought."[11] Emmanuel Gaillard has argued that international arbitration is a separate and autonomous legal order. It is based on a consensus of governing principles. In the words of Gaillard:

10 Lord Jonathan Mance, "Arbitration: A Law Unto Itself?" (2016) 32(2) *Arbitration International* 223–241, available at https://academic.oup.com/arbitration/article-abstract/32/2/223/1741464.

11 *Société PT Putrabali Adyamulia v Société Rena Holding et Société Moguntia Est Epices,* Cass June 29, 2007.

> The term "arbitral legal order" is only justified where it can describe a system that autonomously accounts for the source of the juridicity of international arbitration. Without the consistency offered by a system enjoying its own sources, there can be no legal order. Without autonomy *vis-à-vis* each national legal order, there can be no arbitral legal order.[12]

[14] Lord Mance in his 30th Annual Lecture organised by the School of International Arbitration and Freshfields Bruckhaus Deringer in 2015 has made an elegant rebuttal to the above argument in favour of the need for anchoring an international arbitral process to a national law.[13] This forms the essence of the seat theory argument. The main reason that the transnational system envisaged by the French is not workable is the lack of the possibility of any common understanding and agreement on the principles on which the arbitration would be based. He expresses skepticism about "the ability even of the world's arbitration community to agree on common transnational principles to govern all the multi-faceted disputes which come before them". According to him the "ad hoc nature of arbitration and its finality and privacy militate against overall consistency".[14] Arbitration independent of any legal system would make it irreconcilable with the New York Convention.[15] It is beyond the scope of this article to go into depth regarding the various other reasons given by Lord Mance to rebut the theory of delocalised arbitrations, i.e. arbitrations not anchored in any legal system.

[15] Decisions of the courts of the seat of arbitration are decisions which the parties must, on the face of it, be taken to have accepted when that seat was chosen, and should, in the ordinary course, be treated as final and binding.[16] Reference is made by him to the Queen Mary International Arbitration Surveys conducted in 2015[17] and 2016.[18] The insights which emerge are that "preferences for seats are

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12 Emmanuel Gaillard, *Legal Theory of International Arbitration* (Martinus Nijhoff, 2010), available at https://brill.com/display/book/9789004187153/Bej.9789004186415.i-196_001.xml.

13 Lord Mance, "Arbitration: A Law Unto Itself?", see n 10 above.

14 Ibid, at 229.

15 Ibid, at 231.

16 Ibid, at 233.

17 Available at https://arbitration.qmul.ac.uk/media/arbitration/docs/2015_International_Arbitration_Survey.pdf.

18 Available at https://arbitration.qmul.ac.uk/media/arbitration/docs/Fixing_Tech_report_online_singles.pdf.

predominantly based on users' appraisal of the seat's established formal legal infrastructure: the neutrality and impartiality of the legal system; the national arbitration law; and its track records for enforcing agreements to arbitrate and arbitral awards."

[16] In India, the Constitution Bench (a Bench composed of five judges) in *BALCO* was the leading case which adopted the seat theory, for international arbitrations. It was argued that the 1996 Act recognises and provides for delocalised arbitration, i.e. arbitration not connected with any municipal system of law or what is popularly known as the "seat law". It was held:

> We are also unable to accept the submission of the learned counsel of the appellants that the Arbitration Act, 1996 does not make the seat of the arbitration as the center of gravity of the arbitration. On the contrary, it is accepted by most of the experts that in most of the national laws, arbitrations are anchored to the seat/place/situs of arbitration […].[19]

[17] Thus, in the context of international commercial arbitration, the need for being anchored to the law of a state is now a settled issue and is widely and expressly acknowledged. The state control of arbitration proceedings in an international commercial arbitration is expressly acknowledged.

English perspectives on state control of domestic arbitration: Measures on independence, impartiality and immunity of arbitrators under the English Arbitration Act

[18] In international arbitration proceedings, there would be complete uncertainty in the conduct of the arbitration, if it is not anchored in a national law. In the domestic context, there is no such immediacy noticed or felt. The courts are not required to expressly deal with the underpinnings of state control because the arbitral process is already situated in a particular legal regime. The issue of state control and its underpinning in the arbitral process did not engage the attention of the courts.

[19] Dr Hong-Lin Yu and Laurence Shore point out in their luminous article two areas where the fact of state concession and the role of

19 *BALCO*, see n 8 above, at [75].

the state with respect to arbitration becomes apparent.[20] They are: (i) independence and impartiality of arbitrators; and (ii) immunity of arbitrators. Impartiality of the arbitrator is primarily about the state of mind of the arbitrator. He should not be biased in favour of any party or prejudiced against any party to the case. An independent arbitrator would be one who has no close relationship – financial, professional, or personal – with a party or its counsel. As regards the immunity of the arbitrator, the issue involved is whether the arbitrator can be held liable for any decision passed by him. Upholding arbitral immunity the way it is done for judges is symptomatic of the nature of the function performed by the arbitrator, which is in some measure judicial and therefore sovereign. It is, therefore, immunised against action.

[20] Independence and impartiality of the arbitrator is a *sine qua non* for fairness of arbitral procedure. The requirement of fairness of procedure requires some element of state control for it to be credible for the parties. This underpinning of state control dilutes the contractualist theory of arbitration which is based on the assumption that parties have the right to control the process and maintain that right during the process. Further, the parties' agreement to arbitrate their disputes entails their agreement to let the arbitrators control the process. While the above is true, it is also important to acknowledge, according to Dr Hong-Lin Yu and Laurence Shore, that this is possible because the state concedes/delegates this through a legislation and facilitates a degree of autonomy.[21]

[21] We may now examine the English position in this regard. The English Arbitration Act 1996[22] the "English Act") did not require an arbitrator to be independent or for the arbitrator to disclose their interest. Section 24(1)(a) of the English Act provides that one of the grounds on which an arbitrator can be removed is circumstances that give rise to justifiable doubts as to his impartiality. Section 33(1)(a) of the English Act pertains to the general duty of the arbitral tribunal to

20 Hong-Lin Yu and Laurence Shore, "Independence, Impartiality and Immunity of Arbitrators – US and English Perspectives" (2003) 52(4) ICLQ 935, available at https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/abs/independence-impartiality-and-immunity-of-arbitratorsus-and-english-perspectives/314216A8041D69B3FA253FA8D4BC770F.

21 Ibid.

22 Available at https://www.legislation.gov.uk/ukpga/1996/23/contents.

act fairly and impartially between the parties. In the case of *Stretford v Football Assn Ltd*,[23] it was opined that:

> Lack of independence is relevant only if it gives rise to [justifiable] doubts, in which case the arbitrator can be removed for lack of impartiality.[24]

[22] As regards excluding independence, the rationale appears to have been that if it was included, it could lead to endless challenges where almost any remote connection between an arbitrator and a party could be furnished as a basis to challenge the independence of the arbitrator and could consequently significantly diminish the ability of an expert who could act as an arbitrator.[25]

[23] In the recent case of *Halliburton v Chubb Bermuda Insurance Ltd* ("*Halliburton*"),[26] it has been confirmed that under English law, arbitrators are not required to make a disclosure for the purpose of arbitral proceedings. As opposed to domestic laws influenced by the UNCITRAL Model Law,[27] the duty of disclosure is not regarded as a legal obligation under English law. The Supreme Court further confirmed that the duty to disclose under English law is only a "legal duty".[28] The court evolved the standard of the informed and fair-minded observer and whether she would conclude that there is a real possibility of bias.[29] The case relied on Lord Hope's opinion in *Helow v Secretary of State for Home Dept*,[30] wherein he explained that the epithet "fair minded" means that the observer does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusion which the observer reaches must be justified objectively. The fair minded observer is described as follows:

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23 (2007) EWCA (Civ) 238 at [39].

24 Ibid.

25 Lord Justice Saville, "Departmental Advisory Committee on Arbitration Law 1996 Report on the Arbitration Bill" (1997) 13(3) *Arbitration International* 275–316 paras 102–104, available at https://academic.oup.com/arbitration/article-abstract/13/3/275/218455.

26 (2020) UKSC 48.

27 UNCITRAL Model International Law on International Commercial Arbitration (1994), available at https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-54671_ebook.pdf.

28 See n 26 above, at [78].

29 Ibid, at [52].

30 [2008] 1 WLR 2416, *per* Lord Hope.

> She is the sort of person who takes the trouble to read the text of an article as well as the headline. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair minded, so she will appreciate that the context forms an important part of the material which she must consider before passing the judgment.[31]

[24] However, pursuant to the recommendations of the Law Commission of England and Wales,[32] the UK Government has proposed amendments to the English Act.

[25] Clause 2 of the Arbitration Bill[33] mirrors and extends the obligations established in *Halliburton*, asserting a mandatory provision codifying the general duty of arbitrators to disclose. This codification exemplifies a proactive state intervention aimed at safeguarding the independence, fairness, and, crucially, transparency of arbitration proceedings.

The shift from contractualist protection of party autonomy to evolution of principles of independence and impartiality: Indian jurisprudence, the 2015 amendments, and principles evolved by the Supreme Court of India

[26] A survey of the Indian decisions on impartiality and independence of arbitrators would show that the courts began with a strict contractualist approach giving supreme importance to the agreement entered into between the parties. The early decisions did not interfere even in unilateral appointments of employees or officers of one of the parties to the agreement or even retired officers of one of the parties. This was a usual clause put by government bodies and public sector undertakings in India to protect their own interests. A private party often had no option but to agree to it failing which it risked losing the contract itself. The turning of the Nelson's eyes to this practice by the courts was grounded in the principle of party autonomy. If the party

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31 Ibid, at [3].

32 Law Commission of the England and Wales, "Review of the Arbitration Act 1996: Final Report and Bill," Law Com No. 413 (September 2023), available at https://cloud-platform-e218f50a4812967ba1215eaecede923f.s3.amazonaws.com/uploads/sites/30/2023/09/Arbitration-final-report-with-cover.pdf.

33 The Arbitration Bill as introduced in the House of Lords, UK Parliament on November 21, 2023, available at https://bills.parliament.uk/publications/53038/documents/4018.

had agreed to a clause he had to adhere to it even if they were alleged to be compromising the impartiality and fairness of arbitration. In *Union of India v SP Gupta*,[34] it was held that the court cannot appoint an arbitrator beyond the scope of the arbitration clause. The judgment of the High Court which appointed a retired arbitrator as opposed to two gazetted railway officers who were to be appointed arbitrators was set aside. In *ACE Pipeline Contracts Pvt Ltd v Bharat Petroleum Corp Ltd*,[35] the court held that once the party had entered into an agreement with eyes wide open, it cannot later claim that the arbitrator being the previous employee of the other party cannot be an impartial person. The same principle was reiterated in *Indian Oil Corp v Raja Transport Pvt Ltd*.[36] The basis of this finding was that since arbitration is a binding voluntary dispute resolution process by private forum chosen by the parties, it had to be adhered to. It was further held that it was common for the government, statutory corporations and public sector undertakings ("PSUs") to enter into arbitration agreements for the settlement of disputes with the stipulation that the arbitrator will be one of its senior officers. This could not be objected to by a private party subsequently.[37] In *Ladli Construction Co Pvt Ltd v Punjab Police Housing Corp Ltd*,[38] disputes which were referred to arbitration were heard by the chief engineer of the respondent as the sole arbitrator. This appointment was upheld again on the ground that parties had entered into a contract with open eyes.

