

Amicus Curiae

The Journal of the Society for Advanced Legal Studies



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DIRECTOR'S WELCOME

CARL STYCHIN

Director, IALS, School of Advanced Study, University of
London

On behalf of the Institute of Advanced Legal Studies (IALS) and the Society for Advanced Legal Studies (SALS), it gives me great pleasure to welcome you to this 'relaunch' issue of the Society's journal, *Amicus Curiae*.

Amicus Curiae has played an important role in advancing legal scholarship at the intersection of academia and legal practice for a number of years. In large measure, this has been due to the efforts of the journal's recently retired editor, Julian Harris. I want to begin by expressing my gratitude to Julian for his dedication to *Amicus Curiae*. I also want to thank the numerous Consultant Editors who supported the journal since its inception as well as the many authors who have provided content.

I have every confidence that *Amicus Curiae* has a bright future in supporting the legal community under our new Academic Editor, Professor Michael Palmer (see page 5), and supported by our Production Editor, Marie Selwood. Together, Michael and Marie bring

a wealth of experience in legal publishing and I am grateful that they have agreed to take the journal forward. In particular, I am pleased that, with this issue, *Amicus Curiae* becomes fully 'open access'. This is in keeping with our remit as an Institute. While there will be exciting new features to the relaunched *Amicus Curiae*, what will continue unchanged is a dedication to the publication of timely, original, and relevant scholarship for a broad community of readers.

As the journal of the SALS, the role of *Amicus Curiae* is inextricably tied to that of the Society. Since I became Director of the IALS in January of this year, one of my priorities has been to reinvigorate the Society. In particular, it has seemed to me that the time is right for the Society to return to the original vision of a dedicated group of 'friends' of the Institute. To this end, we have established a new Advisory Group for the Society under the capable leadership of Professor Tony Bradney. We are developing a programme of events



Mid-transformation: the current exterior of IALS

which we hope will be of interest to a wide audience.

Fortunately, the Transformation Project of the Institute ensures that we will continue to have the optimum physical space in central London to welcome friends and guests (see David Gee's news story on page 126). I encourage all supporters of the Institute to take

advantage of the opportunity to become members of the Society, which is free and open to all.

I very much hope that you enjoy this first issue of the new series of *Amicus Curiae*. I look forward to seeing you at upcoming events supported by the SALS, and more generally, at the Institute.

EDITOR'S INTRODUCTION

MICHAEL PALMER

SOAS and IALS, University of London

The new series of the long-established journal, *Amicus Curiae*, is intended to serve as a forum for promoting scholarship and research that brings together academics, the legal profession, and those involved in the administration of justice. It also welcomes interdisciplinary contributions which advance our knowledge and understanding of legal topics and problems.

The pace of social change and technological innovation today is very rapid, and often raises questions that need to be debated, reflected on, and in some cases acted on by way of legal reform. The journal therefore publishes on a broad range of issues including access to justice, legal policy and regulatory issues, contextualized analysis of law and the relationship of legal studies to other disciplines. It also offers not only more formal essays ('Articles') but also shorter 'Notes', intended primarily to draw our attention to new and significant developments in legal practice and administration and in the study of law and law-related issues.

We encourage submissions that address doctrinal, theoretical, or

empirical questions, and which offer knowledge and insights that the author or authors feel to be important and likely to interest those who practise and administer law, or who teach and research in the field of legal studies, or both. *Amicus Curiae* is the official journal of both the Institute of Advanced Legal Studies (IALS) and the Society for Advanced Legal Studies (SALS) and it also reports on their current developments. In keeping with the aims of both the Society and the Institute, and in order to facilitate dialogue and innovative thinking, *Amicus Curiae* is freely available and published online with open access in the SAS Open Journals System.

As editor, I take on new responsibilities with the assistance and support of a number of colleagues from IALS and other members of the University of London. To them I express my gratitude. I also appreciate the efforts of my editorial predecessors including, in particular, Julian Harris. My sincere thanks to all those who have contributed important service and support to *Amicus*.

FOREIGN ACT OF STATE—A PRACTICAL GUIDE FROM *BUTTES GAS* TO *BELHAJ*

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Abstract

Foreign act of state, the principle that a domestic court will not ‘sit in judgment’ over the acts of foreign countries, is coming under increasing scrutiny, as illustrated by the recent case of *Belhaj v Straw* (2017). This article traces the emergence of the principle out of traditional rules of private international law that, according to *Belhaj*, continue to constrain the doctrine. The essay provides a practical guide to the doctrine for use by other judges, who will usually come across act of state in the context of a motion to dismiss or to strike out pleadings. The author reviews five key cases which have considered whether a ‘unifying’ doctrine exists apart from choice of law rules of private international law; whether the principle is one of jurisdiction, non-justiciability, or something different; and the nature of the ‘public policy’ exception. She suggests that the ‘disaggregation’ of act of state into four ‘rules’ posited in *Belhaj* will remain the organizing framework of the doctrine in the medium term—despite Lord Sumption’s attempts to condense it into one or two rules. She suggests the Supreme Court is departing from the notion of act of state as a broad and inflexible principle of jurisdiction and from the notion that courts should use it in cases where requested by the government to avoid embarrassment to its foreign policy. The author disagrees with the observation, made in *Yukos Capital SAR v Rosneft Oil Co* (2012), that non-justiciability—the notion that certain issues are inappropriate for domestic courts to adjudicate—has ‘subsumed’ act of state. Rather, it is doubtful that non-justiciability should continue to be regarded as part of the law of act of state.

Whether act of state is restricted to acts taking place within the territory of the foreign state, whether it applies to all types of

¹ The author wishes to express her thanks to the four Inns of Court for their sponsorship of the Inns of Court Visiting Fellowship 2018 and to the Institute of Advanced Legal Studies (IALS) at the University of London for making the IALS library available to her.

property, whether it applies to injuries to the person, and whether it applies to lawful as well as unlawful executive actions, or to judicial acts, still remain uncertain. The greater significance of *Belhaj* is seen to lie in the Court's adoption of the public policy exception to act of state in certain circumstances. Five of the seven judges agreed that UK courts should adapt to modern conditions in the form of rules of public policy that are 'sufficiently fundamental' to distinguish the conduct in question (in *Belhaj*, alleged complicity in acts of torture) from other violations of international conventions.

Keywords: act of state, state immunity, non-justiciability, torture, doctrine, public policy, jurisdiction

As every student of international law knows, the doctrine of foreign 'act of state'—the principle that domestic courts should not 'sit in judgment' on the laws or conduct of foreign states—has emerged from obscurity in recent years as conflicts between nation states and between states and non-state actors have pushed the traditional boundaries of private and public international law. The globalization of communications, transportation and other industries has weakened the notion of absolute sovereignty. International business dealings have given rise to disputes that, while not involving states directly, may affect their interests. More recently, the recognition of human rights in international conventions has added to the scrutiny accorded to act of state by domestic courts, signalling what some see as a new era of state accountability (see, e.g., Thorroja 2006: 70). Underlying these developments one may find the idea, buried deep in the wording (or between the lines) of some international conventions, that there are circumstances in which state sovereignty may be legally constrained by certain fundamental norms.

As often happens, act of state has taken on greater complexity when seen in the full glare of academic and judicial attention. Uncertainties that were previously tolerated concerning the meaning and limitations of this 'generally confused topic' (Lord Wilberforce in *Buttes Gas* 1982) have become more significant. The recent case of *Belhaj v Straw* (2017) provided an opportunity for the Supreme Court to resolve such uncertainties. But while *Belhaj* has been described as providing a 'measure of clarity' (Dickinson 2018: 12), the judges differed on whether it is a unified, or unifying, principle; two, three or four distinct rules; an 'attitude' of judicial reluctance to adjudicate disputes involving nation states in some way; or a rule of abstention from or—now least likely—lack of jurisdiction over any such involvement. A majority of the Court in

Belhaj did agree on the applicability of the ‘public policy’ exception to act of state—a fact that arguably makes their Lordships’ analyses of the doctrine *obiter* and thus fertile ground for future re-evaluation.

One of the purposes of this paper is to show how act of state is being reshaped—if not clarified—by UK courts in response to the new types of conflicts and human rights issues that now arise with some frequency in the context of civil claims. Although a brief recounting of relevant case law will be necessary, I will not pretend to provide an academic discussion of act of state, nor a long and learned analysis of the authorities. That has already been done in various books and articles. Rather, I hope to provide more practical assistance to the busy master or trial judge who is confronted with a case involving a plea of act of state, but who may not have the time or resources to travel the long and winding road that has led to the doctrine as now understood. In addition, I hope to address the questions of whether, post-*Belhaj*, the ‘portmanteau’ idea of act of state remains workable and, if not, what should replace it in the legal taxonomy. The paper will focus on English law, although the occasional reference to Canadian law will appear. To date, the Supreme Court of Canada has not found it necessary to grapple directly with the nature and scope of the doctrine.

[A] PRELIMINARY MATTERS

A master or judge is likely to come into contact with act of state at an early stage in litigation when a (non-state) defendant asserts the principle as a defence to claims concerning allegedly unlawful or invalid conduct that has taken place outside the forum state, on the part of an official of a foreign state or someone associated therewith. Typically, the defendant will seek an order that the claims are not justiciable or that jurisdiction should be declined by the domestic court.² Depending on the governing rules, the matter may fall to be determined solely on the pleadings. *If* act of state is a matter of jurisdiction, the absence of evidence would not normally preclude the court from ruling, but that proposition is controversial; and those judges who have commented on the matter have found that it is preferable in any event to have facts agreed upon or to have some evidence. In *Belhaj*, Lord Sumption expressed the view that the court must find facts at whatever stage the matter arises, and that the

² In *Belhaj* itself, the motion before the court, brought under Civil Procedure Rules, r 3.1(2)(1), was whether the claim should be dismissed ‘on the basis that the court lacks jurisdiction and/or that the claims are non-justiciable’.

doctrine does not preclude the court from examining at this preliminary stage ‘what the state has done’ (*Belhaj v Straw* 2017: para 267).³

Crown Act of State

Where the conduct alleged is that of an official of the court’s *own* state, the applicable principle is that of *Crown* act of state.⁴ This paper will be limited to *foreign* act of state and references herein to ‘act of state’ should be taken as referring to the foreign variety.

State Immunity

Where the defendant is a foreign state, a different defence is likely to be raised—state immunity. It is limited to cases in which the foreign state is impleaded, directly or indirectly, the latter usually occurring where state property is affected (*Belhaj v Straw* 2017: paras 12-31). Act of state is often paired in pleadings with state immunity, but the two are quite different. State immunity is said to be a personal immunity (in the sense that it depends on the status of the person impleaded) or *ratione personae*; act of state arises by reason of the subject-matter of the proceedings and is thus often described as an immunity *ratione materiae*. As a principle of international law, state immunity is grounded in equality among sovereign states, which is enshrined in Article 2 of the UN Charter (see also Dicey et al 2012: rule 26). The origins of act of state certainly include comity of nations but also include separation of powers between the judicial and executive branches of government (Sales 2006: 94-97).

Both doctrines are creatures of the common law, but state immunity has been codified, or at least modified, in most states, to reflect a more ‘relaxed’ approach than did the common law (*Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* 2006, 2007: 280). In their study *The Law of State Immunity* (2015: 169), Hazel Fox and Philippa Webb write that the State Immunity Act 1978 is not a codifying statute, citing part 14 of the Rules of Supreme Court Practice, para 4671. They observe that the Act has nevertheless led UK courts to apply a ‘restrictive rule’ in determining state immunity in accordance with the common law.⁵

³ See also *Altimo Holdings and Investment Ltd. v Kyrgyz Mobil Tel Ltd* (2011: paras 80-88).

⁴ See *Rahmatullah (No 2) v Ministry of Defence* (2017), decided at the same time as *Belhaj*.

⁵ See also *Holland v Lampen-Wolfe* (2000).

Section 1(1) of the Act provides:

- 1(1) A state *is immune from the jurisdiction* of the courts of the United Kingdom except as provided in the following provisions of this part of this Act (emphasis added).

Section 14(1) provides that references in the Act to a ‘state’ include the sovereign or other head of state ‘in his public capacity’, the government of the state and any department thereof. There are various exceptions to the immunity, including proceedings relating to commercial contracts and proceedings relating to personal injury or damage to property or an interest therein. The Act does not apply to criminal proceedings (s 16 (4)).⁶

State immunity was traditionally regarded as ‘absolute’, in that it immunized the foreign state from scrutiny in respect of any kind of misconduct, criminal or otherwise (see *Jurisdictional Immunities of the State, Germany v Italy* 2012: 142, 144). Even so, international law theorists suggested as early as 1841 that state immunity could not provide a defence to crimes against the rules of war.⁷ In the 1990s, the absolute nature of the immunity was challenged when litigation concerning the extradition of Senator Augusto Pinochet, the former head of state of Chile, wound its way through the English courts. Ultimately in 1999, the House of Lords was asked to consider the validity of warrants of extradition and arrest issued in the UK—where Senator Pinochet was visiting—at the behest of Spain in respect of alleged crimes of torture and hostage-taking committed between 1973 and 1990 in Chile and elsewhere. Senator Pinochet asserted state immunity and was successful in arguing that under the State Immunity Act 1978, read together with the Diplomatic Privileges Act 1964, he was entitled as a (former) head of state to immunity from the criminal jurisdiction of the UK for acts done in his official capacity up to 8 December 1988.

By that date, however, the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment 1984 had been ratified by virtually all nations, including Chile, Spain and the UK. The Convention defined ‘torture’ to mean the infliction of acts of torture ‘by or at the instigation of or with the consent or acquiescence of a public official or other person *acting in an official capacity*’ (emphasis added). In accordance with its access obligations under the Convention, the UK had also enacted s 134 of the Criminal Justice Act in 1988, effectively criminalizing acts of torture committed in the UK or elsewhere. Given

⁶ In Canada, see the State Immunity Act, RSC 1985, c S-18.

⁷ See generally Wright (1947: 71) and Glueck (1946: 421-30), both cited by Lord Millett in *R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte* (2000: 270-71).

these developments, a majority of the House of Lords rejected the contention that it could be an official function to do something that was now outlawed by international convention when committed by a ‘public official or other person acting in an official capacity’. State immunity was therefore found not to be available to Senator Pinochet in respect of acts of torture alleged to have occurred after 8 December 1988. As Lord Browne-Wilkinson noted, this was the first instance in which a ‘local domestic court [had] refused to afford immunity to a head of state or former head of state on the grounds that there can be no immunity against prosecution for certain international crimes’ (*R v Bow Street Metropolitan Stipendiary Magistrates ex p Pinochet Ugarte (No 3) (Pinochet (No 3))* 2000: 201).

[B] DEFINITIONS: ACTS OF STATE AND ACT OF STATE

Act of state will be properly pleaded whenever the legality, validity or efficacy of *an* ‘act of state’ is put in issue. Traditionally, an act of state was defined as a prerogative act of policy in the field of international affairs performed by the Crown (or a foreign government) in the course of its relationship with another state or its subjects. Such acts included the making of treaties, declarations of war, the annexation of foreign territory and the seizure of land or goods in right of conquest (*Halsbury’s Laws of England* 2014, vol 20: para 173). In recent decades, however, an act of state has come to refer to any exercise of the powers of a state, including executive or legislative acts, authorized or ratified by the state and (usually) taking place in its territory. In *Nissan v Attorney General* (1970), Lord Pearson said that such acts must be ‘something exceptional’. Since a state can act only through persons or other agencies, executive or legislative acts carried out by such persons in the execution of their duties or in an official or ‘sovereign’ capacity are acts of state. This ‘characterization’ is a key element of the doctrine, just as it was key to the issue of state immunity in *Pinochet (No 3)*.

If nothing else, this paper will show that the definition of the doctrine (if such it be) of act of state is problematic. The classic statement may be found in Dicey et al (15th edn 2012, but dating back to the 4th edition), whose rule 3 states: ‘English courts *have no jurisdiction* to entertain an action: (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state; or (2) *founded upon an act of state*’ (emphasis added).

One of the best-known definitions is that formulated by the US Supreme Court in *Underhill v Hernandez* (1897) and later adopted by the English Court of Appeal in *Luther v Sagor*. ‘Every sovereign state is bound to respect the independence of every other sovereign state, and the Courts of one country will not sit in judgment on the acts of the Government of another within its own territory.’ (1921: 548)

Halsbury’s states the principle, or ‘rule’, in more absolute terms:

An act of state is essentially an exercise of sovereign power and hence cannot be challenged, controlled or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and the municipal courts cannot question it: it is a catastrophic change, constituting a new departure, and the municipal law has nothing to do with the act of change by which the new departure comes about. Hence the courts have *no jurisdiction to question the validity of an act of state*, and an individual cannot rely upon an act of state in order to found a cause of action (2014, vol 20: para 174; emphasis added).⁸

A more nuanced summary of act of state was provided by Lord Millett in *Pinochet (No 3)*:

Immunity ratione materiae ... is a subject-matter immunity. It operates to prevent the official and governmental acts of one state from being called into question in proceedings before the courts of another; and only incidentally confers immunity on the individual It is an immunity from the civil and criminal jurisdiction of foreign national courts but only in respect of governmental or official acts The immunity finds its rationale in the equality of states and the doctrine of non-interference in the internal affairs of other states [The cases] hold that the courts of one state cannot sit in judgment on the sovereign acts of another.

His Lordship described the doctrine as a rule of domestic law that holds the domestic court ‘*incompetent to adjudicate* upon the lawfulness of the sovereign acts of a foreign state’, contrasting it with state immunity, a ‘creature of international law’ that operates as a plea in bar to the jurisdiction of a domestic court (269; emphasis added).

Private International Law

Historically, discussions of act of state by domestic courts were often obviated, or at least obscured, by specific rules of private international law, which of course focuses on comity and territorial sovereignty. One of the most important contexts in which English courts effectively declined

⁸ The phrase ‘catastrophic change’ comes from the dissenting judgment of Fletcher Moulton LJ in *Salaman v Secretary of State in Council for India* (1906: 640).

to 'adjudicate upon' the effect of foreign laws was where a foreign state had confiscated property in its own territory. Under private international law, domestic courts presumed that foreign laws were constitutionally and formally valid and applied the *lex situs* to issues of title and compensation. The courts therefore routinely dismissed claims of trespass brought in England and declined to entertain claims in respect of the seizure of foreign property as lying outside their jurisdiction (see the seminal *Companhia de Mocambique v British South Africa Co* 1892).⁹ Act of state, not always by that name, was sometimes relied upon in reaching the same result, but the longstanding *lex situs* rule usually made extended analysis of act of state unnecessary.¹⁰ As noted in *Dicey*:

This principle is sometimes used as an alternative ground for a result which can also be reached by the application of the ordinary rules of the conflict of laws. Thus the executive seizure of property by a foreign sovereign within its territory will not give rise to an action in tort in England, either on the basis of this general principle, or because the act was lawful by the law of the place where it was committed and thus afforded a defence under the second rule in *Phillips v Eyre* (1870) L.R. 6 Q.B. Nor can a former owner challenge title to property acquired from a foreign government which had been confiscated within its own territory, again either on the basis of the general principle or on the basis of the rule that the validity of a confiscatory transfer of title depends on the *lex situs* (Dicey et al 2012: s 5-047).

The same was true of torts committed abroad: they too were governed by the *lex situs* (subject to the double actionability rule in *Phillips v Eyre*) and were generally disposed of on that basis.

Act of state as a principle distinct from the choice of law rules of private international law therefore languished in obscurity for much of the 19th and early 20th centuries. Indeed, one writer notes that for many years act of state was 'little more than an extrapolation from a small number of disparate and unusual cases, some of them barely reasoned and most of which belong to a very different constitutional era' (Scott 2015: 367). Writing in 1986, F A Mann stated in *Foreign Affairs in English Courts* that, with only one exception, there had not been a decision in English law that had produced a noteworthy evolution in the law of act of state since the 1920s (1986: 168).

Mann's statement was perhaps somewhat exaggerated. The ground under state immunity and the inviolability of foreign legislation began to shift after 1945, when the four states that constituted the Nuremberg

⁹ This rule against recovery has now been reversed in part by s 30(1) of the Civil Jurisdiction and Judgments Act 1982.

¹⁰ See especially *Luther v Sagor* (1921: 558-59) and *Princess Paley Olga v Weisz* (1929).

Tribunal accepted that the perpetrators of war crimes should not be accorded the protection of state immunity and related doctrines. The fact that the tribunal operated at Nuremberg meant, as Lord Millett noted in *Pinochet (No 3)*, that most of the war criminals were tried in the territories in which their crimes had been committed. But, he continued:

As in the case of the major war criminals tried at Nuremberg, they were generally (though not always) tried by national courts or by courts established by the occupying powers. The jurisdiction of these courts has never been questioned and could be said to be territorial. *But everywhere the plea of state immunity was rejected in respect of atrocities committed in the furtherance of state policy in the course of the Second World War*, and nowhere was this justified on the narrow (though available) ground that there is no immunity in respect of crimes committed in the territory of the forum state. (272; emphasis added)

Lord Millett also quoted extracts from the Nuremberg Tribunal's judgment to the effect that the protection of international law cannot be applied to the acts of representatives of a state that are 'condemned as criminal by international law'.

Other changes took place after the Second World War when certain foreign legislation was found to be 'repugnant' to English public policy. As noted by Martin Buhler, English and Canadian courts refused in some instances to give effect to foreign laws or ruled them 'ineffective', even where property rights were at issue (2001: 346-50). Buhler cites cases dealing with the nationalization of the shipping assets of Estonia after the USSR invaded that country and admitted it into the Soviet Union.¹¹ In the well-known taxation case of *Oppenheimer v Cattermole* (1976), a majority of the House of Lords indicated in *obiter* that, had it been necessary for the determination of the case, they would have declined to recognize or give effect to a (formally valid) law enacted by Germany in 1941 that had stripped non-resident Jews of their German nationality.¹² I note parenthetically that US courts declined to make a similar exception in *Banco National de Cuba v Sabbatino* (1964). This led Congress to pass the so-called Second Hickenlooper Treaty Amendment, which purported to reverse the Supreme Court's position insofar as the taking of property contrary to international law was concerned.

The exceptions made in the UK to the usual rule, however, could still be explained on the basis of private international law, which recognizes

¹¹ See *A/S Tallina Laevaibus v Tallina Shipping Co* (1947) and, in Canada, *Laane and Baltser v Estonian State Cargo and Passenger Steamship Line* (1949). Note that the assets were, however, outside Estonia at the time of seizure.