[27] There were instances when the court would deviate from the appointment clause. These would usually be cases where the appointing party did not appoint within the time prescribed in the agreement or in the 1996 Act. It was in such cases that the court could make an appointment entirely as per its own discretion.[39] Another ground where the court would intervene would be if the appointment was *ex facie* invalid in which case the court would invoke its power of appointment to remove the irregularly appointed arbitrator.[40]

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34 (2004) 10 SCC 504.
35 (2007) 5 SCC 304.
36 (2009) 8 SCC 520.
37 Ibid, at [13]–[14].
38 (2012) 4 SCC 609.
39 See, for example, *Union of India v Bharat Battery Manufacturing Co Pvt Ltd* (2007) 7 SCC 684 and *Datar Switchgears Ltd v Tata Finance Ltd* (2000) 8 SCC 151.
40 *Walter BAU AG v Municipal Corp of Greater Mumbai* (2015) 3 SCC 800.

[28] The 246th Law Commission was constituted and entrusted with the task of reviewing the provisions of the 1996 Act. It articulated its concern that such a strict contractualist interpretation of arbitral agreements would impact the fairness, integrity and impartiality of the arbitral procedure. It also identified the paradox that arbitration seeks the cooperation of the very public authority from which it wants to free itself.

[29] The Law Commission observed as follows:

> The balance between procedural fairness and binding nature of these contracts, appears to have been tilted in favor of the latter by the Supreme Court, and the Commission believes the present position of law is far from satisfactory. Since the principles of impartiality and independence cannot be discarded at any stage of the proceedings, specifically at the stage of constitution of the arbitral tribunal, it would be incongruous to say that party autonomy can be exercised in complete disregard of these principles – even if the same has been agreed prior to the disputes having arisen between the parties. There are certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' apparent agreement. A sensible law cannot, for instance, permit appointment of an arbitrator who is himself a party to the dispute, or who is employed by (or similarly dependent on) one party, even if this is what the parties agreed. The Commission hastens to add that Mr. PK Malhotra, the *ex officio* member of the Law Commission suggested having an exception for the State, and allow State parties to appoint employee arbitrators. The Commission is of the opinion that, on this issue, there cannot be any distinction between State and non-State parties. The concept of party autonomy cannot be stretched to a point where it negates the very basis of having impartial and independent adjudicators for resolution of disputes. In fact, when the party appointing an adjudicator is the State, the duty to appoint an impartial and independent adjudicator is that much more onerous – and the right to natural justice cannot be said to have been waived only on the basis of a "prior" agreement between the parties at the time of the contract and before arising of the disputes.[41]

41 Law Commission of India, "Amendments to the Arbitration and Conciliation Act, 1996", see n 6 above, at para 57.

[30] It further held:

> Large scale amendments have been suggested to address this fundamental issue of neutrality of arbitrators which the Commission believes is critical to the functioning of the arbitration process in India […][42]

[31] The said observations of the Law Commission reflected the concern of overemphasising the importance of party autonomy. This is reflected by the Law Commission's following findings:

> 19. It is thought in some quarters that judicial intervention is an anathema to arbitration and this view is not alien to a section of the arbitration community even in India. The Commission however does not subscribe to this review. The Commission recognizes that the judicial machinery provides essential support for the arbitral process. The paradox of arbitration, as noted by a leading academic on the subject, is that it seeks the cooperation of the very public authorities from which it wants to free itself.
>
> 20. The obvious starting point for any discussion on the role of judiciary in arbitration is Section 5 of the Act which itself is derived from Article 5 of the model law, which brings reduced judicial involvement in the arbitral process and a consequential increase in the powers of the arbitral tribunal. The position is all the more dark in India given the changed regime from the 1940 Act which envisaged a much larger and more active role for the judiciary. However, notwithstanding the reduced role of the courts and the enhanced powers accorded to the arbitral tribunal in the Act, it is necessary to carefully collaborate the balance between judicial intervention and judicial restraint …[43]

[32] It is in this background that the Law Commission brought in amendments to section 12 of the 1996 Act. The Fourth and Fifth Schedules as recommended by the Law Commission were incorporated as the Fifth and Seventh Schedules to the 1996 Act. The Fifth Schedule was based on the International Bar Association Guidelines on Conflict of Interest in International Arbitration 2004 ("IBA Guidelines"). The Fifth Schedule sets out 34 circumstances which would give rise to justifiable doubts as to independence and impartiality of arbitrators.

42 Ibid, at para 58.
43 Ibid, paras 19–20.

The said Schedule is not exhaustive and is merely required to serve as a guiding factor for disclosure by any person who is appointed as an arbitrator.

[33] The said amendments led to increased attention to the fairness of the arbitral process and the courts began taking a more interventionist role in the appointment process. In *Bharat Broadband Network Ltd v United Telecoms Ltd* ("*Bharat Broadband*"), the petitioner sought removal of the arbitrator appointed by its chairman-cum-managing director on the grounds of his ineligibility under section 12(5) of the 1996 Act.[44] The High Court adopted the reasoning which had held sway prior to the amendment that the petitioner could not challenge the appointment as he had entered into a contract in this regard and had also participated in the arbitral proceedings. This was however reversed by the Supreme Court. The following observations were made by the apex court:

> The expression "express agreement in writing" refers to an agreement made in words as opposed to an agreement which is to be inferred by conduct [...] It is thus necessary that there be an "express" agreement in writing. This agreement must be an agreement by which both parties, with full knowledge of the fact that Shri Khan is ineligible to be appointed as an arbitrator, still go ahead and say that they have full faith and confidence in him to continue as such.[45]

[34] In *TRF Ltd v Energo Engineering Projects Ltd*,[46] the clause provided that in case of dispute between the parties, the managing director of the buyer or his nominee be appointed as sole arbitrator to adjudicate the matter. The issue which arose was whether the managing director of the party who was obviously ineligible under section 12(5) of the 1996 Act could still appoint a nominee instead of acting as an arbitrator himself. The Supreme Court relying on the doctrine of "agency" held that once a person is ineligible to act as an arbitrator, he also ceases to have the power to appoint a nominee to act as an arbitrator. In *Perkins Eastman Architects DPC v HSDC (India) Ltd*,[47] the Supreme Court was dealing with a clause where the sole arbitrator could be appointed by

44 (2019) 5 SCC 755.
45 Ibid.
46 (2017) 8 SCC 377.
47 (2019) SCC OnLine SC 1517.

the chief managing director ("CMD") of the respondent. It was argued that the parties had not agreed that the CMD would act as an arbitrator. They had simply agreed that he would appoint the arbitrator. Even this was rejected by the Supreme Court. In *Voestalpine Schienen GMBH v Delhi Metro Rail Corp*,[48] the Supreme Court dealt with an arbitration clause which provided for the nomination of arbitrators and a panel of arbitrators to be appointed by the respondent ("DMRC"). This procedure was challenged as being contrary to section 12 of the 1996 Act. The court found the procedure of DMRC detaining the right to choose five members from its panel and restricting the right of the parties to appoint arbitrators from the said chosen arbitrators was not permissible.

[35] However, recently in the case of *Central Organization for Railways Electrification v ECI-SPIC-SMO-MCML*,[49] the clause provided that three gazetted railway officers or three former railway officers above a certain rank would constitute the arbitral tribunal. The railway was required to suggest two names out of the panel for appointment of its nominee arbitrator. The general manager of the appellant would have the discretion to choose one of the said names as the contractor's nominee. The general manager of the appellant would have to appoint the remaining two arbitrators either from the panel as suggested or otherwise. In this case, the Supreme Court felt that the said procedure would provide sufficient opportunity and freedom to the contractor to choose an arbitrator and the said procedure was required to be followed. The correctness of this decision has been doubted in *Tantia Constructions Ltd v Union of India*,[50] and sought a reference of the said case to a larger Bench. The said case is now pending adjudication before a five-judge Bench of the Supreme Court of India. It would be interesting to see the view taken by the Supreme Court in the matter, and whether there is greater acknowledgment of the role of the state in arbitration.[51]

48 (2017) 4 SCC 665.

49 (2020) 14 SCC 712.

50 AP No. 732/2018, decided on March 12, 2020.

51 In *Central Organisation For Railway Electrification v ECL-SPIC-SMO-MCML (JV), JSW Steel Ltd v South Western Railway* SLP(C) Nos. 24173-74 of 2019, a constitutional Bench of the Supreme Court is to decide on the validity of the system of unilateral appointment of arbitrators and whether such a system may be validly opted for by contracting parties.

State control and immunity of arbitrators

[36] As regards the immunity of arbitrators is concerned, the principles of immunity of arbitrators is based on the fact that the functions performed by the arbitrators can be compared to the functions performed by judges. Adjudication of disputes has been held to be sovereign in nature. It would therefore be arguable that the arbitral process itself can be viewed as a facet of state action.

[37] In *Sirros v Moore*,[52] the issue of judicial immunity was dealt with by Lord Denning MR who opined that:

> If the reason underlying immunity is to ensure "that they may be free in thought and independence in judgment" it applies to every judge, whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear.He should not have to turn the pages of his book with trembling fingers, asking himself: "If I do this, shall I be liable for damages?"

[38] The immunity of the arbitrator was also upheld in the case of *Sutcliffe v Thackrah*[53] where it was emphasised that arbitrators are much in the same position as judges. They carry out more or less the same functions and that the law has, for generations, recognised that public policy requires that they too shall be accorded the immunity. In the *Arenson v Casson Beckman Rutley and Co*,[54] the same principle was reiterated. However, an interesting question was raised by Lord Kilbrandon who saw no reason for the arbitrator to be immune from liability. This was shared by Justice Fraser who opined:

> What was the essential difference between the typical valuer, the auditor in the present case, and an arbitrator at common law or under the Arbitration Acts? It was conceded that an arbitrator is immune from suit, aside from fraud, but why? … I have come to be of the opinion that it is a necessary conclusion to be drawn from *Sutcliffe v Thackrah* and from the instant decision that an arbitrator at common law or under the Act is indeed a person selected by the parties for his expertise, whether technical or intellectual, that he pledges skills

52 [1975] QB 118.
53 [1974] AC 727.
54 [1977] AC 405.

> in exercise thereof, and that if he is negligent in that exercise he will be liable in damages.

[39] In section 29(1) of the English Act, it is provided that "An arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator unless the act or omission is known to have been in bad faith." The 1996 Report on the Arbitration Bill (for the English Act) which was prepared by the Departmental Advisory Committee ("DAC"), endorsed the idea that immunity was necessary for arbitrators just as it was necessary for judges. It was necessary to prevent the undermining of the arbitral process. Parties could try to re-arbitrate an issue on the basis that a competent arbitrator would have decided in favour of that party.