¹² The law had by 1976 been declared invalid by the German Federal Republic.

an exception where the foreign law is ‘repugnant’ to public policy (Dicey et al 2012: rule 2). Running parallel to these cases was a series of decisions that did not involve foreign legislation *per se* but concerned other matters of international relations such as the territorial boundaries of states and issues arising out of treaties (see Alderton 2011: 12). In these cases, English courts declined to adjudicate regarding ‘transactions of independent states between each other [that] are governed by other laws than those which municipal courts administer’ (*Cook v Sprigg* 1899: 578). Such issues were said to be ‘non-justiciable’, but that term was also used in other cases involving different types of act of state.

As Alderton notes, although these decisions were all founded upon similar principles—comity and the separation of powers—they lacked a ‘clear unifying doctrine’. F A Mann in *Foreign Affairs* observed in 1986 that no English court had considered the rational foundations of the doctrine of act of state. He famously expressed the hope that if and when English courts were presented with a clear case, they would be ‘guided by legal reasoning rather than misconceived maxims of policy’ (1986: 181). Various lower court judges also expressed the view that the terms ‘act of state’ and ‘non-justiciability’ were confusing and required clarification.

[C] THE KEY CASES

It was not until late in the 20th century that a series of cases—*Buttes Gas and Oil Co v Hammer (No 3)* (1982); *Pinochet (No 3)* (1999); *Kuwait Airways Corp v Iraqi Airways Co (Nos 4 and 5)* (2002); *Jones v Ministry of the Interior of the Kingdom of Saudi Arabia* (2007); *Yukos Capital SARL v OJSC Rosneft Oil Co (No 2)* (2014); and *Belhaj*—led appellate judges to consider whether a unifying doctrine existed apart from and beyond the choice of law rules of private international law. An additional case, *Shergil v Khaira* (2015), provided guidance on the meaning of non-justiciability, albeit in a purely domestic law context.

Buttes Gas (1982)

Buttes Gas did not directly involve states or acts of a sovereign state, but arose out of a defamation action between two California corporations in the context of a dispute over gas rights granted to them respectively by different rulers in the Persian Gulf. The plaintiffs sued in London for slander uttered in the UK on the part of the defendant and its chairman concerning the disputed area. The defendants counterclaimed for conspiracy between the plaintiffs and one of the rulers. In order to determine whether the impugned statement had been false, the court

would be required to decide matters (including the validity of the decrees granting the concessions) in dispute between four sovereign states and to pronounce certain transactions unlawful under international law, putting the validity of some official decrees in question. The matter came to court on a preliminary application by the plaintiffs for an order that the court should decline to exercise jurisdiction in respect of certain aspects of the counterclaims, which they characterized as acts of state. It appears that counsel were content to have the court assume that the allegations in the pleadings were true for purposes of the application.

The House of Lords affirmed the stay orders granted by the lower court. In the course of his reasons for the Appellate Division, Lord Wilberforce observed that much of the difficulty of the case arose from the indiscriminate use of ‘act of state’ to cover situations that are ‘quite distinct, and different in law’. One category consisted of actions taken by an officer of the Crown outside the UK against foreigners ‘otherwise than under colour of legal right’. That category (Crown act of state) did not arise in *Buttes Gas*. A second category consisted of cases concerning the applicability of foreign domestic (or ‘municipal’) legislation within a state’s own territory and the ‘examinability’ of such legislation. Lord Wilberforce seems to have agreed with the suggestion that these cases were within the area of conflict of laws, ‘concerned essentially with the choice of the proper law to be applied’ (*Buttes Gas* 1982: 931). Since counsel’s arguments regarding this category did not resolve the issues before the court, his Lordship turned to consider whether:

apart from such particular rules as I have discussed, viz., those established by (a) the Mocambique ... and by (b) [Luther v Sagor], there exists in English law a more general principle that the courts will not adjudicate upon the transactions of foreign sovereign states. Though I would prefer to avoid argument on terminology, it seems desirable to consider this principle, if existing, not as a variety of ‘act of state’ but one for judicial restraint or abstention. The respondents’ argument was that although there may have been traces of such a general principle, it has now been crystallised into particular rules (such as those I have mentioned) within one of which the appellant must bring the case – or fail. The Nile, once separated into a multi-channel delta, cannot be reconstituted.

In my opinion there is, and for long has been, such a general principle, starting in English law, adopted and generalized in the law of the United States of America which is effective and compelling in English courts. This principle is not one of discretion, but is inherent in the very nature of the judicial process (Buttes Gas and Oil Co v Hammer 1982: 931-32; emphasis added).

This general principle, Lord Wilberforce said, had first been clearly recognized in the seminal case of *Duke of Brunswick v King of Hanover* (1844), where the court had clearly stated that ‘the courts in England will not adjudicate upon acts done abroad by virtue of sovereign authority’—despite an allegation that the acts in question were illegal by the law of both foreign states. Lord Wilberforce then turned to various American cases on the topic—particularly *Underhill* (in which he said the *Duke of Brunswick* case had been followed) and *Banco Nacional de Cuba v Sabbatino* (1964). In the latter case, the US Supreme Court had given full recognition to laws passed by the revolutionary government seizing certain land in Cuba. His Lordship said the case exemplified the *conflict of laws rule* normally applicable to the expropriation of land—i.e., the doctrine of ‘act of state’ in its ‘normal meaning’ (*Buttes Gas* 1982: 934). As well, the US Fifth District Court of Appeals had declined to adjudicate a dispute resembling that at issue in *Buttes Gas*, recognizing that ‘the political sensitivity of territorial issues, [and] the need for unquestionable US neutrality and the harm to our foreign relations which might otherwise ensue’ were ‘compelling grounds for judicial abstention’.¹³

In *Buttes Gas*, Lord Wilberforce gave a different rationale for judicial abstention: leaving aside any question of embarrassment to the UK that could result from the court’s entertaining the action, there were simply no ‘judicial or manageable standards’ by which a court could decide the issues. The court would be in a ‘judicial no-man’s land’: it would be asked to review transactions in which four sovereign states were involved, which they had brought to a precarious settlement, after diplomacy and the use of force, and to say that at least part of these were unlawful under international law (938). Lord Wilberforce did not return to the ‘general principle’ he had mentioned earlier; nor did he explain the connection between that principle and the ‘judicial no-man’s land’ rationale, and the ‘political embarrassment’ cases such as *Sabbatino*. Arguably, this lack of elaboration perpetuated the confusion concerning the scope of non-justiciability and its relationship to act of state which his Lordship had hoped to dispel.

Pinochet (No 3) (1999)

This decision of the House of Lords has already been referred to in connection with state immunity, but act of state was also advanced as a defence by Senator Pinochet. Their Lordships dealt with this argument to varying degrees in their diverse reasons and clearly differed on the

¹³ His Lordship’s reliance on US authorities has been the subject of criticism, see, e.g., Sim (2010).

‘characterization’ issue—whether the acts of torture alleged could constitute a ‘state function’ for purposes of the definition of ‘torture’ in the Convention but not for purposes of act of state. Without trying to summarize the views of each of their Lordships, I note that Lord Millett was of the view that the definition of ‘torture’ in the Convention was ‘entirely inconsistent with the existence of a plea of immunity *ratione materiae*’. In his analysis, the Convention had by implication removed the immunity that would normally attach to an act of official or governmental character. Thus ‘international law [could not] be supposed to have established a crime having the character of a *jus cogens* and at the same time to have provided an immunity which is coextensive with the obligation it seeks to impose’ (*Pinochet (No 3)* 1999: 273). Lord Saville took a similar view, as did Lord Browne-Wilkinson (205). Lord Hope concluded that immunity *ratione materiae* had been lost from the date on which Chile ratified the Torture Convention. In his words:

Nor would I accept that it was an implied term of the Torture Convention that former heads of state were to be deprived of their immunity *ratione materiae* with respect to all acts of official torture as defined in article 1. *It is just that the obligations which were recognized by customary international law in the case of such serious international crimes by the date when Chile ratified the convention are so strong as to override any objection by it on the ground of immunity ratione materiae to the exercise of the jurisdiction over crimes committed after that date which the United Kingdom had made available* (248; emphasis added).

Lord Hutton considered that Senator Pinochet was not entitled to immunity because:

the commission of acts of torture is not a function of a head of state, and therefore in this case the immunity to which Sen. Pinochet is entitled as a former head of state does not arise in relation to, and does not attach to, acts of torture (263).

Lord Goff dissented, finding no intention on the part of the framers of the Convention to exclude or remove immunity (221). *Buttes Gas* was not discussed.

Kuwait Airways Corp v Iraqi Airways Co (2002)

This case arose from the seizure by Iraq of 10 aircraft owned by Kuwait during the invasion of that country by Iraq in 1990. Through a state-owned corporation (IAC), Iraq proceeded to use the aircraft as part of its own fleet and refused to comply with resolutions passed by the UN Security Council requiring it to withdraw from Kuwait. In the resulting military action against Iraq, four of the Kuwaiti aircraft were destroyed by

bombing. Six were taken to Iran, where they were impounded until the plaintiff paid Iran US\$20 million for their return in 1992. Kuwait sued IAC in the UK (where IAC had offices) for the tort of conversion, claiming delivery of the aircraft and consequential damages for Iraq's unlawful interference with them, or damages equal to the value of the aircraft in accordance with the common law and the Torts (Interference with Goods) Act 1977. In 1995, the House of Lords ruled that, although Iraq enjoyed state immunity for its taking of the aircraft and their removal from Kuwait, its retention and use of the aircraft *from the date on which the UN resolution came into force* were not acts done in the exercise of sovereign authority. These acts were therefore not protected by state immunity from that date. (See *Kuwait Airways Corp v Iraqi Airways Co* 1995.) The action was remitted to the Commercial Court, where issues arose concerning the application of the 'but for' test of causation, double actionability, remoteness and quantification of damages.

The case ultimately reached the House of Lords again in 2002 and reasoned decisions were given by all five members of the Appellate Committee. I will deal with the reasons of only two of their Lordships relating to the recognition of Iraqi law and the public policy exception to the usual rule. Lord Nicholls rejected the defendant's argument that the breach of international law by Iraq was not a ground for refusing to recognize the foreign decree (which of course was a law expropriating property). Counsel asserted the 'rule' that 'the courts will not adjudicate upon the transactions of foreign sovereign states', but Lord Nicholls said this contention took 'the non-justiciability principle too far' (*Kuwait Airways Corp v Iraqi Airways Co* 2002: 1080). He continued:

this is not to say that an English court is disabled from ever taking cognisance of international law or from ever considering whether a violation of international law has occurred. In appropriate circumstances *it is legitimate for an English court to have regard to the content of international law in deciding whether to recognize a foreign law. Lord Wilberforce himself accepted this in the Buttes case at page 931D. Nor does the 'non-justiciable' principle mean that the judiciary must shut their eyes to a breach of an established principle of international law committed by one state against another when the breach is plain* and, indeed, acknowledged. In such a case the adjudication problems confronting the English court in the *Buttes* litigation do not arise. The standard being applied by the court is clear and manageable, and the outcome is not in doubt. That is the present case (1081; emphasis added).