[40] However, Dr Hong-Lin Yu and Laurence Shore go deeper than a mere similarity in function and argue that:

> Looking at Section 29 in detail, in the DAC Report both paragraph 133, stressing the mandatory nature of this provision and paragraph 136 concluding that the court should be given the power to remove or modify the immunity as it sees fit when it removes the arbitrator, reveals that the arbitral immunity originates not from the parties' agreement but from the state.[55]

[41] In Indian jurisprudence, adjudication has been held to be a sovereign function and since arbitration consists of adjudication of disputes it is arguable that the functions of the arbitral tribunal are sovereign in nature. In *Kalpana Mehta v UOI & Ors*,[56] the apex court held that adjudication is the power of the court to decide and pronounce a judgment and carry it into effect between the person and the parties who bring a cause before it for a decision. Both for civil and criminal cases people look forward to courts for justice. To decide the controversy between its subjects has always been treated as part of sovereign functions. If a function is sovereign in nature the need for just and fair adjudication would be a *sine qua non*. Reference may be made to *Bharat Broadband*[57] – it was reiterated that there should

55 Hong-Lin Yu and Laurence Shore, "Independence, Impartiality and Immunity of Arbitrators – US and English Perspectives", see n 20 above, at 956.

56 (2018) 7 SCC 1 at [440].

57 *Bharat Broadband*, see n 44 above, at [16].

be certain minimum levels of independence and impartiality that should be required of the arbitral process regardless of the parties' agreement. Finally, in the case of *Vidya Drolia v Durga Trading Corp*,[58] it was held that the broader public policy goal was to have arbitration as a transparent, fair and just alternative to court adjudication. The protection and immunity of the arbitrators in the Indian statute must be viewed in the context of the above decisions.

[42] In the Indian statute, there is no equivalent to section 29(1) of the English Act. However, section 13 of the 1996 Act provides a challenge procedure to the appointment of the arbitrator. The two grounds on which the arbitrator can be removed are: (i) circumstances which give rise to justifiable doubts as to his independence or impartiality, or (ii) he does not possess the qualifications agreed to by the parties. However, if the other party does not agree with the challenge and the arbitrator also rejects the challenge the arbitral proceedings would continue. The only recourse left thereafter is to challenge the award once the same is passed. The aim seems to be to maintain the immunity of the arbitrator and enable the challenge only on limited grounds. Because of section 5 of the 1996 Act which limits judicial intervention except as provided therein, there is no other way that the arbitrator can be removed.

[43] Another interesting provision is section 29A of the 1996 Act which mandates a time limit of 12 months to complete the arbitral procedure from the date of the completion of the pleadings. Extension for another six months is possible with the consent of the parties after which the court has to be approached for further extension of time period. There is also a provision for reduction of fee of the arbitrator in case of delay beyond the limit prescribed which is attributable to the arbitrator. The above provisions reflect a balanced approach where there is some accountability of arbitrators built into the 1996 Act without compromising their immunity in any serious way.

[44] It is, therefore, clear that under the Indian law, the emphasis is on ensuring proper immunity for an arbitrator which is a recognition of the fact that the function being performed by the arbitrator does have a public interest element to it and, therefore, an arbitrator needs to be protected from the consequences of the decision which the arbitrator may take.

58 (2021) 2 SCC 1.

Recent developments: Reconciling party autonomy and state control

[45] The survey of the cases mentioned above would show that the allure of the principle of party autonomy did mesmerise the courts initially. Subsequently, there was an increasing consciousness of the need for procedural fairness and transparency. This reflected the growing awareness and inclination by the courts to dilute party autonomy in some measure to maintain minimum levels of impartiality, fairness and independence in arbitral proceedings. In the *DLF Home Developers Ltd v Rajapura Homes (P) Ltd*,[59] it was held that while adjudicating an application under section 11(6) the court could look beyond the bare existence of an arbitration clause. In *Indian Oil Corp Ltd v NCC Ltd*,[60] it was held that rewriting a contract for the parties would be a breach of fundamental principles of justice entitling a court to interfere since such a case would be one which shocks the conscience of the court and as such, would fall in the exceptional category.

[46] In a case totally unrelated to arbitration but having the potential for a deep impact in the debate of state control of arbitration, is the judgment of *Kaushal Kishore v State of UP* ("*Kaushal Kishore*").[61] The court had gone into the question of whether certain fundamental rights under Article 19 (right to freedom of expression, movement, etc.) or Article 21 (right to life) of the Constitution of India 1950 can be claimed against non-state actors as well. The law had been that such constitutional rights are enforceable only against states or government corporations and authorities. The court relied on the concept of horizontal and vertical effect and held that Part III of the Constitution which consists of Articles 19 and 21 has a horizontal effect. Whenever constitutional rights regulate and impact only the government and the government actors in their dealing with the private individuals they are said to have a vertical effect. But wherever the constitutional rights impact even the relations between private individuals they are said to have a horizontal effect. The judgment in *Kaushal Kishore* has by analysing precedents re-emphasised the fact that non-state actors and individuals are not beyond the ken of constitutional rights being enforced against them. Whether a party can make the claim of

59 2021 SCC Online SC 781 at [21].
60 (2023) 2 SCC 539.
61 (2023) 4 SCC 1.

constitutional rights under arbitration proceedings and if so what kind of rights is therefore an interesting question which would require a detailed treatment beyond the scope of this article. However, this judgment is relevant in the present debate to highlight the potential for deeper links between arbitral processes and the Constitution. If a party for example feels that there has been deprivation of equality of treatment in the entire process, can constitutional rights be invoked against the tribunal? This would be an interesting issue which would further determine the contours of the public/sovereign character of the arbitral process. It also paves the way for greater awareness of the dynamics of interplay between state power and arbitral processes.

[47] In the case of *Lombardi Engineering Ltd v Uttarakhand Jal Vidyut Nigam Ltd* ("*Lombardi Engineering Ltd*"),[62] it was held that for an arbitration clause to be legally binding it has to be in consonance with the "operation of law" which includes the Grundnorm, i.e. the Constitution. This decision represents the willingness of the court to go far deeper in its exploration of the interplay between arbitration and the Constitution, something which would normally be reserved for functioning of state authorities/government bodies, etc. This decision has been criticised on the ground that the Grundnorm cannot be equated to the Constitution.[63] Even if the reasoning of the judgment is controversial it is an important judgment marking a milestone in open acknowledgment of state power and control with respect to arbitration.

[48] Furthermore, in several instances where the Supreme Court of India has upheld the principle of fairness in arbitration agreements involving private entities, there has been a consistent reliance on the doctrine of conscionability. In *SK Jain v State of Haryana*,[64] *ICOMM Tele Ltd v Punjab State Water Supply and Sewerage Board & Anor*[65] and *Lombardi Engineering Ltd*, the court has gone so far as to employ the test of conscionability in order to decide if certain clauses in the arbitration agreement can be ruled to be unconscionable and subsequently

62 2023 SCC Online SC 1422.

63 Shweta Kushe, "*Lombardi Engineering v UVNL*: 'Arbitrariness' over 'Party Autonomy'? A Response", *Indian Constitutional Law and Philosophy* (December 2023), available at https://indconlawphil.wordpress.com/2023/12/06/guest-post-lombardi-engineering-v-uvnl-arbitrariness-over-party-autonomy-a-response/.

64 (2009) 4 SCC 357.

65 (2019) 4 SCC 401.

invalid. In doing so, the court performs its sovereign function *per se* by utilising the doctrine of unconscionability to conduct a thorough and extensive examination of fairness and disparities in bargaining power among parties involved in arbitration proceedings. This not only underscores the court's commitment to upholding fairness but also signifies its proactive involvement in ensuring equity and rule of law in the realm of arbitration.

Conclusion

[49] Indian courts had been mesmerised by the doctrine of party autonomy in arbitration till the 2015 amendments were brought in. In viewing arbitration as an alternative to courts, the Indian courts do not seem to have paid much attention to the fact that ultimately even arbitration is another route of access to justice and very much part of the rule of law. As Claudia Salomon, President of the International Chamber of Commerce ("ICC") wrote in her article "ICC Arbitration Enabling Justice and Rule of Law" that "since the ICC Court was established in 1923, it has been committed to providing access to justice and the rule of law."[66]

[50] If justice is the objective of arbitration as well, then permeation of state control is imperative and inevitable. Dr Hong-Lin Yu and Laurence Shore go to the heart of the matter with remarkable clarity in stating that it is only the state that can cede powers to the parties and to the arbitrators.[67] The assertion of fairness and integrity in the arbitral process is a recognition of the need for state control and state intervention. In fact, the very enactment of the Arbitration and Conciliation Act 1996 represents the framework through which state power to adjudicate the disputes is shared with the private parties.

[51] The Indian courts had emphasised the need for procedural fairness and transparency as essential for the legitimacy of the process, however, they did not expound with clarity, the ultimate basis for such principles. There have been recent attempts at engaging with the relationship between state power and arbitration, however it

66 Claudia Salomon, "ICC Arbitration: Enabling Justice and the Rule of Law" (2023) *Delhi High Court Bar Association Quarterly Bar Review* 57, available at https://trilegal.com/wp-content/uploads/2023/09/QBR-2023.pdf.

67 Hong-Lin Yu and Laurence Shore, "Independence, Impartiality and Immunity of Arbitrators – US and English Perspectives", see n 20 above.

has been limited and at times lacking clarity as the case of *Lombardi Engineering Ltd* would show.[68]

[52] Lord Kilbrandon in *Arenson v Casson Beckman Rutley*[69] gave deep clarity on the interplay between arbitration and state power when he opined:

> The State – I use the word for convenience – sets up a judicial system, which includes not only the courts of Justice but also the numerous tribunals, statutory arbitrators, commissioners and so on, who give decisions, whether final or not, on matters in which the state has given them competence […] You do not test a claim to immunity by asking whether the claimant is bound to act judicially; such a question, as Lord Reid pointed out in *Sutcliffe v Thackrah* leads to arguing in a circle. Immunity is judged by the origin and character of the appointment, not by the duties which the appointee has to perform, or his methods of performing them.[70]

[53] At the same time there should not be what the great Indian jurist Fali S Nariman has termed as the "judicialisation of arbitration" where arbitral proceedings start resembling court proceedings. In the 10th Annual Goff Lecture, he has elegantly articulated the precise difference between court proceedings and arbitration even though both are procedures for access to justice. He stated:

> Arbitrators do not have to imitate the courts. Commercial justice can be dispensed without the turn of phrase and the logic which is expected from the court of appeal. The AAA and the Commonwealth Associations have survived without giving reasons … Our function was to decide, not to teach.[71]

[54] Undoubtedly arbitration must remain fast, flexible, informal, private, relatively inexpensive, and conducive to finality. At the same time, the roots of arbitration must be affirmed, acknowledged and never forgotten, it is ultimately an instrument of access to justice which makes the process a facet of sovereignty and the rule of law.

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68 *Lombardi Engineering Ltd*, see n 62 above; and see Shweta Kushe, "*Lombardi Engineering v UVNL*: 'Arbitrariness' over 'Party Autonomy'? A Response", see n 63 above.

69 [1977] AC 405 at 431.