Lord Hope warned that 'very narrow limits must be placed on any exception to the act of state rule'. The rule, he said, applies to the 'legislative or other governmental acts of a recognized foreign state or

government within the limits of its own territory. The English courts will not adjudicate upon, or call into question, any such acts ... [which may be] pleaded and relied upon by way of defence ... without being subjected to that kind of judicial scrutiny' (para 135). On the other hand, the public policy exception to the usual rule was not confined to cases in which there was a 'grave infringement of human rights' (citing *Oppenheimer*). In his analysis:

As I see it, the essence of the public-policy exception is that it is not so constrained. The golden rule is that care must be taken not to expand its application beyond the true limits of the principle. These limits demand that, where there is any room for doubt, judicial restraint must be exercised. *But restraint is what is needed, not abstention. And there is no need for restraint on grounds of public policy where it is plain beyond dispute that a clearly established norm of international law has been violated* (para 140).¹⁴

In the result, their Lordships concluded (with Lord Scott dissenting on the issue of double actionability), that act of state should not be applied so as to recognize and validate the Iraqi law expropriating the aircraft. Fox and Webb in *The Law of State Immunity* write that respect for the state and its laws over property within its territory as reflected by the *lex situs* rule was:

displaced [in *Kuwait Airways*] by enquiry as to whether the laws were contrary to established rules of international laws of 'fundamental importance', a 'flagrant international wrong', a breach ... of principles of the UN Charter prohibiting the use of force as having the character of jus cogens supported by the universal consensus on the illegality of Iraq's aggression (2015: 65).

Jones v Ministry of Interior of Saudi Arabia (2007)

In this case, the relationship between *state immunity* and the Torture Convention arose in a *civil* context. Three individual plaintiffs sought to base a civil action for damages based on the Convention, alleging they had been tortured while imprisoned in Saudi Arabia. The proceedings were brought against that state and certain officials of the prison in which they had been held. At a preliminary hearing, a master dismissed the claim against the kingdom on the basis of the State Immunity Act 1978 and refused permission to serve the individual defendants outside the jurisdiction, on the grounds that they were state officials. The Court of Appeal upheld the kingdom's claim to immunity but allowed claims against the personal defendants on two bases—that a blanket immunity would be contrary to the plaintiffs' rights under the European Convention

¹⁴ See also Lord Steyn (*Kuwait Airways Corp v Iraqi Airways Co* 2002: paras 114-18).

on Human Rights, and that torture could not be treated as an official act of state so as to attract immunity either in criminal or civil law—essentially an extension of *Pinochet (No 3)* to civil proceedings.

The House of Lords allowed the appeal of the individual defendants. Lord Bingham wrote that, although he would not question the correctness of *Pinochet (No 3)* (1999), it was ‘categorically different’ from *Jones*. *Pinochet* had involved criminal proceedings ‘falling squarely within the universal criminal jurisdiction mandated by the Torture Convention and did not fall within Part 1 of the [State Immunity Act 1978]’. In his analysis:

The essential ratio of the decision, as I understand it, was that *international law could not without absurdity require criminal jurisdiction to be assumed and exercised where the Torture Convention conditions were satisfied and, at the same time, require immunity to be granted to those properly charged*. The Torture Convention was the mainspring of the decision, and certain members of the House expressly accepted that the grant of immunity in civil proceedings was unaffected *It is, I think, difficult to accept that torture cannot be a governmental or official act, since under article 1 of the [Convention] torture must, to qualify as such, be inflicted by or with the connivance of a public official or other person acting in an official capacity*. The claimants’ argument encounters the difficulty that it is founded on the Torture Convention but to bring themselves within the Torture Convention they must show that the torture was (to paraphrase the definition) official; yet they argue that the conduct was not official in order to defeat the claim to immunity (*Jones v Ministry of Interior of Saudi Arabia* 2007: 286; emphasis added).

Assuming the pleadings to be true, Lord Bingham said it was clear the individual defendants had at all material times been acting, or purporting to act, as servants or agents of the Kingdom of Saudi Arabia; that no distinction was therefore to be made between the plaintiffs’ claims against the Kingdom and those against the personal defendants; and that none of the exceptions specified in the State Immunity Act 1978 was engaged (283) Normally, it would follow that *all* the defendants would be entitled to the protection of state immunity. As far as the Convention was concerned, there was nothing to indicate that UK domestic courts were required to provide *civil* remedies for breaches of the Convention taking place outside the UK. In fact, the authorities in international law were to the opposite effect. No consensus of judicial opinion existed to the effect that courts are obliged by international law to exercise jurisdiction over alleged breaches of peremptory norms (p 288). The usual rule of state immunity was not displaced.

Lord Hoffman (with whom Lord Bingham also expressed his agreement) also rejected the argument that ‘torture or some other contravention of a

jus cogens cannot attract immunity *ratione materiae* because it cannot be an official act'. (Note the apparent reference to act of state.) He explained Lord Millett's reasoning in *Pinochet (No 3)* as having been based on the conclusion that *by necessary implication*, international law had 'removed the immunity' *ratione materiae*. In his words:

It seems thus clear that a state will incur responsibility in international law if one of its officials, under colour of his authority, tortures a national of another state, even though the acts were unlawful and unauthorised. To hold that for purposes of state immunity he was not acting in an official capacity would produce an asymmetry between the rules of liability and immunity.

Furthermore, in the case of torture, there would be an even more striking asymmetry between the Torture Convention and the rules of immunity if it were to be held that that the same act was official for purposes of the definition of torture but not for purposes of immunity (*Jones v Ministry of Interior of Saudi Arabia* 2007: 302).

Lord Hoffman then carried out an examination of various commentaries critical of the notion that acts contrary to *jus cogens* could not be 'official' acts; an examination of the various judgments in *Pinochet (No 3)*; and a brief review of relevant US authorities. He disagreed with suggestions that in allowing service out of the jurisdiction, courts must be 'sensitive' to the position of foreign governments. On this point, he endorsed Lord Millett's statement in *Holland v Lampen-Wolfe* (2000) that state immunity is not a 'self-imposed restriction on the jurisdiction of its courts which the United Kingdom has chosen to adopt' and which it can, as a 'matter of discretion, relax or abandon'. In Lord Hoffman's analysis, state immunity was imposed by international law:

without any discrimination between one state and another. It would be invidious in the extreme for the judicial branch of government to have the power to decide that it will allow the investigation of allegations of torture against the officials of one foreign state but not against those of another (306).

The other members of the division of the Court agreed with both Lord Bingham and Lord Hoffman. In the result, the Appellate Division upheld the assertions to state immunity of all the defendants. *Jones* was followed by the Supreme Court of Canada in *Kazemi Estate v Islamic Republic of Iran* (2014).

Yukos Capital SARL v Rosneft Oil Co (2012)

This was a commercial dispute between private parties to a loan agreement. The plaintiff was a Luxembourg company; the defendant, a

Russian state-controlled company. Their dispute had been referred to arbitration under the rules of the International Commercial Court, which made awards in the plaintiff's favour. When enforcement proceedings were begun in the Netherlands, a Russian court set the awards aside—a ruling upheld on appeal in Russia. The plaintiff convinced the Dutch court that the Russian court had not been impartial and independent but had, in the words of the headnote, been 'guided by the interests of the Russian state' and that its decisions should not be recognized. The plaintiff also began proceedings in London to enforce the awards pursuant to the Arbitration Act 1996, or alternatively to recover the amount awarded as a debt owing.¹⁵ At a trial of preliminary issues, the lower court ruled that the defendant was estopped by the ruling of the Dutch court from denying that the Russian court's decisions were the result of a 'partial and dependent judicial process'. Conversely, the plaintiff was not prohibited from asserting, nor was the court prohibited from adjudicating, any of the issues raised on the grounds of act of state, non-justiciability, or comity.

In the Court of Appeal, Rix LJ, speaking for the Court, described the case as raising the following 'complex and intriguing' issues:

what is the rationale of the act of state doctrine? Is it a narrow doctrine which requires the *validity* [original emphasis] (as distinct from the lawfulness, morality or motives) of the foreign sovereign's acts to be impugned, or else requires some positive remedy to be sought from the English court which is predicated on an attack on those sovereign acts? Or is it a broader doctrine which prevents the English court 'sitting in judgment' on those acts? Does the doctrine apply to judicial acts at all? How is it that the English court does appear regularly to consider the quality of justice in foreign states in cases concerned with the English long-arm statute and issues of *forum non conveniens*, or in cases concerned with extradition? How is it that the English court does regularly consider the persecutory acts of foreign sovereigns, both in the past and potentially in the future, in the context of cases concerned with claims to asylum? How do the act of state doctrines fit with the doctrine of estoppel, where there may be a conflict between rules of public policy? When, on a claim to enforce a foreign arbitration award, there is competing reliance on decisions of the state where the award was made and of another state where the award is taken for enforcement, and when issues of public policy may be said to be involved, should the English court be deciding any issue of public policy for itself, or should it be content to abide by the foreign courts' decision, and if so, which one? (*Yukos Capital SARL v Rosneft Oil Co* 2012: 469)

Not all these questions were answered.

¹⁵ Much of the award was then paid, but a significant amount of interest remained outstanding.

Beginning at para 40, Rix LJ reviewed the English law relating to act of state, including the cases discussed above and ending with *Lucasfilm Ltd v Ainsworth* (2012). There the Supreme Court had ruled that the grant of a national patent was not an exercise of sovereignty and that the doctrine of act of state ‘should not today be regarded as an impediment to an action for infringement of foreign intellectual property rights, even if [the] validity of a grant is in issue, simply because the action calls into question the decision of a foreign official’ (para 86).

Rix LJ then returned to *Buttes Gas*, suggesting that Lord Wilberforce’s principle of non-justiciability had ‘on the whole, not come through as a doctrine separate from the act of state principle itself, but rather has to a large extent subsumed it as the paradigm restatement of that principle’ (para 66). He observed:

The various formulations of the paradigm principle are apparently wide, and prevent adjudication on the validity, legality, lawfulness, acceptability or motives of state actors. It is a form of immunity *ratione materiae*, closely connected with analogous doctrines of sovereign immunity and, although a domestic doctrine of English (and American) law, is founded on analogous concepts of international law, both public and private, and of the comity of nations. It has been applied to a wide variety of situations, but often arises by way of defence or riposte: as where a dispossessed owner sues in respect of his property, the defendant relies on a foreign act of state as altering title to that property, and the claimant is prevented from calling into question the effectiveness of that act of state.

The Court then considered the limitations of the doctrine, which were said to be founded on the ‘very language of the doctrine and in its rationale’. The first was that in general, the impugned act of state must take place within the territory of the foreign state itself. Second, the doctrine ‘will not apply’ to foreign acts of state that are in violation of clearly established rules of international law, or English principles of public policy or in cases of ‘grave infringement’ of human rights. A third limitation on act of state had in the past been that caution must be taken in challenging *judicial* acts; ‘cogent evidence’ was required in such cases. Nevertheless, recent authorities had doubted the existence of any general principle that UK courts would never ‘pass judgment on the judiciary of a foreign country’ (citing *Chieny v Deripaska (No 2)* 2009 and *Berezovsky v Abramovich* (2010); see also *Altimo Holdings* 2011: paras 96-101). Classic definitions of act of state had referred only to legislative and executive acts (para 87). Ultimately, the Court endorsed the statement made in the court below to the effect that there was no rule against ‘passing judgment on the judiciary’ of a foreign country (para 91). This conclusion had obvious implications for the facts of *Yukos* itself.

Another limitation on, or exception to, the act of state doctrine pertained to commercial activities of the foreign state. As already mentioned, an exception of this kind was codified in the State Immunity Act 1978, and Rix LJ seemed to suggest the same reasoning would apply to act of state (paras 92-94). Another exception, this one from US law, was also endorsed—the ‘*Kirkpatrick*’ exception for cases in which the court does not ‘sit in judgment’ on the acts of the foreign state but acknowledges those acts ‘incidentally’—i.e., as acts that have occurred as part of the factual context of the case. This had been famously applied in the US in *Sharon v Times Inc* (1984) and of course in *Kirkpatrick & Co Inc v Environmental Tectonics Corp International* (1990). In the latter case, Scalia J for the Court had emphasized that act of state was not:

some vague doctrine of abstention but a ‘*principle of decision* binding on federal and state courts alike’... Act of state issues only arise where a court *must decide*—that is, when the outcome of the case turns upon—the effect of official action by a foreign sovereign. When that question is not in the case, neither is the act of state doctrine (p 406; original emphasis).