70 Ibid.

71 Fali S Nariman, "The Spirit of Arbitration: The Tenth Annual Goff Lecture", see n 2 above, at 263.

State control or state intervention should not be viewed as antithetical to arbitration but must be seen as something which is part and parcel of arbitration and supplements and strengthens arbitration. This is precisely because arbitration is not the rejection of rule of law, but it seeks to strengthen it.[72] While it is accurate to assert that arbitration critiques many aspects of traditional law, it undeniably holds a distinctive and crucial role within any legal framework. Consequently, it can be viewed as an advanced application within the same framework, rather than a departure from it.[73] As the Supreme Court of India has itself held that one must balance and weigh a private right against public order, and where a private bargain does not cause harm to the public order, the court must allow for the private bargain to flourish.[74] One should heed the call of Lord Mance:

> In short, an increasingly interconnected world needs mutually supportive and inter-related systems for the administration of law, not more legal systems. Arbitration already offers those engaging in it very substantial autonomy. Siren calls for complete or yet further autonomy should be viewed with skepticism. We – judges, arbitrators and lawyers – are engaged in common exercise, the administration of justice for the benefit of litigants and society. A degree of order, coordination and inter-dependence is necessary and desirable, if this exercise is to be conducted efficiently and economically in a globalised world."[75]

72 Jan Paulsson, "Arbitration in Three Dimensions" *The International and Comparative Law Quarterly*, (2011) 60(2) Cambridge University Press (April) 291–323, available online at <https://www.jstor.org/stable/23017003>.

73 Ibid.

74 *PASL Wind Solutions v GE Power Conversion India Pvt Ltd* (2021) 7 SCC 1.

75 Lord Mance, "Arbitration: A Law Unto Itself?", see n 10 above.

Artificial Intelligence: The Game Changer in Legal Services and Beyond

by

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Abstract: The incorporation of artificial intelligence ("AI") into the legal field has initiated a profound revolution, altering conventional paradigms and reinventing the delivery of legal services. This article examines the ramifications of this revolutionary technology on legal education and practice, as well as the complex relationship that exists between AI and the legal profession. The article begins with an introduction that contextualises AI in the sphere of law, emphasising the advancements and breakthroughs that AI has produced in legal services such as automating documentation, improving research capabilities, and predicting case outcomes. The article then proceeds to discuss the key legal and ethical concerns arising from AI's integration into the legal arena including privacy, biases, and accountability, acknowledging the critical nature of these concerns in the age of AI. Beyond the legal and ethical concerns, the article also addresses the paradigm shift that AI has brought about in the realm of legal education through enhancing research capacities, automating legal processes, and fostering critical thinking. Ultimately, this article presents significant observations regarding the implications of AI in the field of law, advocating for a proactive stance that capitalises on its advantages while mitigating potential obstacles. As AI becomes a mainstream for the legal profession, there is a growing call that law students and instructors acquire the necessary competencies to succeed in this dynamic environment.

Introduction to artificial intelligence and law

[1] The transition spanning over the past few decades has been an age of tremendous change and innovation, coupled with the heyday

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of rapid technological evolution, which has held the potential to alter the demographics of various industries, one of them being the field of legal services. AI is one such technological frontier that, among others, has found its place in the highly detailed and intricate domain of legal services. The present article embarks on a journey of intellectual discourse to delve into various applications, implications and associated challenges that are bound to arise as AI is integrated within the legal domain. In order to achieve a thorough comprehension of the subject matter, it is necessary to investigate the interrelationship of different themes rather than analysing them in isolation. On this note, understanding the intricate relationship between AI and the field of law holds significant importance. Hence, the objective of this article is to provide a systematic and scholarly evaluation of the link between AI and the discipline of law.

[2] This article highlights the various intersections between AI and the legal domain, with the ultimate effect of revolutionising legal education. To provide a nuanced and comprehensive analysis, the authors anatomise this article methodically by dividing it into four parts as follows: Part 1 contextualizes AI; Part 2 delves into the central applications of AI within the realm of law; Part 3 engages in a critical discourse on the many legal and ethical considerations raised by AI; and Part 4 reflects upon the transformative potential of AI to revolutionise legal education, and concludes with our synthesised insights.

Contextualising artificial intelligence

[3] First and foremost, it is essential to have a firm grasp of AI. Although non-technical individuals may be unfamiliar with the intricacies of AI, it is likely that they have interacted with AI applications without being aware of it. Experts cannot agree on a single definition of AI, which makes it difficult to define.[1] Bearing this in mind, the works of literature provide valuable insights and perspectives on AI definition, aiding in the comprehensive understanding of this pivotal technological advancement. The purposes and goals of AI development have evolved over time. Since the start of computers, there has been a growing belief among humans that machines had

1 Matthew U Scherer, "Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies" (2015) 29(2) *Harvard Journal of Law & Technology* 354–98.

capabilities beyond ordinary tasks that necessitate intelligence. McCarthy, Minsky, Newell, and Simon are widely acknowledged as the pioneering figures in the establishment and advancement of the contemporary field of AI research.[2] The reason for their significant influence in the field of AI extends beyond their mere attendance at the Dartmouth meeting, when the term "artificial intelligence" was initially coined.

[4] Their impact may be attributed to the establishment of three prominent research institutions, which have played a pivotal role in shaping the prevailing trajectory of AI for several decades.[3] Moreover, the historical progression has witnessed the identification of AI through the emergence and advancement of several approaches, including but not limited to theorem proving, heuristic search, game playing, expert systems, neural networks, Bayesian networks, data mining, agents, and more recently, deep learning.[4] Due to the distinct theoretical underpinnings and problem-specific applications, AI has given rise to several subdomains, including knowledge representation, reasoning, planning, machine learning, vision, natural language processing, and robotics, among others.

[5] AI is conceptualised as computer systems that, in some ways, resemble the human mind. However, a computer and a human mind cannot be identical in every way.[5] The ambiguity of intelligence is at the core of the problem in defining AI. It is expected that intelligence is defined based on human characteristics including consciousness, self-awareness, language use, the ability to learn, the ability to abstract, the ability to adapt, and the ability to reason. The predominant rationale is that humans are universally acknowledged as the sole entities possessing intelligence. From these overarching principles, various sub-approaches to defining AI arise:

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2 George F Luger, "A Brief History and Foundations for Modern Artificial Intelligence" (2023) 17(1) *International Journal of Semantic Computing* 123–45, available at https://doi.org/10.1142/S1793351X22500076.

3 Michael Haenlein and Andreas Kaplan, "A Brief History of Artificial Intelligence: On the Past, Present, and Future of Artificial Intelligence" (2019) 61(4) *California Management Review* 1–10.

4 Nikesh Muthukrishnan *et al*, "Brief History of Artificial Intelligence" (2020) 30(4) *Neuroimaging Clinics of North America* 393–99.

5 Pei Wang, "On Defining Artificial Intelligence" (2019) 10(2) *Journal of Artificial General Intelligence* 1–37.

(1) **Structure AI:** From this standpoint, the primary criterion and rationale for the design is its resemblance to the brain, rather than being solely seen as a source of inspiration.[6] This approach is alternatively referred to as the brain-modelling project.

(2) **Behaviour AI:** One potential approach to recognising a mind like that of a person, without necessitating a brain that resembles a human brain, is to attribute intelligence based on the observable behaviours exhibited by the entity. In light of the aforementioned, it is reasonable to assert that an agent exhibiting human-like behaviour should be deemed intelligent, irrespective of its physical resemblance to a human, both internally and externally.[7]

(3) **Performance of intellectual task:** Other preliminary approaches to define AI frequently equated intelligence with the capacity to perform specific intellectual tasks that were formerly considered in the human domain.[8] As a result, conceptions of what constitutes AI have evolved over time as technological advancements have enabled computers to perform tasks that were once regarded as indelible characteristics of intelligence.[9]

(4) **Machines' ability to achieve specific goals:** Currently, it appears that the most popular approach to defining AI focuses on the concept of goal-directed devices as a key component of "acting rationally".[10] If the AI system achieves the objective its creator programmed it to achieve, it meets the definition.[11] It is arguable that this definition of AI is overly simplistic and does not

6 Spence Green, Jeffrey Heer and Christopher D Manning, "Natural Language Translation at the Intersection of AI and HCI Old Questions Being Answered with Both AI and HCI" (2015) 13(6) *ACM Queue* 1–13.

7 Bernardo Gonçalves, "The Turing Test Is a Thought Experiment" (2023) 33(1) *Minds and Machines* 1–31.

8 William J Rapaport, "Philosophy of Artificial Intelligence: A Course Outline" (1986) 9(2) *Teaching Philosophy* 1–24.

9 Henrik Svensson, Anthony Morse and Tom Ziemke, "Representation as Internal Simulation: A Minimalistic Robotic Model" (2009) *Proceedings of the Thirty-First Annual Conference of the Cognitive Science Society* 2890–95.

10 Stuart Russell and Peter Norvig, *Artificial Intelligence: A Modern Approach (Global Edition)*, 4th edn (2021).

11 Vaibhav Gavane, "A Measure of Real-Time Intelligence" (2013) 4(1) *Journal of Artificial General Intelligence* 31–48.

> accurately reflect its capabilities. Many computer programmes that pose no risk to the public can be associated with correct, rational behaviour. Computer chess programmes, for instance, strive to achieve the best possible outcome within the constraints of predefined sets of rules, and so could be described as acting rationally (because they accomplish their objective). Certainly, there appears to be no need to regulate the development of such harmless programmes and systems as currently exist.[12]

[6] In the context of this article, in order to provide a viable and comprehensive evaluation of the intersection between AI and the field of law, the term "artificial intelligence" pertains to the ability of machines to do tasks that would typically require human intelligence.[13]

Interactions between artificial intelligence and law

[7] Understanding the intricate relationship between AI and law necessitates considering three pivotal interactions: law applied to computer science, computer science applied to law, and the jurisprudence of AI.

[8] The first interaction revolves around the application of the law to computer science. It concerns AI being generally acknowledged as an interdisciplinary field of computer science in which legal principles and regulations are integrated into the development and application of AI technologies.[14] This interaction guarantees that AI systems adhere to legal and ethical standards, thereby reducing possible hazards and safeguarding social interests. Consequently, legal knowledge is used to the development and execution of AI systems.[15]

[9] In contrast, the application of computer science to the field of law involves using AI and related technologies to improve legal processes, decision-making and information management. Legal professionals can go far beyond keyword-based searches

12 Pei Wang, "On Defining Artificial Intelligence", see n 5 above.

13 Matthew U Scherer, "Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies", see n 1 above.

14 Le Cheng and Xiuli Liu, "From Principles to Practices: The Intertextual Interaction between AI Ethical and Legal Discourses" (2023) 8(1) *International Journal of Legal Discourse* 31–52.

15 Katie Atkinson and Trevor Bench-Capon, "Argumentation Schemes in AI and Law" (2021) 12(3) *Argument and Computation* 5–21.

and Boolean operators. Instead, they can use information retrieval techniques, data analysis and machine learning algorithms to not only perform legal research more quickly, but to automate mundane, repetitive tasks and produce a more nuanced analysis of a large body of data. In other words, computer science is allowing savvy legal professionals to merge cutting-edge instruments and techniques to become more productive, and to aid in making better, more informed decisions.

[10] In the context of the jurisprudence of AI, it is imperative to delve into the study of legal principles, norms, and frameworks that govern AI systems and their societal implications.[16] This encompasses a thorough examination of liability, accountability, and fairness concerns associated with the deployment of AI. As AI continues to permeate diverse fields, a comprehensive understanding of its legal implications becomes paramount, necessitating the formulation of appropriate regulations and policies.[17] The field of jurisprudence of AI aims to tackle these intricate legal and ethical challenges, ultimately shaping the legal landscape in this era of AI.

Artificial intelligence reshaping the legal profession: Some breakthroughs

[11] The legal industry is amid a profound transformation, propelled by the rapid evolution of AI technologies and platforms. These technological breakthroughs are revolutionising traditional legal methodologies and processes, promising unprecedented efficiency and accuracy in legal practice. Several notable AI-powered platforms have emerged, each making a significant impact on different facets of legal practice, enhancing various aspects of the legal profession.

16 Josh Paul Davis, "Law Without Mind: AI, Ethics, and Jurisprudence" (2018) 4(32) *SSRN Electronic Journal* 145–67.

17 Abdul Paliwala, "Rediscovering Artificial Intelligence and Law: An Inadequate Jurisprudence?" (2016) 30(3) *International Review of Law, Computers and Technology* 23–43.

Table 1: Examples of AI Use Case in the Legal Industry

Use Case	Description
ROSS Intelligence	ROSS Intelligence is a pioneering platform at the forefront of reshaping legal research. By harnessing the power of AI, it has redefined the way legal professionals conduct research. The platform offers lawyers access to relevant case law, statutes, and regulations in response to queries expressed in plain language.[18] This functionality significantly expedites and refines the information retrieval process, doing away with the need for labourious manual searches through extensive legal documents. As a result, lawyers can vastly improve their productivity, dedicating more time to the crucial task of analysing and effectively applying the law to address the unique requirements of their clients.[19]
Lex Machina	In the domain of intellectual property litigation analysis, Lex Machina is making remarkable strides through its innovative use of AI. Lex Machina utilises AI to extract and meticulously analyse patent and lawsuit data. The platform's comprehensive analysis of an extensive collection of data provides valuable insights that guide legal professionals in making strategic decisions related to intellectual property matters.[20] By assessing patent strength and understanding litigation trends, the AI-powered platform aids lawyers in constructing stronger claims and achieving favourable outcomes.[21]

18 David Houlihan, "ROSS Intelligence Artificial Intelligence in Legal Research ROSS Intelligence and Artificial Intelligence in Legal Research" (2017) 3 *Blue Hill Research* 231–45.

19 Sharon D Nelson and John W Simek, "Running with the Machines: Artificial Intelligence in the Practice of Law" (2018) 35(10) *Computer & Internet Lawyer* 1–7.

20 Mary Ann Neary and Sherry Xin Chen, "Artificial Intelligence: Legal Research and Law Librarians" (2017) 21(5) *AALL Spectrum* 16–20.

21 Valentin Jeutner, *Lex Machina: Unlikely Encounters of International Law and Technology*, (2020).

Blue J Legal	Tax law, known for its complexity and uncertainty, undergoes a significant transformation through the application of AI by Blue J Legal. This platform addresses the intricacies of tax law by leveraging AI to offer tax law prediction. Tax professionals benefit from the platform's ability to analyse intricate tax scenarios, enabling them to evaluate potential outcomes and provide recommendations grounded in historical precedents.[22] Using AI, tax professionals navigate the complex terrain of tax legislation with increased confidence and precision. This ensures compliance with regulatory requirements and minimises potential liabilities on behalf of their clients.[23]
Kira Systems and eBrevia	In the domain of contract review and due diligence, AI is proving to be a game-changer through platforms like Kira Systems and eBrevia. These platforms automate contract analysis, utilising sophisticated AI algorithms. During mergers, acquisitions, and contract review processes, these platforms efficiently extract crucial information, identify risks, and aid in due diligence.[24] Legal professionals can significantly enhance their productivity, reduce risks, and make informed decisions based on comprehensive contract insights by leveraging the power of AI.

[12] These cutting-edge AI technologies and platforms have the ability to radically transform the legal landscape. They enhance efficiency, accuracy, and strategic decision-making within the legal profession. As AI continues to evolve, its influence on the legal industry is expected to grow, further optimising legal processes and empowering legal professionals to deliver exceptional services to their clients. The future

22 Benjamin Alarie, Anthony Niblett and Albert Yoon, "Using Machine Learning to Predict Outcomes in Tax Law" (2016) 58(3) *SSRN Electronic Journal* 1–23, available at https://doi.org/10.2139/ssrn.2855977.

23 Peter I Macreadie *et al*, "Operationalizing Marketable Blue Carbon" (2022) 5(5) *One Earth*, 485–492.

24 Paul Dunker, "Deloitte Forms Alliance with Kira Systems to Drive the Adoption of Artificial Intelligence in the Workplace" Deloitte, 2016.

promises continued advancements in AI, offering a glimpse into a legal landscape driven by intelligent technologies.

Exploring the implications of artificial intelligence-powered legal profession

[13] AI advancements have resulted in enormous efficiency benefits, with far-reaching consequences for various parts of the legal profession. The legal sector is significantly altered in its approach to practise due to the far-reaching implications of the technology, which include improved efficiency and the automation of critical procedures.

A. Efficiency improvements: Towards automating the legal industry

[14] Advancements in AI have heralded a new era in the legal industry, bringing forth substantial efficiency gains and transformative shifts across various domains. The implications of AI in the legal sector are diverse, encompassing efficiency improvements and the automation of key processes.[25] One of the significant areas where AI has made a notable impact is in improving efficiency and automating routine legal processes. AI-powered technologies have revolutionised legal research, document management, contract review, due diligence, and case management, leading to substantial time savings and increased productivity.[26]

(1) **Automated legal research:** Automated legal research stands out as a hallmark of AI's influence. AI-powered tools quickly search and analyse extensive legal databases, providing legal professionals with relevant case law, statutes, and regulations in a fraction of the time that manual research methods would require.[27] This enables informed decision-making and enhances the quality of legal arguments.

(2) **Document automation:** Document automation is another facet where AI has shown its prowess. AI systems can autonomously populate legal document templates with relevant information,

25 Laura Stoskute, "How Artificial Intelligence Is Transforming the Legal Profession" in Susanne Chishti (ed-in-chief) *et al*, *The LegalTech Book* (2020), pp 32–43.

26 Jeffrey A Burt, "The Revolutionary Impact of Artificial Intelligence on the Future of the Legal Profession" (2021) 8(3) *Kutafin Law Review* 21–33.

27 Samuel Maireg Biresaw and Abhijit Umesh Saste, "The Impacts of Artificial Intelligence on Research in the Legal Profession" (2022) 5(1) *International Journal of Law and Society* 12–18.

significantly reducing the time and manual effort required for document preparation and review.[28] Legal professionals can then focus on tasks that require higher cognitive input.

(3) **Streamlined due diligence:** In the due diligence process, AI can rapidly evaluate and analyse documents, expediting the identification of essential information and potential risks.[29] This enhances the efficiency of due diligence exercises, a critical aspect of legal proceedings.

(4) **Faster contract review:** Contract review, often a time-consuming task, is streamlined with AI-powered contract analysis tools. These tools swiftly examine contracts, extract essential provisions and clauses, and expedite the review process, allowing legal professionals to manage a greater quantity of contracts in less time.[30]

(5) **Efficient case management:** Case management is made more efficient through the automation of tasks such as document indexing and deadline management.[31] By relieving legal professionals of repetitive administrative tasks, AI enables them to focus on more complex and strategic aspects of their cases.

(6) **Improved legal analytics:** Moreover, AI-driven legal analytics provide valuable insights and predictions by analysing vast amounts of legal data. This empowers legal professionals to make informed decisions based on a comprehensive analysis of legal data.[32]

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28 Michael Legg and Felicity Bell, "Artificial Intelligence and the Legal Profession: Becoming the AI-Enhanced Lawyer" (2019) 38(2) *University of Tasmania Law Review* 43–51.

29 William J Connell, "Artificial Intelligence in the Legal Profession – What You Might Want to Know" (2018) 35(9) *Computer & Internet Lawyer* 32–38.

30 Jagger S Bellagarda and Adnan M Abu-Mahfouz, "An Updated Survey on the Convergence of Distributed Ledger Technology and Artificial Intelligence: Current State, Major Challenges and Future Direction" (2022) 10(5) *IEEE Access* 22–42.

31 Anthony E Davis, "The Future of Law Firms (and Lawyers) in the Age of Artificial Intelligence" (2020) 16(1) *Revista Direito GV* 12–18.

32 Ephraim Nissan, "Digital Technologies and Artificial Intelligence's Present and Foreseeable Impact on Lawyering, Judging, Policing and Law Enforcement" (2017) 32(3) *AI and Society* 45–58.

B. The legal tech startup ecosystem

[15] In tandem with the rise of AI in the legal industry, an increase legal tech startup ecosystem is emerging. These firms are utilising AI to provide unique solutions to enduring problems in the legal industry. For instance, the creation of new legal tech companies. The current legal technology industry is experiencing the emergence of multiple startup companies that utilise AI to cater to distinct legal requirements. Casetext and its AI legal assistant, CoCounsel, is an example of a startup that has created a legal assistant powered by AI. The CoCounsel platform enables legal professionals to inquire about research matters in an approach like the queries directed towards junior associates.[33] This novel tool serves as a prime example of the potential of AI in augmenting the capabilities of legal research.

[16] Consequently, the growing ecosystem of legal tech companies provides diverse AI products. The legal tech ecosystem is quickly expanding, with a growing number of companies offering AI-based products and services tailored to the legal industry.[34] These businesses are at the highest level of innovation and are stretching the limits of what is possible in legal practice. The progress in AI has opened up possibilities for the complete automation of legal services, encompassing tasks such as document creation and the supply of legal counsel.[35] This development presents novel opportunities for enhanced accessibility to legal services and improved efficiency. In this context, there is a call for updated legal and policy frameworks to support this disruptive innovation. As AI continues to disrupt the legal industry, it is essential to have legal and policy frameworks that can accommodate these technological advancements. Ultimately, given the profound implications and transformative potential of AI in the legal field, it is of paramount importance to ensure its responsible and ethical use. To achieve this, regulatory bodies must undergo necessary

33 Susan Nevelow Mart, "The Algorithm as a Human Artifact: Implications for Legal [Re]Search" (2017) 109(3) *Law Library Journal* 21–41, available at https://doi.org/10.2139/ssrn.2859720.

34 Katrina Lee, Susan Azyndar and Ingrid Mattson, "A New Era: Integrating Today's 'Next Gen' Research Tools Ravel and Casetext in the Law School Classroom" (2015) 4(7) *SSRN Electronic Journal* 76–89, available at https://doi.org/10.2139/ssrn.2550430.