Applying this reasoning in *Yukos*, the Court of Appeal rejected the notion that the plaintiff was not challenging the legality of any act of state of Russia. In fact, the plaintiff had pleaded that Russian law had been deliberately misapplied as a matter of state policy. On that ground, the English court *was* being asked to declare the Russian annulment decisions to be ineffective and invalid (see para 104).

This brought the *Yukos* Court to what it regarded as the most fundamental issue in the case—whether act of state applied only where an English court was asked to decide the *validity* of an act of a foreign sovereign, either by granting a declaration of invalidity or providing a civil remedy. The Court of Appeal disagreed with the lower court’s holding that the ‘pure’ act of state principle is so restricted. Rix LJ again referred to various US cases to illustrate that the *Kirkpatrick* line of cases was not concerned with distinctions between validity, legality, effectiveness, lawfulness, wrongfulness, etc.:

Validity (or invalidity) is just a useful label with which to refer to a congeries of legal concepts, which can be found spread around the cases. Similarly, the word ‘challenge’ is not sacrosanct: the cases refer to the prohibition on adjudication, sitting in judgement on, investigation, examination, and so on. What *Kirkpatrick* is ultimately about, however, is the distinction between referring to acts of state (or proving them if their occurrence is disputed) as an existential matter, and on the other hand asking the court to enquire into them for the purpose of adjudicating upon their legal effectiveness (para 110).

The Court referred to the judgments of the House of Lords in *Kuwait Airways*, noting a ‘possible tension’ between the speeches of Lord Nicholls and Lord Hope. Rix LJ sought to reconcile their approaches in the following terms:

We recognise these differences of emphasis. Lord Hope’s broad restatement as to the general effect of the act of state doctrine, in para. 135, is that ‘[I]t applies to the legislative or other governmental acts of a recognised foreign state or government within the limits of its own territory. The English court will not adjudicate upon, or call into question, any such acts’. *This is the clearest modern formulation of the doctrine at the highest level, but it perhaps needs to be understood as qualified by Lord Wilberforce’s two insights [in Buttes Gas] that his principle of non-justiciability can also extend beyond international boundaries, and that the principle is one of restraint rather than abstinence* (as Lord Hope himself commented). However, it is also proper to have regard to the various limitations on that broad doctrine, only one of which was an issue in that case. We think that on the whole we prefer to speak of ‘limitations’ rather than ‘exceptions’. The important thing is to recognise that *increasingly in the modern world the doctrine is being defined, like a silhouette, by its limitations, rather than to regard it as occupying the whole ground save to the extent that an exception can be imposed*. That after all would explain why it has become wholly commonplace to adjudicate or call into question the acts of a foreign state in relation to matters of international convention, whether it is the persecution of applicant asylum refugees, or the application of the Rome Statute with regard to international criminal responsibility That is also perhaps an element in the naturalness with which our courts have been prepared, in the face of cogent evidence, to adjudicate upon allegations relating to the availability of substantive justice in foreign courts. It also has to be remembered that the doctrine was first developed in an era which predated the existence of modern international human rights law (para 115; emphasis added).

At the end of the day, the Court of Appeal ruled that the doctrine of act of state did not bar any part of the plaintiff’s claims. The essential issue was whether the Russian annulment decisions should be recognized—a ‘judicial question raised in respect of judicial acts’. In seeking to enforce the Dutch arbitration awards, the plaintiff ‘must be entitled to seek to show that such decisions are not worthy of recognition by the English court’. In the words of Rix LJ:

in a world which increasingly speaks about the rule of law, it should not in principle be open to another party to those decisions to claim an immunity from adjudication on the ground that an investigation into those allegations is protected by deference due to the legislative or executive acts of a foreign sovereign. ... We also bear in mind Lord Hope’s comments on the rule of law in [*Kuwait*] at [para] 145 (para 135).

It is now clear, if it was not before, that the judiciary cannot close their eyes to the need for a concerted, international response to these threats to the rule of law in a democratic society.

Shergil (2015)

Shergil did not involve act of state. It was a religious dispute between rival factions of a Sikh community in central England as to the successor to the First Holy Saint under the terms of a charitable trust. In the course of its reasons, however, the Court dealt with the circumstances in which an English court will be unable to deal with a disputed issue on its merits. One example noted by Lord Neuberger for the Court was the act of state doctrine, which ‘confer[s] immunity from liability on certain persons for certain acts’. Another example was the common law rule against the enforcement of foreign penal, revenue or public laws (now limited by statute and by the Lugano Convention). However, he said, the term ‘non-justiciability’ refers to something different: ‘It refers to a case where an issue is said to be inherently unsuitable for judicial determination *by reason only of its subject-matter*’ (para 41; emphasis added). These cases, his Lordship said, generally fall into two categories. The first is where the issue in question lies beyond the constitutional competence of courts. These cases are rare and involve transactions of foreign states or proceedings in Parliament. *Buttes Gas* was said to fall into this grouping to the extent it was based on the separation of powers, although the boundaries of the term ‘transactions’ in this context were now less clear than they had been 40 years earlier.

The second group of non-justiciable cases was said to involve claims or defences not based on private law rights or obligations nor on reviewable matters of public law, such as domestic disputes and some issues of international law. A court will not enter upon the latter type of case, usually because no legal right of the citizen is engaged, whether in public or private law—no ‘domestic foothold’ exists (para 43). However, a court will adjudicate if a ‘justiciable legitimate expectation’ depends on it, a convention right depends on it, or a private law liability which depends on such a matter is asserted (citing *R (Gentle) v Prime Minister* 2008: para 8; and a Canadian case, *Bruker v Marcovitz* 2007, a religious dispute between divorcing spouses). This suggestion has received surprisingly little attention in academic commentaries or subsequent cases, but see Lord Dyson at the Court of Appeal stage in *Belhaj* (para 92) and *R (on the application of Abbasi) v Secretary of State for Foreign and Commonwealth Affairs* (2002).

Belhaj (2017)

We come finally to *Belhaj*. As noted earlier, it was decided in tandem with *Rahmatullah (No 2) v Ministry of Defence (2017)*, which dealt with Crown immunity. In *Belhaj*, the plaintiffs were Mr Belhaj, a Libyan national opposed to the Qaddafi regime, and his wife Ms Boudchar, a Moroccan national. They had been preparing to fly from Beijing to London in March 2004 when they were allegedly deported by Chinese authorities and forcibly taken, via Kuala Lumpur and Bangkok, to Libya. There, Ms Boudchar was detained until June 2004 and Mr Belhaj was detained (and allegedly tortured) until 2010. The plaintiffs pleaded that MI6 had participated by ‘common design’ in this series of events with Libyan and US authorities. They advanced claims in unlawful detention, assault, misfeasance in public office, negligence, cruel and inhuman treatment and torture. The defendants included the UK Foreign Secretary and the Ministry of Defence. None of the USA, Libya, Thailand or Malaysia was impleaded; state immunity was therefore not engaged in this case. The defendants Mr Straw and Sir Mark Allen, an official of MI6, stated through counsel that the Official Secrets Act 1911-1989 precluded them from pleading in their defence. The remaining defendants argued that it would be damaging to the public interest for them to plead to the allegations. In their submission, the ‘prime actors’ in the case were foreign states, and although those states were not impleaded, it would be necessary for the Court to adjudicate upon their conduct (para 4). The defendants thus raised preliminary objections that the issues before the court were ‘inadmissible or non-justiciable on their merits’ by virtue of act of state or state immunity and sought to have the claims dismissed (paras 2 and 7). At this stage, only the plaintiffs’ pleadings were before the Court.

As mentioned earlier, while five members of the Supreme Court were in agreement that the public policy exception to act of state applied (or would have applied if act of state had applied), the judges split three ways in their analysis of act of state itself. It is therefore necessary to summarize the most salient points of each of the considered judgments, which were delivered by Lords Mance, Neuberger (which was technically the majority judgment on act of state *per se*) and Sumption respectively. In hopes of providing practical assistance to trial judges and masters, I will do so in summary or point form only, attempting to avoid the reproduction of lengthy passages from the reasons.¹⁶

¹⁶ A summary in table form may be found in the *UK Supreme Court Yearbook* for 2017 in an article by Malek and Miles (2018: 457).

Lords Mance and Neuberger were in agreement that the term ‘act of state’ needed to be ‘disaggregated’ in light of the different ways in which it had been used by courts in the past. Both of their Lordships carried out the ‘disaggregation’ basically along the lines of the traditional categories that underlay the cases discussed above.

Lord Mance

His Lordship identified three ‘types’ of act of state (and a fourth that he rejected outright) under current English law, namely:

- ◇ First, the *rule of private international law* that a foreign state’s legislation will normally be recognized and treated as valid ‘in so far as it affects property, whether movable or immovable’, within the foreign state’s jurisdiction (para 35, citing *Princess Paley* and Dicey et al 2012: rule 137). This rule and the second rule should not be extended to acts of a foreign state taking place anywhere outside the domestic court’s territory. (At para 11(iv).) The first rule is subject to exception where the recognition of the foreign legislation would conflict with a fundamental principle of domestic public policy (citing *Oppenheimer and Kuwait Airways*).
- ◇ Second, the rule, ‘which may be regarded as a rule of private international law’, that domestic courts will not question the validity of any foreign governmental act *in respect of property within the foreign state’s jurisdiction*, ‘at least in times of civil disorder’ (para 11(3)(b)). Lord Mance was prepared to accept the existence of this second category of act of state for purposes of the appeal, mainly because of ‘the need for security of title and of international trade’ (para 74), but emphasized (e.g., at para 65) that it might not exist at all. In any case, it should not extend to the victim of a personal *tort* who can found jurisdiction ‘against a relevant non-state actor outside the territory of any foreign state also implicated in the tortious acts’. The ‘special considerations’ applicable to property do not arise in respect of such personal injuries (para 74). *If* this type of act of state does not extend to such wrongs, the public policy limitation ‘could constitute a valid basis for refusal to recognise a foreign act of state of either the first or second type’ (at para 80).
- ◇ Third, is the principle that a domestic court will treat as non-justiciable, or abstain or refrain from adjudicating upon or questioning, certain categories of sovereign acts by a foreign state abroad, even those occurring outside the foreign state’s jurisdiction (paras 11 and 90). Although the court in *Yukos* had suggested this principle had subsumed the first and second types of act of state, Lord Mance disapproved this

‘blurring’ of the distinction between different types of act of state, which impeded the important task of identifying the ‘scope and characteristics of each type of foreign act of state’ (at para 40). He cited *Buttes Gas* as the leading authority on this category, which he described as fact- and issue-sensitive, and one that should not be restricted to situations analogous to those in *Buttes Gas*. The facts of *Belhaj* did not raise any issues of a sovereign, international or inter-state nature ‘upon which a domestic court cannot or should not appropriately adjudicate’ (para 101).

- ◇ A fourth possible rule—truly a ‘straw man’ in Lord Mance’s analysis—was that act of state should be applied when the court received a request for abstention from Her Majesty’s government in order to avoid embarrassment in the conduct of international affairs. His Lordship saw no basis for giving the government ‘so blanket a power over court proceedings’, although the consequences of a court ruling for foreign relations might well ‘feed in’ to the issue of justiciability (para 41).

Act of state, Lord Mance said, was and remains essentially a domestic law doctrine, and English law sets its limits. Torture has long been abhorrent to English law, and it was also appropriate to take into account fundamental rights, including those ‘more recently developed’ (para 98). Differing somewhat with Lord Sumption’s view of qualifications to act of state, Lord Mance preferred to base his analysis on individual rights rather than to the concept of *jus cogens* (para 107). He saw no reason why English law should refrain from scrutinizing the conduct of foreign states (themselves immune) in the course of deciding claims against ‘other parties involved who enjoy no such immunity [in the UK]’, where the alleged conduct involved ‘almost indefinite detention’, denial of access to justice and torture or persistent ill-treatment (para 99). Ultimately he preferred to take a case-by-case approach to the public policy exception and did not see how the fact that a violation of *jus cogens* was involved would be helpful when, in Lord Sumption’s analysis, not every such violation would justify the exception (subparas 107(iv) and (v)). Lord Mance added:

Nothing I have said should be taken to mean that the existence of relevant *jus cogens* principles may not be a stimulus to considering whether judicial abstention is really called for in a particular situation. But the doctrine of abstention rests on underlying principles relating to the role of a domestic judge and the existence of alternative means of redress at an international level, which make it difficult to lie too closely to particular rules of international law, however, basic and binding at that level (para 107).

Lord Neuberger

Lord Neuberger agreed with his colleagues that state immunity could not assist the defendants; but found that foreign act of state raised ‘more troubling issues’. He defined the doctrine of act of state as follows:

The courts of the United Kingdom *will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states*, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully. In so far as it is relied on in these proceedings, the Doctrine is purely one of domestic common law, and it has all the advantages and disadvantages of a principle that has been developed on a case by case basis by judges over the century. Thus, while it is pragmatic and adaptable to changing norms ... *It is a principle whose precise scope is not always easy to identify* (para 118; emphasis added).

His Lordship suggested four ‘possible rules’ that have been treated as aspects of the doctrine of act of state:

- ◇ First, English courts will recognize and will not question *the effect of a foreign state’s legislation* or other laws in relation to any acts which take place or take effect within the territory of that state. *Buttes Gas* was said to have been decided in accordance with this rule. Lord Neuberger had no doubt that the rule was good law, ‘at least in relation to property’ (at para 125) and saw strong reasons for its application to personal injuries as well, as had been discussed in *R (Khan) v Foreign Secretary* (2014). The rule was based on, or ‘close to’, the choice of law principle applied in private international law (paras 150, 159). At para 168, he concluded that the rule did not apply to this case for two reasons, one being that the wrongdoing involved harm to individuals rather than to property.
- ◇ Second, English courts will recognize and will not question, *the effect of an act of a foreign state executive* in relation to any acts which take place or take effect within the territory of that state. His Lordship described this rule as ‘close to’ a rule of private international law (para 150). The rule is supported by the authorities, again *in relation to property* (citing *Blad v Bamfield* 1674), the facts of which were described by Lord Sumption at para 202. The rule clearly applies to lawful executive acts, but his Lordship was not convinced it should apply to unlawful acts, and cases such as *Buck v Attorney General* (1965) seemed to suggest it did not (paras 137-40). On the other hand, there were good practical reasons for treating as effective executive acts that, even though unlawful, related to property and property rights (para 142). It was not necessary to decide this point.

- ◇ Third, a rule that applies where issues are raised that are inappropriate for English courts to resolve ‘because they involve a challenge to the lawfulness of the act of a foreign state *which is of such a nature that a municipal judge cannot or ought not rule on it*’ (para 123; emphasis added). This rule has two components—that the court will not interpret or question dealings between sovereign states (such as making war and peace, making treaties, etc.); and that the court will not, *as a matter of judicial policy*, determine the legality of a foreign government’s acts in the conduct of foreign affairs (emphasis added). These matters, Lord Neuberger said, are ‘only really appropriate for diplomatic or similar channels’. International treaties and conventions cannot be the source of domestic rights or duties and will not be interpreted by domestic courts (para 123, citing *Shergil*). *Buttes Gas*, which he described as a boundary dispute, was said to be a prime example of this rule. There was no doubt about the existence of the third rule in relation to property and property rights, but since it serves to defeat what would otherwise be a valid claim under private law, judges should ‘not be enthusiastic’ in applying it (para 144). Contrary to the Court of Appeal’s suggestion in *Yukos*, if foreign act of state is regarded as including his Lordship’s first and second rules, the idea that non-justiciability had ‘subsumed’ the act of state doctrine was erroneous. In Lord Neuberger’s analysis:

The third rule is based on judicial self-restraint and is, at least in part, concerned with arrangements between states and is not limited to acts within the territory of the state in question, whereas *the first and second rules are of a more hard-edged nature* and are almost always concerned with acts of a single state, normally within its own territory. (para 146; emphasis added).

At para 151, his Lordship again described his third rule as based on judicial self-restraint and common law, and therefore having no basis in international law, even though it might be influenced thereby. Cases falling into this category usually involve more than one foreign state.

- ◇ Fourth, a ‘possible rule’ that courts will not investigate acts of a foreign state where such investigation would embarrass the government of the UK. This situation would arise only as the result of a communication to the court from the Foreign Office (para 124). This idea was supported by US authority such as *Banco National de Cuba v Sabbatino* and *Kirkpatrick*, but found little support in English law beyond some comments of the Court of Appeal in *Kuwait Airways and R (Khan)*. If it existed (which his Lordship doubted), ‘exceptional’ circumstances would be required before it could be invoked (para 132). In his Lordship’s view, if a member of the executive was to inform a

court formally that the determination of an issue could embarrass the government's relations with another state, the court would *not* be bound to refuse to determine that issue. Such abstention would involve the executive dictating to the judiciary—which would be 'quite unacceptable at least in the absence of clear legislative sanction' (para 149). However, it was not necessary to decide this point.

The public policy exception likely applied to the first and second rules. The authorities were unclear as to the third and fourth rules, assuming the latter existed (para 157). Whether cases involving injury to the person constituted an exception to the doctrine of act of state was also unclear, but where executive acts resulted in such injuries and those acts were unauthorized or unlawful according to the law of the foreign state, Lord Neuberger was 'unconvinced' that the second rule should be available as a defence (para 162).

As for territoriality, the nature of sovereign power is that it is limited to territory over which the power exists; thus it was 'hard to see' how the first and second rules could apply to acts taking place outside the territory of the foreign state (para 161). The position was again less clear with regard to the third rule, but his Lordship agreed with the Court of Appeal that at least in some circumstances it could do so 'as it is *inherent in the nature of the rule* that it may apply to actions outside the territory of the state concerned' (para 165; emphasis added).

Applying the foregoing to the facts in *Belhaj*, Lord Neuberger noted there was no suggestion that the alleged detention, kidnapping and torture of the plaintiffs or their rendition to Libya had been lawful under Malay or Thai law; nor that the alleged rendition was lawful under US law; nor that the subsequent acts of detention and torture in Libya were lawful in that country. The first rule therefore did not apply. Nor, on the evidence available, was there any suggestion that the acts in question had been governed by some high-level treaty or agreement between any of the states involved. Indeed, 'it would be positively inimical to the rule of law if it were otherwise' (para 167). Thus, the third rule was not engaged. The second rule could not be invoked, he said, because the wrongdoing involved harm to individuals and not to property. If any of the rules applied, Lord Neuberger would have applied the public policy exception, essentially for the reasons given by Lord Sumption (see para 172).

Lord Sumption

Lord Sumption's approach to act of state was much less categorical than those of his colleagues. Indeed, he said:

It is always possible to break down the cases into different factual categories, and to deconstruct the law into a fissiparous bundle of distinct rules. But the process is apt to make it look more arbitrary and incoherent than it really is. I think that it is more productive to distinguish between the decisions according to the underlying principle that the court is applying. (para 227)

He viewed act of state (which he described at para 200 as ‘wholly the creation of the common law’) as encompassing two principles. The first is Crown act of state, which is concerned with acts done abroad in circumstances where a defence may be provided by the fact it was done with the approval of the Crown in the course of its relations with a foreign state (para 199). This principle has arisen most often in connection with legislative acts expropriating property but also extends to executive acts ‘with no legal basis at all’. It applied to the alleged acts of Malaysia, for example, in deporting the plaintiffs in *Belhaj*, and to the acts of Thailand in detaining and delivering them to the USA (para 233).

The second principle, which he preferred to call ‘international law act of state’, is very similar to the formulation given in *Buttes Gas*: domestic courts will not adjudicate ‘upon the lawfulness or validity of certain sovereign acts of foreign states’, or *jure imperii* (para 199). His Lordship continued:

*the English courts will not adjudicate on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. Nor may it subject the sovereign acts of a foreign state to its own rules of municipal law or (by the same token) to the municipal law of a third country If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion and the like. This is not for reasons peculiar to armed conflict, which is no more than an ill-defined extreme of inter-state relations. The rule is altogether more general, as was pointed out by Lord Wilberforce in *Buttes Gas* Once the acts alleged are such as to bring the issues into the ‘area of international dispute’ the act of state doctrine is engaged (para 234; emphasis added).*

His Lordship rejected the contention¹⁷ that act of state does not apply where the relevant acts were done outside a sovereign state’s territory,

¹⁷ See Dicey et al (2012: s 5-149).

since international law does not generally recognize the right of a state to apply its domestic laws extraterritorially. In his view, this branch of the doctrine applies ‘*wherever the relevant act of the foreign state occurs*’ (emphasis added)—except, arguably, if it occurred in the UK. This was again inherent in the principle of act of state itself—it is not concerned with the lawfulness of the state’s acts under domestic systems of law but with acts whose lawfulness could be determined only by reference to international law, which has no territorial bounds (para 237). Thus in *Belhaj*, act of state applied to the alleged conduct of the US government, which took place outside its territory. In Lord Sumption’s analysis:

It involved the application of force by United States officials in the course of their government’s campaign against international terrorism and in the conduct of their relations with Malaysia, Thailand and Libya. *Whatever one may think of the lawfulness or morality of these acts, they were acts of state performed outside the territorial jurisdiction of the United States, which cannot be treated by an English court as mere private law torts, any more than drone strikes by US armed forces can* (para 238; emphasis added).

After tracing the development of act of state in English law at paras 202-08 and in US law at paras 209-12, and the ‘Russian Revolution cases’ at paras 213-15, Lord Sumption turned to Lord Wilberforce’s suggestion in *Buttes Gas* that a ‘more general principle’ exists in English law that the courts ‘will not adjudicate upon the transactions of foreign sovereign states’. In Lord Sumption’s analysis, the point Lord Wilberforce had been making was simply that this general principle was *something different* from the act of state doctrine (para 219). The application of the principle had ‘often been disputed but the principle itself has not’. His Lordship approved the Court of Appeal’s statement in *JH Rayner (Mincing Lane) Ltd v Dept of Trade and Industry* (1990) that courts are not competent to ‘adjudicate upon or to enforce the right arising out of transactions entered into by independent sovereign states between themselves on the plane of international law’, and found that it assisted in understanding what Lord Wilberforce had meant by the word ‘transactions’. As well, he noted *R (Khan)* (2014), where the Court of Appeal adopted the lower court’s statement (paras 14-15) that the rationale for this principle is:

founded upon the proposition that the attitude and approach of one country to the acts and conduct of another is *a matter of high policy, crucially connected to the conduct of the relations between the two sovereign powers*. To examine and sit in judgment on the conduct of another state would imperil relations between the states (para 25 of the Court of Appeal’s reasons; emphasis added).