35 Darren Dalcher, "The Quest for Artificial Intelligence in Projects" (2022) XI(III) *PM World Journal* XI 45–66.

adaptations of integrating technology and implement workable and viable guidelines and approaches.

C. Artificial intelligence creating a future-proof workforce

[17] AI is poised to revolutionise various sectors, presenting immense opportunities for transformation. However, it is pivotal to understand that effective utilisation of AI tools goes beyond a simple click of a button. Human expertise and knowledge remain indispensable, constituting a critical aspect in the successful integration of AI technologies.[36] To develop a workforce that can effectively harness the benefits of AI, several essential factors need careful consideration.

[18] First and foremost, AI should be viewed as a complement to human skills rather than a substitute. The optimal use of AI is as a supplement to human capabilities, enhancing and augmenting the abilities of legal professionals. The ability to seamlessly meld AI with human judgment and experience is key, allowing the strengths of each to be fully leveraged to achieve optimal outcomes.[37] As such, upskilling is crucial for legal professionals to harness the opportunities that AI presents. This requires new skill sets that include, among other things, the ability to: choose from the proliferation of AI tools that have emerged for nearly all legal tasks; frame appropriate queries; evaluate the relevance and accuracy of the responses they receive and, when it is not, quickly refine their queries; combine AI-generated findings with other sources of information into a coherent deliberative framework that can be used to shape strategic decisions or negotiations; and guard against the leakage of confidential information when employing AI tools.[38]

[19] Secondly, law firms should adopt a proactive approach in this evolving landscape by offering training programmes to practitioners. These programmes are pivotal in enabling legal professionals to acquire the requisite skills needed to navigate the AI-driven environment

36 Niti Nipuna Saxena, "Artificial Intelligence in Legal Profession: Pros, Cons and Challenges" (2022) 3(10) *HARIDRA* 32–44.

37 John Armour, Richard Parnham and Mari Sako, "Augmented Lawyering" (2022) 1 *University of Illinois Law Review* 7–21.

38 Ni Xu, Kung Jeng Wang and Chen Yang Lin, "Technology Acceptance Model for Lawyer Robots with AI: A Quantitative Survey" (2022) 14(4) *International Journal of Social Robotics* 15–33.

effectively.[39] These training sessions should focus on the successful utilisation of AI research and writing tools, as well as the seamless integration of AI into legal practice.

[20] Building on this, the third key consideration is to update and review law school curricula to include education on AI writing and research tools which is equally vital.[40] This strategic enhancement ensures that future lawyers are equipped with the necessary abilities to thrive in the dynamically changing legal landscape. It provides them with a foundational understanding of AI and its practical applications in the legal domain, making them adept in utilising AI as a valuable tool in their future legal careers.

Legal analysis of AI: Lessons learned from *State v Loomis*[41]

[21] The rise of AI as a disruptive force across a wide swath of industries has also spawned a growing number of complex legal issues, confronting existing regulatory and ethical paradigms head-on.[42] These legal puzzles arise from AI's core qualities: autonomy, complexity, and ability to independently learn and decide. While these attributes hold great promise, they also introduce enormous, often disorienting legal implications that encompass accountability, privacy, bias, and transparency, among other areas. We are still just beginning to unravel how law will interface with and regulate AI technologies, and the scope and range of AI's legal implications are vast. Consider the backdrop: AI touches on intellectual property rights, privacy concerns with surveillance technology, age-old product liability laws in context of autonomous vehicles, and even employment law and worker displacement as AI and automation steadily encroach across all industries.

[22] Amidst this broad spectrum of legal considerations, the use of AI for criminal sentencing emerges as a particularly contentious and critical issue, meriting focused discussion. This application of

39 Evgenia E Frolova and Elena P Ermakova, "Utilizing Artificial Intelligence in Legal Practice" in *Smart Innovation, Systems and Technologies*, Vol 254 (2022), pp 34–56.

40 Zhiqiong June Wang, "Between Constancy and Change: Legal Practice and Legal Education in the Age of Technology" (2019) 36(1) *Law in Context. A Socio-Legal Journal* 7–15.

41 881 NW2d 749 (Wis 2016).

42 Harry Surden, "Artificial Intelligence and Law: An Overview," (2019) 35(4) *Georgia State University Law Review* 1306–37.

AI intersects with fundamental rights and principles at the heart of the justice system, raising profound questions about fairness, bias, and the essence of human judgment. The potential for AI to influence decisions that affect the liberty of individuals places it at a nexus of legal, ethical, and societal concerns. As such, this article will specifically delve into the legal issues surrounding the use of AI in criminal sentencing.

[23] In the United States, the integration of AI into the judicial system, particularly in the context of criminal sentencing, represents a significant shift towards leveraging technology to inform and potentially streamline legal processes.[43] This shift is most prominently observed through the deployment of risk assessment tools, sophisticated AI algorithms designed to predict the likelihood of a defendant reoffending or failing to appear for court hearings. COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) is one of these algorithms which has been rolled out in various jurisdictions across the United States ("US"). These algorithms can crunch through enormous amounts of data much faster than their human counterparts. In doing so, they can find patterns and correlations that may not be immediately obvious.[44] Therefore, they provide a more data-driven way of assessing the dangers in freeing or sentencing certain people and should, in theory, make the judicial process less arbitrary and more objective. This capability is particularly valuable in a system striving for fairness and efficiency – as it can contribute to more informed sentencing decisions, potentially lowering the frequency of recidivism and enabling the allocation of resources towards individuals who would benefit most from rehabilitation programs.[45] Moreover, AI-driven tools can assist in confronting the challenge of overcrowded prison systems. By accurately identifying individuals with a lower risk of reoffending, judges can consider alternatives to incarceration for lower-level offences, such as community service or electronic monitoring, which not only alleviates prison population

43 Aleš Završnik, "Criminal Justice, Artificial Intelligence Systems, and Human Rights," (2020) 20(3) *ERA Forum* 567–583.

44 Eugenie Jackson and Christina Mendoza, "Setting the Record Straight: What the COMPAS Core Risk and Need Assessment Is and Is Not," (2020) 2(1) *Harvard Data Science Review* 1–15.

45 Isaac Taylor, "Justice by Algorithm: The Limits of AI in Criminal Sentencing," (2023) 42(3) *Criminal Justice Ethics* 193–213.

pressures but supports the work necessary to safely return offenders back into the community.[46]

[24] COMPAS operates by scrutinising an extensive range of data points pertaining to a defendant, encompassing factors such as their criminal record, age, job situation, and educational attainment.[47] This data is then processed through machine learning algorithms that have been trained on historical datasets to identify patterns and predictors of future behaviour. The output is a risk score that predicts the defendant's likelihood of reoffending or failing to comply with court orders, providing judges with additional insights when making sentencing decisions.[48] It is crucial to note that these tools are designed to supplement, not replace, the judge's discretion. They provide a statistical assessment that must be weighed alongside the broader context of each case, including factors that cannot be quantified, such as the circumstances leading to the offence and the defendant's personal history.

[25] While AI promises to enhance the efficiency and consistency of sentencing decisions, its deployment raises critical concerns, particularly regarding bias, due process, and the opacity of algorithmic decision-making processes. A landmark case that illuminates these issues is the Wisconsin case, *State v Loomis*, where the use of the COMPAS risk assessment tool in sentencing was contested.

Facts and decision in State v Loomis

[26] In 2013, Eric Loomis was charged in Wisconsin with offences related to a drive-by shooting, including recklessly endangering safety and possession of a firearm by a felon. Loomis pleaded guilty to two charges, while others were considered during sentencing without a conviction.[49] The sentencing process incorporated a COMPAS risk assessment, which classified Loomis as a high recidivism risk, leading to a six-year imprisonment sentence and five years of supervision.

46 A Washington, "How to Argue with an Algorithm: Lessons from the COMPAS-ProPublica Debate," (2019) 17(1) *The Colorado Technology Law Journal* 132–60.

47 Alexander P. Sukhodolov and Anna M. Bychkova, "Artificial Intelligence in Crime Counteraction, Prediction, Prevention and Evolution," *Russian Journal of Criminology* 12, no. 6 (2018): 753–66.

48 Ibid.

49 Ryan Calo, "Artificial Intelligence Policy: A Primer and Roadmap," (2019) 3(2) *University of Bologna Law Review* 180–218.

Challenging this, Loomis sought post-conviction relief, arguing the use of COMPAS in sentencing violated his due process rights by relying on opaque data, impairing individualised sentencing, and incorporating gender-based assessments.

[27] The Wisconsin Supreme Court dismissed Loomis's claims. It held that the risk assessment's reliance on criminal history and questionnaire responses allowed Loomis to challenge its accuracy. The court also maintained that COMPAS served as one of many factors in sentencing, thus preserving individualised sentencing principles. On the gender issue, the court found no due process violation, suggesting that gender inclusion in risk assessments could improve accuracy. While the court rejected Loomis's appeals, it imposed nominal restrictions on COMPAS's use, emphasising its role as a supplementary factor in sentencing. The court mandated that any pre-sentencing investigation report featuring a COMPAS risk-assessment score must include a "written advisement" outlining its limitations. This advisement should clarify that:

(1) COMPAS is a proprietary tool, which has prevented the disclosure of specific information about the weights of the factors or how risk scores are calculated.

(2) COMPAS scores are based on group data, and therefore identify groups with characteristics that make them high-risk offenders, not particularly high-risk individuals.

(3) Several studies have suggested the COMPAS algorithm may be biased in how it classifies minority offenders.

(4) COMPAS compares defendants to a national sample but has not completed a cross-validation study for a Wisconsin population, and tools like this must be constantly monitored and updated for accuracy as populations change.

(5) COMPAS was not originally developed for use at sentencing *State v Loomis*.

Critique of the use of COMPAS in State v Loomis

[28] The *State v Loomis* case has emerged as a pivotal point of discussion in the intersection of law, technology, and ethics, spotlighting the critical issue of algorithmic bias and discrimination within judicial

sentencing.[50] This case is emblematic of the broader concerns about the increasing reliance on algorithmic tools in the criminal justice system and the ethical and legal challenges this reliance engenders, especially in terms of bias and fairness.[51] At the heart of these concerns – and of the *Loomis* case specifically – is the now infamous COMPAS risk assessment tool. Designed to forecast the likelihood of a defendant reoffending, the critique of COMPAS in *Loomis* raises basic questions about the opacity of such tools, a reliance on past data that may be skewed against minority populations, an over-reliance on judges upon potentially flawed instruments, and whether sufficient safeguards exist to guard against their inherent biases.[52] One of the primary criticisms levied against COMPAS is its lack of transparency. Among the primary criticisms of the tool is its regular opacity, as a proprietary tool, its algorithmic processes, and the data upon which its assessments are based are not open to public scrutiny. The lack of transparency in this matter poses a significant issue as it contradicts the fundamental concept of open justice and hinders defendants and their legal representatives from comprehending and questioning the underlying grounds of sentencing recommendations produced by COMPAS.[53] The lack of opportunity to scrutinise and interrogate the functionality of the tool undermines confidence in the impartiality of the legal procedure and gives rise to substantial concerns regarding due process.