Under the heading ‘The search for general principle’, Lord Sumption described foreign act of state as based on an ‘awareness that the courts of the United Kingdom are an organ of the United Kingdom’ (a principle he referred to as comity) *and* the constitutional separation of powers ‘which assigns the conduct of foreign affairs to the executive’ (para 225). Of course, many cases involving the acts of foreign states had failed:

because the acts in question are legally irrelevant. They give rise to no rights as a matter of private law and no reviewable questions of public law. It is on this ground that the court will not entertain an action to determine that Her Majesty’s government is acting or proposes to act in breach of international law in circumstances where no private law status, right or obligation depends on it (para 226).

In such instances, the court declines to treat the matter as governed by ordinary principles of English law *because of its subject matter*.

In *Belhaj* itself, Lord Sumption said, the claimants had a ‘domestic foothold’ in that they had pleaded ordinary torts under the laws of the states in which they had been committed. The question was whether they could do so consistently with the law relating to foreign act of state. At para 238, he answered this question in the negative. In particular, the actions alleged on the part of US officials had involved the application of force in the course of the American government’s campaign against international terrorism and in the conduct of US relations with Malaysia, Thailand and Libya. Whatever one might think of the lawfulness or morality of these acts, they were ‘acts of state performed outside the territorial jurisdiction of the United States, which could not be treated by an English court as mere private law torts, any more than drone strikes by US armed forces can’ (para 238). *Prima facie*, then, act of state applied to block the plaintiffs’ claims.

Lord Sumption found it ‘unhelpful’ to describe act of state as a principle of non-justiciability. That term applies to a number of different concepts that rest on different principles. In addition to cases where the issue is assigned to the executive or legislative branches, many cases of this kind involve issues that are simply not susceptible to the application of legal standards—as in *Buttes Gas*—or issues that *ought not* to be decided by a domestic court because they cannot properly be resolved by the domestic law of the state. As an example, an unlawful conspiracy involving foreign states would itself be justiciable in the sense that conspiracy is a recognized cause of action in English law. However, a domestic court ‘could not adjudicate upon it because it would be parasitic upon a finding that the foreign states involved had acted in breach of international law, being the only law relevant to their acts’. This too is an application of the

principle of non-justiciability, which should not be confined to cases in which the absence of judicial or manageable standards precludes adjudication by a domestic court (para 239).

Lord Sumption went on to observe that act of state does not apply in either form simply by reason of the fact that the subject matter may ‘incidentally’ disclose that the foreign state has acted unlawfully. This is the *Kirkpatrick* exception in the US; in England, see *Buck v Attorney General* (1965). Thus, many circumstances could arise in which an English court might express critical views about the public institutions of another country without offending the act of state doctrine or any analogous rule of law. In any event, the law of act of state ‘has never been directed to the avoidance of embarrassment, either to foreign states or to the United Kingdom’ (para 241).¹⁸

On the facts of *Belhaj*, however, the illegality of acts alleged against the relevant foreign states was not incidental—it was:

essential to the pleaded causes of action against the defendants in both actions. This is because the various civil wrongs which are alleged to have caused damage to the claimants are not said to have been committed directly by the defendants. They were committed by the foreign states. If the conduct of the foreign states was lawful, it cannot be tortious for the defendants to have assisted in their commission (para 242).

His Lordship then turned to the public policy exception, and in this regard was speaking for the majority of the Court. Where violations of international law or fundamental human rights are concerned, he accepted that courts should ‘move with the times and that widely accepted treaties and statutes may point to the direction in which such conceptions, as applied by the courts, ought to move’ (para 250, citing *Blathwayt v Baron Cawley* 1976: 426). The standards applied by public policy in cases with an international dimension have changed considerably in recent decades and international law itself increasingly ‘places limits on the permissible content of municipal law and on the means available to states for achieving even their legitimate policy objectives’ (para 251). Customary international law had historically been seen as part of the common law, but is now seen only as one of the sources of the common law. Although in principle, judges applying the common law may not create, modify or abrogate domestic law rights or obligations in accordance with ‘unincorporated norms derived from

¹⁸ But compare para 225 in which his Lordship noted with apparent approval the Court’s treatment of a certificate from the Secretary of State as conclusive in *Government of the Republic of Spain v SS ‘Arantzazu Mendi’* (1939: 264).

international law, whether customary or treaty-based', such norms may nevertheless 'affect the interpretation of ambiguous statutory provisions, guide the exercise of judicial or executive discretions and influence the development of the common law' (para 252).

Where this happens and where public policies conflict, Lord Sumption suggested, there is a danger that 'retaining the doctrine [of foreign act of state] while recognizing exceptions, will result either in the exception consuming the rule or in the rule becoming incoherent'. Any exception must therefore be limited to violations of international law which could be distinguished on rational grounds from the rest. The House of Lords had grappled with this difficulty in both *Oppenheimer* and *Kuwait Airways*. After reviewing those cases as well as Jones and the Canadian case of *Kazemi Estate*, he emphasized the 'exceptional' nature of torture, which in the words of the Convention, cannot be justified by any 'threat of war, internal political instability or any other public emergency' (para 258). Jones had turned on an unquestionable international law obligation to recognize the 'forensic immunity' of states, which was codified by statute. In contrast, the doctrine of act of state did not reflect any obligation of states under international law. In Lord Sumption's words:

The act of state doctrine, by comparison, does not reflect any obligation of states and international law. It follows that an exception to it does not need to be based on a countervailing international law obligation in order to accord with principle. *It is enough that the proposed exception reflects a sufficiently fundamental rule of English public policy* (para 261; emphasis added).

He concluded that it would be 'contrary to the fundamental requirements of justice administered by an English court' to apply act of state to an allegation of civil liability for complicity in acts of torture by foreign states. As well, he emphasized that the defendants were not foreign states or agents thereof and that:

They are or were at the relevant time officials and departments of the British government. They would *have no right of their own to claim an immunity in English legal proceedings, whether ratione personae or ratione materiae*. On the other hand, they would be protected by state immunity in any other jurisdiction, with the result *that unless answerable here they would be in the unique position of being immune everywhere in the world. Their exoneration under the foreign act of state doctrine would serve no interest which it is the purpose of the doctrine to protect* (para 262; emphasis added).

It was not the purpose of foreign act of state to protect English parties from liability for their role in the acts of foreign states. In *R (Khan)*, the Court of Appeal had held that UK officials could rely on act of state in

connection with allegations that they had assisted in military action overseas by a foreign sovereign. Lord Sumption viewed that decision as correct. However, he said:

torture is different. It is by definition an act of a public official or a person acting in an official capacity: see Article 1 of the Torture Convention It is no answer ... to say that these treaty provisions are concerned with criminal law and jurisdiction. So they are. But the criminal law reflects the moral values of our society and may inform the content of its public policy. Torture is contrary to both a peremptory norm of international law and a fundamental value of domestic law. Indeed, it was contrary to domestic public policy in England long before the development of any peremptory norm of international law (para 266; emphasis added).

It would not be consistent with English public policy to apply foreign act of state ‘so as to prevent the court from determining the allegations of torture or assisting or conniving in torture made against these defendants’ (para 268). Similar reasoning applied to the allegations of forced rendition.

Would the same result have been reached if the defendants had not been English subjects? In theory, the answer should be yes: as long as the English court has jurisdiction over the defendant, the exception should apply to any person who has colluded in acts of torture or violated other peremptory norms. However, the emphasis placed by Lord Sumption on this point and at this stage of his reasons may leave open an argument to the contrary.

The Tally

In the result in *Belhaj*, Lord Wilson agreed with the reasons of Lord Neuberger. Lady Hale and Lord Clarke agreed with Lord Neuberger that act of state did not apply. They described Lord Mance’s reasons as ‘essentially the same’ as those of Lord Neuberger, and correctly so, although the latter expressed views on some issues on which Lord Mance did not. However, since Lady Hale and Lord Clarke did not expressly agree with both Lords Mance and Neuberger, the latter’s reasons are the majority judgment on act of state *per se*. Lord Sumption, with Lord Hughes concurring, would have held that act of state did apply, but for the public policy exception. Lady Hale and Lord Clarke declined to express a view on the exception. Thus, five of the seven judges were of the view that the public policy exception applied or would have applied if act of state had been engaged. Lord Neuberger (para 172) agreed generally with Lord Sumption’s view of the public policy exception, as did Lord Mance

at para 48; thus, Lord Sumption's analysis of the exception represents the opinion of a majority of the seven judges.

[D] ANALYSIS

Obviously, a high degree of tentativeness characterized the reasons, especially those of Lord Mance (who doubted the existence of his second and fourth rules) and Lord Neuberger (who was uncertain as to whether his first two 'possible rules' were restricted to property, whether unlawful executive acts were caught by the second rule, and whether the fourth rule existed). This uncertainty is unfortunate, but, in fairness, it is usually prudent for a court to determine only the concrete issues requiring determination in the particular case and to leave other questions for another day—a principle academic commentators often forget.

Their Lordships' disaggregation of act of state does represent a concerted attempt to clarify the nature and scope of each aspect of the doctrine. Their analyses may reflect what the Court of Appeal described in *Yukos* as the tendency of modern courts to define act of state 'like a silhouette, by its limitations' rather than to approach it as 'occupying the whole ground save to the extent an exception can be imposed' (para 115). Their Lordships do seem to depart from the previous readiness of English courts to apply act of state as a broad and inflexible principle of *jurisdiction* (see Dicey et al 2012: rule 3; Halsbury 2014, vol 20: para 174, both quoted above) and from the tendency to accord deference to older US authorities that were informed by different statutory and constitutional circumstances.¹⁹ On the point of jurisdiction, English courts now seem to accept that they exercise a discretion when they decide that an issue is not justiciable. As Lord Goff observed in *Re State of Norway's Application* (1990) concerning the rule of non-justiciability stated in the 1987 edition of Dicey et al (unchanged in the 15th edition):

At all events, the rule cannot, in my view, go to the jurisdiction of the English court. What the English court does is simply to decline in such cases to exercise its jurisdiction, and on that basis the relevant proceedings will be either struck out or dismissed (Dicey et al 2012: 808).

Having said this, it seems one must accept that the separation of act of state into the four 'rules' posited by Lords Mance and Neuberger, or something akin to those rules, will remain the organizing framework of the doctrine in the medium term. Given the precedential significance of

¹⁹ *Buttes Gas* is perhaps the prime example of this phenomenon; see now the warnings given by Lord Mance at para 57 and Lord Neuberger at para 134 against reliance upon American authorities in discussing act of state.

Belhaj, it does not seem possible now for a trial court to reorganize the doctrine into some other order altogether or even into one or two larger principles as Lord Sumption did. Indeed, his formulation of ‘international law act of state’ seems to describe only the principle of non-justiciability in the sense I have adopted. It fails to account for many of the instances in which act of state in its ‘normal meaning’ (to quote Lord Wilberforce) has been applied to facts that do not involve dealings or transactions between sovereign states on the ‘international plane’.