[29] The reliance of COMPAS on historical data introduces another layer of complexity. This method assumes that past patterns will predict future behaviour, ignoring potential shifts in societal norms or individual circumstances. More critically, if the historical data reflects systemic biases – such as racial disparities in arrest, conviction, and sentencing – then tools like COMPAS may serve to

50 Nurus Sakinatul Fikriah Mohd Shith Putera *et al*, "Artificial Intelligence-Powered Criminal Sentencing in Malaysia: A Conflict with the Rule of Law" (2022) 7(SI7) *Environment-Behaviour Proceedings Journal* 441–48.

51 Han Wei Liu, Ching Fu Lin, and Yu Jie Chen, "Beyond State v Loomis: Artificial Intelligence, Government Algorithmization and Accountability" (2019) 27(2) *International Journal of Law and Information Technology* 122–141.

52 John Lightbourne, "Damned Lies & Criminal Sentencing Using Evidence-Based Tools" (2017) 15(3) *Duke Law & Technology Review* 328–43.

53 Ashley Deeks, "The Judicial Demand for Explainable Artificial Intelligence" (2019) 119(7) *Columbia Law Review* 1829–50.

perpetuate or even exacerbate these injustices.[54] This is particularly concerning given the documented disproportionate classification of minority offenders as high-risk by such tools, intensifying pre-existing disparities within the criminal justice system. The Judiciary's reliance on tools like COMPAS is also a point of contention.[55] While the use of data-driven assessments could ostensibly enhance objectivity in sentencing, the lack of transparency and understanding of these tools' inner workings may lead judges to over-rely on their recommendations. This delegation of judicial responsibility to opaque algorithms is troubling, especially when the implications of algorithmic recommendations are not fully understood by those who use them to inform their decisions.[56]

[30] Moreover, the safeguards proposed, such as the advisements prescribed by the court in *Loomis*, are criticised for being inadequate. Simply cautioning judges about the limitations of COMPAS does not address the fundamental issues of transparency and inherent bias. Such measures do not equip judges to critically evaluate the tool's recommendations or fully comprehend the potential biases influencing their sentencing decisions.[57] Critics argue that these advisements fail to foster meaningful judicial scepticism due to judges' inability to assess the methodology behind such tools, the lack of detailed criticism of the assessments' accuracy and biases, and the pressures within the judicial system favouring their use. The advisements do not sufficiently counteract the inherent biases in risk assessment tools, nor do they provide judges with the necessary information to critically evaluate or adjust their reliance on these assessments. The judicial reliance on algorithmic risk assessments also reflects a broader trend of favouring quantitative over qualitative evaluations in sentencing, raising concerns about the perpetuation of systemic biases and the erosion of individualised justice.

54 J Villasenor and V Foggo, "Artificial Intelligence, Due Process and Criminal Sentencing" (2020) 23(2) *Mich St L Rev* 295–354.

55 Ibid.

56 Iaian Frank, "State v. Loomis Wisconsin Supreme Court Requires Warning Before Use of Algorithmic Risk Assessments in Sentencing" (2017) 130(5) *Harvard Law Review* 1530–37.

57 Eva Schmidt, Andreas Sesing-Wagenpfeil, and Maximilian A Köhl, "Bare Statistical Evidence and the Legitimacy of Software-Based Judicial Decisions," (2023) 201(4) *Synthese* 1–27.

The erosion of the rule of law in the age of AI

[31] A fundamental principle of the rule of law is the accessibility of laws, ensuring that individuals can comply with them and understand their obligations, with predictability being of utmost importance.[58] Within the academic narrative on legal theory, Tucker draws upon Fuller's assertion that the principles of publication and intelligibility stand at the heart of the rule of law.[59] However, the complexity of AI poses challenges to accessibility, insight, and transparency due to its intricate mathematical calculations and hidden algorithms. As governance increasingly relies on computer code, citizens' comprehension of legal processes may decrease.[60] This situation highlights the challenge of intelligibility, as neither ordinary individuals nor judges utilising systems like COMPAS possess the cognitive capacity to fully grasp them.[61] Even the creators of these systems struggle to understand them, as these algorithms, which are self-learning and self-evolving, take on a life of their own. This complexity is further compounded by the fact that algorithms can mutate and update their processes multiple times per second, constantly altering the mathematical balance of attributes they consider. This underscores the importance of interpretability in the technical realm. Moreover, the complexity of these systems increases the potential for errors. Therefore, it has been proposed that a prudent approach when dealing with AI technology is to consider it incorrect until proven otherwise. This lack of transparency and comprehensibility raises concerns about the collision between AI and the rule of law, questioning whether the future will be governed by a rule of law or a rule of algorithm.[62] Further, by upholding the constitutionality of the risk assessment algorithm, the Wisconsin Supreme Court overlooked the significant impact of "automation bias". By asserting that the lower court had the ability to deviate

58 Stanley Greenstein, "Preserving the Rule of Law in the Era of Artificial Intelligence (AI)" (2022) 30(3) *Artificial Intelligence and Law* 291–323.

59 Edwin W Tucker, "The Morality of Law Book Review" (1965) 40(2) *Indiana Law Journal* 55–78,

60 Michael E Donohue, "A Replacement For Justitia's Scales?: Machine Learning's Role In Sentencing" (2019) 32(2) *Harvard Journal of Law & Technology* 657–78.

61 Marek Kowalkiewicz, "How Did We Get Here? The Story of Algorithms" Medium, 2019, available at https://towardsdatascience.com/how-did-we-get-here-the-story-of-algorithms-9ee186ba2a07.

62 Inger Österdahl, Jane Reichel, and Anna-Sara Lind, "On the Openness of the Digital Society: From Religion via Language to Algorithm as the Basis for the Exercise of Public Powers" in *Transparency in the Future – Swedish Openness 250 Years*, 2017, 201–24.

from the algorithmic risk assessment's recommendations, the court disregarded the extensive body of social psychology and human-computer interaction research that highlights the inherent biases in all algorithmic decision-making systems. This research demonstrates that when a high-tech tool provides a recommendation, it becomes exceedingly difficult for human decision-makers to challenge such a "recommendation". Decision-makers tend to favour automated suggestions over neutral ones, even when they are aware that these recommendations could be inaccurate, incomplete, or erroneous.

[32] In the 2017 case of *Kansas v Walls*[63] the Court of Appeals of Kansas diverged from the precedent set by Loomis, ruling that defendants must have access to the full diagnostic Level of Service Inventory-Revised ("LSI-R") assessments upon which courts base their probation condition decisions. The appellate court found that the District Court's denial of access to the defendant's LSI-R assessment impeded his ability to contest the accuracy of the information considered in determining his probation conditions. Citing the earlier case of *Kansas v Easterling*,[64] the Court of Appeals concluded that withholding the full LSI-R assessment from the defendant violated his constitutional right to procedural due process during the sentencing phase of his criminal trial. Nevertheless, the divergent outcomes in cases involving the use of algorithmic risk assessments in judicial proceedings highlight an inconsistency in the judicial approach to ensuring defendants' rights and the principles of transparency and due process. In *People v Younglove*,[65] the Court of Appeals of Michigan confronted similar concerns regarding the use of COMPAS risk assessments but arrived at a markedly different conclusion. The defendants in Younglove argued that COMPAS's reliance on general population data and its potential discriminatory impacts on race and gender made its use in individual sentencing decisions inappropriate and opaque. However, the court dismissed these concerns, equating the COMPAS projections with the type of information traditionally included in pre-sentence investigation reports ("PSIRs") and deemed acceptable, such as probation agents' opinions. By doing so, the court essentially endorsed the status quo, suggesting that the inclusion of algorithmic risk assessments does not unduly influence or supplant the court's discretion in sentencing.

63 No. 116,027, The Court of Appeals of the State of Kansas (2017).
64 289 Kan 470, 481; 213 P3d 418 (2009).
65 No. 341901, 2019 WL 846117.

[33] Greenstein argued that the erosion of the rule of law cannot solely be attributed to technological advancements. Traditional laws often seek to mediate between conflicting interests, crafting a balance of rights and obligations among various stakeholders.[66] Yet, technology, particularly with its disruptive influence on society, challenges this equilibrium, especially in the legal domain where traditional balances are upset by new capabilities and implications. The General Data Protection Regulation ("GDPR") for instance, exemplifies efforts to reconcile intellectual property rights with privacy, offering individuals insight into automated decisions while also safeguarding trade secrets, a balance tested in cases like *Loomis* and *NJCM v The Netherlands*,[67] also known as the SyRI case. SyRI is a digital system used in the Netherlands to detect benefit fraud in disadvantaged communities. Following a court case in The Hague, the system was deemed to violate human rights and was ordered to cease operations. SyRI utilised an algorithm to surveil low-income neighbourhoods without prior suspicion of fraud, drawing attention to privacy breaches and discriminatory practices.[68] Enabled by the SyRI Act of 2013, the system collected data from public databases on income, housing, benefits, family, debts, and utility usage, assigning individuals a risk score for investigation. The system's negative impacts included privacy violations, discrimination, stigmatisation, and an unchecked expansion of executive power, raising doubts about its compatibility with the rule of law.[69] These instances pinpoint the inherent tension between transparency and intellectual property rights, suggesting the need for regulatory mechanisms that foster accountability without stifling innovation. Proposals for registering and monitoring AI systems via trusted third parties as recommended by the United Kingdom Law Commission and recently made by the European Commission reflect an effort to strategically blend the rule of law with technological innovation to ensure that longstanding legal norms – like transparency and accountability – are upheld in an era of newly-designed digital challenges.

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66 Greenstein, "Preserving the Rule of Law in the Era of Artificial Intelligence (AI)", see n 58 above.

67 C-09-550982-HA ZA 18-388.

68 Mark Thenisine, "Court Hearing in Case against System Risk Indication (SyRI)" Privacy First, 2019, available at https://privacyfirst.nl/en/articles/court-session-in-case-against-system-risk-indication-syri/.

69 Sonja Bekker, "Fundamental Rights in Digital Welfare States: The Case of SyRI in the Netherlands," (2021) 50(4) *Netherlands Yearbook of International Law* 289–307.

Legal developments and measures in addressing AI-related discriminatory practices and opacity

[34] Legal efforts aimed at combating the unfairness of how AI systems are developed and deployed embody a multifaceted regulatory strategy that privileges transparency, equity, and accountability. They include rules that ban unfair discrimination, require proactive measures to prevent algorithmic biases and ensure equitable treatment over autonomous platforms.[70] A vivid illustration is the proposal to require algorithmic transparency and accountability to address the "black-box" problem of AI and make their decision-making processes understandable and justifiable.[71] Also crucial is the use of assessments of equity and representative data when these are fashioned and developed, so that biases are reduced and unjust outputs avoided.[72] Finally, creating regulatory frameworks and organisational oversight to ensure adherence to these principles and counteract discriminatory systems is discussed as a strategy.[73] The legislative initiative taken by the EU with the Artificial Intelligence Act is an unprecedented example of this mode of regulation.[74] It contains an extensive list of responsibilities for both AI providers and users to prevent discriminatory practices and prevent discriminatory outcomes as a result of AI decision-making. One particularly significant feature is the creation of an EU-wide database registering high-risk AI systems, which puts the AI applications in one of three different risk levels, with different levels of regulatory scrutiny, according to the potential impact and risk they pose.[75] This tiered approach underscores a nuanced understanding of the diverse landscape of AI applications and their associated risks.

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70 Müge Fazlioglu, "US Federal AI Governance: Laws, Policies and Strategies" IAPP, 2023, available at https://iapp.org/resources/article/us-federal-ai-governance/.

71 Greenstein, "Preserving the Rule of Law in the Era of Artificial Intelligence (AI)", see n 58 above.

72 Rita Matulionyte and Ambreen Hanif, "A Call for More Explainable AI in Law Enforcement," in 2021 *IEEE 25th International Enterprise Distributed Object Computing Workshop (EDOCW)*, 2021, 32–44, available at https://ssrn.com/abstract=3974243.

73 Finale Doshi-Velez *et al*, "Accountability of AI Under the Law: The Role of Explanation" *SSRN* (2017) 3(4) *Electronic Journal* 34–41.

74 Simone Borsci *et al*, "Embedding Artificial Intelligence in Society: Looking beyond the EU AI Master Plan Using the Culture Cycle" (2022) 3(2) *AI and Society* 122–41.

75 Ibid.

[35] Moreover, the Act aims to promote AI systems within the EU that are not only compliant with regulations, but also prioritise safety, transparency, traceability, equity, and environmental sustainability. These rules embody a comprehensive perspective on AI governance that seeks to strike a balance between innovation and societal and ethical concerns. Complementing the regulatory framework, the European Commission's Ethics Guidelines for Trustworthy AI further underscore the critical values of transparency, accountability, and fairness.[76] These guidelines illuminate the path towards developing AI systems that users can trust, emphasising ethical principles that should guide AI development and deployment.[77] Together, these initiatives represent a significant acknowledgment of the complexities and challenges posed by AI technologies. At their heart, the guidelines address the "black-box" problem of AI systems, where their inner workings are frequently opaque – it is hard to determine how they make decisions. The EU is effectively championing transparency and accountability, in other words. It is a big step toward removing the mystery from AI technologies and making sure they are both truly serving the public as well as following ethical standards. All told, it is an expansion of the global AI discussion. It not only underscores the need for a legislative and ethical framework as these technologies become more commonplace, but the importance of ensuring those breakthroughs reflect human values and rights.

Revolutionising legal education

[36] Having delved into the intricate legal analysis of AI with a particular focus on criminal sentencing, it is essential to reposition from the scrutiny of AI's legal analysis to a no less critical discussion for the legal profession's future – the revolutionary potential of AI in legal education. An exploration of AI's role in criminal sentencing has revealed a rich tapestry of ethical, legal, and procedural challenges and opportunities. It has underscored the urgent need for a legal framework that not only understands but can effectively navigate the rapidly changing technical landscape. That need brings us to the brink of another transformational frontier – how AI is poised to

76 Nathalie A Smuha, "The EU Approach to Ethics Guidelines for Trustworthy Artificial Intelligence" (2019) 20(4) *Computer Law Review International* 97–106.

77 Alexander Antonov, "Managing Complexity: The EU's Contribution to Artificial Intelligence Governance" (2022) 3(131) *Revista CIDOB d'Afers Internacionals* 41–68.

alter legal education. The transition from analysing AI's implications in criminal sentencing to examining its impact on legal education is both a natural and essential progression. The complexities and nuances uncovered in the previous discussion highlight a broader theme: the legal profession is at a critical juncture, requiring not only adaptation to current technological advancements but also proactive preparation for future innovations. As AI continues to redefine the parameters of legal practice, from the courtroom to client consultations, the imperative to integrate AI into legal education becomes undeniable.

[37] The integration of AI technologies into the learning process has irrevocably transformed how law teachers and students conduct research, expedite document-related tasks, analyse data, simulate scenarios, improve their writing, and collaborate effectively. This technological revolution represents a profound shift in legal education, bringing forth a multitude of benefits to aspiring legal professionals. First and foremost, the incorporation of AI has significantly revolutionised research capabilities for law teachers and students.[78] AI-powered research tools like Casetext and Westlaw have provided students with unprecedented access to vast legal databases, allowing them to examine case law, laws, and legal precedents in a more efficient and effective manner. Additionally, Malaysian law students can benefit from local AI applications such as eLaw's AI-powered legal research platform, CLJ Legal Network's AI-driven case analysis tools, and MyLexisNexis' AI research capabilities.

[38] Moreover, AI has automated document-related tasks, enabling students to streamline document compilation, contract drafting, and legal writing.[79] AI systems such as Contract Express and Evisort utilise algorithms for natural language processing to extract information, generate templates, and enhance document management processes. By automating these routine tasks, students can allocate their time towards legal analysis, thereby enhancing the overall quality and

78 Elena Y Barakina *et al*, "Digital Technologies and Artificial Intelligence Technologies in Education" (2021) 10(2) *European Journal of Contemporary Education* 23–44, available at https://doi.org/10.13187/ejced.2021.2.285.

79 Zhiqiong June Wang, "Between Constancy and Change: Legal Practice and Legal Education in the Age of Technology", see n 40 above.

depth of their work.[80] Furthermore, AI-powered virtual assistants, such as ROSS Intelligence and Fastcase AI, provide invaluable legal research assistance.[81] These assistants enable students to promptly acquire responses to legal inquiries, identify pertinent case law and statutes, and discover reputable sources, acting as intelligent research companions and facilitating navigation through intricate legal terrains.

[39] In addition to research and document automation, AI has advanced data analysis and visualisation capabilities.[82] Tools like IBM Watson Analytics and Tableau empower law students to analyse and visually represent legal material, offering profound insights based on patterns, trends, and correlations. This not only enriches their understanding of complex legal concepts but also enhances critical thinking and decision-making skills. Furthermore, AI-driven simulations and predictive analytics platforms, such as CaseCrunch and Lex Machina, provide students with the unique opportunity to comprehend legal cases and forecast outcomes by utilising diverse aspects. Through participation in simulated legal scenarios, students cultivate problem-solving abilities, acquire practical experience, and construct efficacious legal tactics, thus bridging the gap between theoretical knowledge and practical application.

[40] In the domain of legal writing, AI writing tools like Grammarly or Hemingway Editor play a crucial role in enhancing the legal writing proficiency of students. These tools offer recommendations for sentence structure, grammar, and legal language, ensuring the production of high-quality written work.[83] The utilisation of AI writing helpers enables students to augment their communication skills and generate legal documents that are more refined and polished. AI-powered collaboration tools, such as Microsoft Teams or Google Workspace, facilitate effective communication and collaboration among students.

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80 Kathleen A McLeod, "Law Librarianship in the Age of AI" (2020) 37(3) Technical Services Quarterly 4–34, available at https://doi.org/10.1080/07317131.2020.1768719.

81 Adriana Krasniansky, "Meet Ross, the IBM Watson-Powered Lawyer" (2015) 8(2) PSFK 33–45.

82 Katherine Medianik, "Artificially Intelligent Lawyers: Updating the Artificially Intelligent Lawyers: Updating the Model Rules of Professional Conduct in Accordance With the New Technological Era" (2018) 39(4) *Cardozo Law Review* 88–97.

83 P Maharg, "Let's Get Digital. Paul Maharg Explores the Potential for AI and Legal Education" (2017) 6(9) *New Law Journal* 23–45.

[41] These platforms encourage team work, knowledge exchange, and streamlined discussions on legal topics, providing a conducive environment for collaborative projects and material sharing. On another spectrum, as technology continues to advance at an unprecedented rate, aspiring legal professionals must equip themselves with the skills and knowledge necessary to flourish in this ever-changing environment.[84] To succeed in this AI-driven legal landscape, law students must cultivate a fundamental comprehension of AI technologies and their implications. Upskilling in the era of AI is imperative, encompassing key areas such as technological literacy, data analysis and interpretation, legal tech fluency, critical thinking and ethical reasoning, adaptability and continuous learning, communication and collaboration proficiency, ethical and legal awareness, and an entrepreneurial mindset. Such proficiencies are paramount in harnessing the potential of AI and optimising legal research, drafting, and client interactions.[85] Essentially, it is crucial to cultivate critical thinking, ethical awareness and an entrepreneurial perspective in order to efficiently navigate the changing legal environment.

Conclusion

[42] The myriad applications for AI have been analyzed in depth, with a specific focus on the incredible progress and transformative innovations that are driving the legal sector forward. Within this rapidly changing landscape, careful attention has been paid to the profound implications of this disruptive technology on the legal profession. In charting this dynamic territory, however, it is critical to consider the legal and ethical considerations that accompany the infusion of AI. By recognising and minimising bias, promoting transparency, safeguarding data privacy, and upholding legal and ethical standards, the full promise of AI can be achieved while preserving the essential principles of justice, fairness, and accountability.

[43] In the context of AI, it is of utmost importance for law students to acquire the requisite skills and knowledge. The possession of technological literacy, proficiency in data analysis, fluency in legal

84 Ross Hyams, "On Teaching Students to 'Act like a Lawyer': What Sort of Lawyer?" (2014) 13(8) *International Journal of Clinical Legal Education* 9–23, available at https://doi.org/10.19164/ijcle.v13i0.65.

85 Jonathan H Choi *et al*, "ChatGPT Goes to Law School" (2023) 8(13) *SSRN Electronic Journal* 23–53, available at https://doi.org/10.2139/ssrn.4335905.

technology, strong critical thinking skills, and good communication abilities will equip individuals with the necessary tools to navigate this emerging domain confidently and proficiently. The adoption of an entrepreneurial attitude will empower individuals to capitalise on possibilities and foster innovation within the legal landscape influenced by AI.

[44] Furthermore, we have observed the remarkable potential that AI offers. Students can utilise AI technology in order to augment their research talents, optimise the process of document automation, and obtain important support in legal research. In Malaysia, students are afforded the chance to engage with advanced AI tools through the utilisation of local AI applications and platforms. For instance, eLaw's AI-powered legal research platform and MyLexisNexis' AI research capabilities enable students to explore state-of-the-art AI tools, thereby enhancing their legal education and influencing their prospective professional endeavours.

[45] Industry stakeholders have also recognised the potential of AI in the transformation of different legal activities including legal research, contract analysis and e-discovery. They have cobbled together AI technologies and observed the sharp improvement in operational effectiveness, more informed decision-making and a far better client service delivery. The coming together of students and industry stakeholders to explore and employ AI tools to advance the practice of the legal profession will lead the law into a new, rich horizon of innovative strategies and refined expertise. It is important to bear in mind that AI's real potential is not to replace human capabilities but to enhance them. The realisation of the full potential of AI in the field of law hinges upon the synergistic partnership between human cognitive abilities and machine-based intelligence. Collectively, let us wholeheartedly embrace the potentialities, surmount the obstacles, and establish a forthcoming wherein AI and the legal profession coexist harmoniously.

Barcode
ISSN 0127-9270