Fourth Rule: Avoiding Embarrassment

What, then, can the master or trial judge at the preliminary or trial stage of litigation take from their Lordships’ unpacking of act of state? Approaching the rules posited by the majority (Lord Neuberger) in reverse order, it appears that the fourth possible rule—that an English court should comply with a request from the executive to abstain from adjudicating a matter in order to avoid embarrassment to the government in its foreign relations—has been all but laid to rest. As Lord Sumption observed at para 241, the act of state doctrine has ‘never been directed to the avoidance of embarrassment’. It would now take considerable courage on the part of an executive to challenge the court’s *obiter* on this point, which has support only in US law.²⁰

The consequences of the falling away of the fourth rule in the UK have in any event been attenuated by the enactment of the Justice and Security Act 2013. It sets out a procedure whereby the government may seek to avoid the disclosure (to the public record and even to the non-governmental party in the litigation) of documents or material where such disclosure would damage the ‘interests of national security’. Once this procedure is invoked, the onus is on the Crown to persuade the court that the use of the ‘closed material procedure’ is in the interests of the ‘fair and effective administration of justice’ (see Akhtar 2016: 374-76).

Third Rule: Non-justiciability

With respect to the third rule, Dickinson suggests (2018: 17) that all three judgments assumed the existence of a ‘broad principle’ of abstention with a constitutional basis. The Court did make it clear that non-justiciability is not limited to cases like *Buttes Gas* in which a court of law would be operating in a ‘judicial no-man’s land’—i.e., without ‘judicial or manageable standards’ by which to decide them. Certainly, this rubric would also include high-level dealings (‘transactions’) between states that

²⁰ See the ‘Bernstein exception’ discussed by Alderton (2011: 5).

are, in Lord Neuberger's words, 'only really appropriate for diplomatic or similar channels' Whether described as beyond the competence of courts or as 'inappropriate' for courts to resolve, these matters are usually not difficult to identify.

It must in my view now be doubted, however, that non-justiciability—the existence of certain issues of law over which it is inappropriate or impossible for domestic courts to adjudicate—should continue to be regarded as *part of the law of act of state*. The fact that non-justiciability is engaged by reason of the subject-matter of the issue at stake does not make it part of the doctrine. Based on the constitutional role and competence of the judiciary, non-justiciability has a different theoretical underpinning than the other 'rules' identified in *Belhaj*; although it may have been obscured in previous centuries by the rules of private international law, it did not grow out of them; as *Shergill* illustrates, it is not confined to cases with an international aspect; and if Lord Sumption is correct, it is not constrained by territoriality but applies 'wherever the act of the foreign state occurs' (para 237, citing *Buttes Gas* and *R (Khan)*). Indeed, as the Court of Appeal suggested in *Belhaj*, to the extent that non-justiciability is concerned with the transactions of states on the international plane, 'territoriality will not always be material', nor easily determined (para 131).

As we have seen, Lord Wilberforce has been taken as suggesting in *Buttes Gas* that the 'more general and more fundamental principle' of non-justiciability unites or underlies the other rules of act of state. But in fact he suggested it should not be considered as a 'variety' of act of state but as a principle 'for judicial restraint or abstention' (931). As also seen above, the Court of Appeal in *Yukos* viewed Lord Wilberforce's larger principle of non-justiciability as not having 'come through' the intervening cases (*Pinochet (No 3)*, *Kuwait Airways* and *Altimo Holdings*) as a doctrine separate from act of state, but as having largely subsumed it 'as the paradigm restatement' of act of state (para 66). Again with respect, this seems doubtful at least in retrospect, given the independent existence of the more 'hard-edged' (and territorially limited) first and second rules of Lords Mance and Neuberger (see *Belhaj*: para 146). It is difficult to disagree with Lord Sumption's observation at para 219 that Lord Wilberforce's general principle is 'unquestionably different from the rule about the application to a sovereign act of the sovereign's municipal law'.

A decent argument could be made that the public policy exception should not apply to non-justiciability—i.e., that the judicial branch of government is either competent or appropriate to adjudicate the issue in

question, or it is not. But Lord Sumption (with whom Lords Mance (para 107) and Neuberger (para 168) generally concurred on this point) met this point directly. He emphasized that there are constitutional aspects to the exception as well as to the rule. Rules of judge-made law, he said, are rarely absolute (para 250); the relationship between international law and domestic law has changed as certain minimum standards for the contents of municipal law have been accepted; and domestic courts have become accustomed to considering, if not directly applying, international law norms in interpreting private law rights and obligations (para 252). As we have seen, he ultimately concluded (and on this point he carried the majority of the Court) that it would (now) be contrary to fundamental justice for an English court to apply act of state to an allegation of complicity in acts of torture by a foreign state (para 262). Non-justiciability does have this exception in common, then, with the first two rules.

First Rule: Recognizing and Giving Effect to Foreign Legislation

This leaves the first two rules, which it may be useful to recap. According to Lord Neuberger's analysis, the first rule is either based on or is 'close to' the private international law concept of choice of law (para 159; cf. Lord Sumption's statement at para 200 that act of state is 'wholly the creation of the common law'). In Lord Neuberger's judgment, the rule has the following characteristics:

- ◇ It would appear to apply to all types of property, since at para 150, his Lordship quoted with apparent approval a statement from *Re Helbert Wagg & Co Ltd's Claim* (1956: 344-45) that 'in general every civilized state must be recognized as having power to legislate in respect of movables situate within that state',
- ◇ The rule 'only applies to acts which take effect within the territory of the state concerned' (para 135, citing *Peer International Corporation v Termidor Music Publishers Ltd* 2004) and it is 'hard to see' how it could apply to acts in a location outside the subject state (para 163).
- ◇ There is 'a very powerful argument' for the proposition that it applies equally to injuries to the person as to the taking of property; but with one exception, that has not been considered by English courts (para 159).

Second Rule: Recognizing the Validity of Executive Acts by or on Behalf of Foreign States

The second rule may or may not exist, Lord Neuberger said. He assumed it did for purposes of the appeal. If it does exist, he said, it ‘may be close to being a general principle of private international law’ (para 150). It is ‘valid and well-established’ in respect of acts of state confiscating or transferring property or property rights within the territory of the foreign state where the act is lawful or at least not unlawful. The rule also has the following characteristics:

- ◇ Assuming it ‘can apply’ to property if the executive acts were unlawful, it *should not* apply to personal injuries caused to a plaintiff by an act that was unlawful under the laws of the foreign state (see paras 137-42, 160). At para 169, Lord Neuberger took a more definite view: he said the rule *did not* apply in *Belhaj* because the conduct complained of involved injury to persons rather than property.
- ◇ Again, it was ‘hard to see’ how the second rule could apply to acts taking place outside the territory of the foreign state. Older cases recognize that the rule is based on sovereign power and the nature of sovereign power ‘is that it is limited to territory over which the power exists’ (para 163).
- ◇ It was unnecessary to consider whether the second rule applies to *judicial* acts.²¹ (However, I note that this issue was dealt with definitively by the Court of Appeal in *Yukos* and by the *Privy Council in AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011) and *Altimo Holdings* 2011 paras 89-102), none of which judgments has been disapproved.)

Of course, the two, or even all three, rules may well overlap in any given factual situation. (*Buttes Gas*, for example, could have been decided under the first rule (as Lord Neuberger suggested it was) or the third.) It might not be possible, at least at the outset of the litigation, to determine whether the impugned act was lawful; both damage to property and personal injury may be featured; and both the efficacy of legislation and the legality of executive acts carried out under the legislation may be challenged. None of the authorities has grappled with overlapping situations of this kind. Where they arise, masters or trial judges would be well advised to raise the matter with defence counsel at an early stage to see if a commitment can be extracted as to which route(s) to act of state they intend to pursue.

²¹ However, I note that this issue was dealt with definitively by the Court of Appeal in *Yukos* and by the Privy Council in *AK Investment CJSC v Kyrgyz Mobil Tel Ltd* (2011) and *Altimo Holdings* (2011: paras 89-102), none of which judgments has been disapproved.

If at some future time, English courts decide that *both* the first and second rules either do or do not apply to acts resulting in personal injury, the two rules might well be merged into one—that domestic courts will recognize and give effect to legislative acts (i.e., acts done pursuant to legislation of the foreign state) and executive acts of a foreign state, occurring inside that state (or not) and resulting in the relevant type of damage—subject, of course, to the established exceptions to the doctrine. Such a rule would not be very different from the summary offered by Lord Neuberger at the outset of his reasons:

the Doctrine amounts to this, that the courts of the United Kingdom will not readily adjudicate upon the lawfulness or validity of sovereign acts of foreign states, and it applies to claims which, while not made against the foreign state concerned, involve an allegation that a foreign state has acted unlawfully (para 118).

At present, however, this formulation does not reflect the nuanced issues that were left open for future determination.²²

[E] CONCLUSION

Their Lordships' reasons in *Belhaj* are learned, thorough and reflective of modern realities. They leave open the door to limitations on act of state that will accord with the greater role being played by international law in the decisions of domestic courts in which the interests or conduct of states are involved, and do so without disrespecting the constitutional limitations on the judiciary's role. In an era in which some states, or state actors, are resorting to extreme measures causing personal injury and even death to individuals, it is to be hoped that domestic courts will continue the trend towards civil, as well as criminal, accountability to the full extent permitted by international law. In the meantime, the first and second rules remain the touchstone for pleas of act of state, and the term 'non-justiciability' may continue to be used—or misused—with reference to 'true' acts of state.

The greater significance of *Belhaj* lies, in my view, in the Supreme Court's treatment of the public policy exception. Through Lord Sumption, five of the seven judges agreed that English courts should adapt to modern conditions in the form of rules of public policy that are 'sufficiently fundamental' to distinguish the conduct in question from other violations of international conventions. The abhorrence of torture represented such a fundamental value in English law, and one having a long history. As a common law principle, the exception will, one hopes, continue to

²² Nor, it should be noted, does it purport to include the principle of non-justiciability.

evolve to include the violation of other fundamental and internationally accepted norms.

At the same time, it must be remembered that *Belhaj* and most of the other cases discussed above were decided *at the pleadings stage*. It was not necessary for the Court to investigate or examine the lawfulness of the conduct alleged: the allegations pleaded were accepted as true, and in *Belhaj* there could be no doubt as to the unlawfulness of torture, whatever law was applied (see also *Minister of Justice v Khadr* 2008). The case may not always be so clear, however, and as Lord Dyson MR observed at the Court of Appeal level in *Belhaj*, ‘it is the adjudication, sitting in judgment, examination, challenge or investigation which is an essential element of the mischief’ (para 89). It is in these stages of the litigation that the greatest difficulties will arise in terms of the original objectives of act of state—comity and equality of states. These difficulties will require trial judges to give even fuller consideration to the problematic and changing interface between domestic and international law.

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MANDATORY MEDIATION AND THE RULE OF LAW

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Abstract

This article evaluates mediation practice against the core principles that Thomas Bingham identifies as constituting the rule of law. It identifies three forms of compulsion and discusses these in the light of Thomas Bingham's eight principles. The article examines how voluntary mediation may increase access to justice, a significant component of the rule of law, but an element of compulsion, in its strict sense, impedes the constitutional right of access to the courts and stifles the development of precedent. To comply with the rule of law, in its more substantive version, any instruction that parties attempt to settle via mediation needs to be subject to judicial scrutiny, must ensure that the cost of mediation is not disproportionate, that there is a genuine willingness of the parties to engage in the process with good faith, and that it involves no greater structural inequalities than in litigation.

Keywords: mediation, rule of law, ADR, access to justice, mandatory mediation

[A] INTRODUCTION

There have always been two contrasting processes for resolving disputes—one that may sharpen conflict between the parties, by appealing to the authority of a state-sanctioned third party to vindicate rights, and the other that encourages engagement between the parties to

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create their own resolution to a dispute (Roberts and Palmer 2005; Roebuck 2007).

Mediation has become a regular aspect of civil litigation in the United Kingdom yet there has been a dearth of analysis of the implications of this development for the rule of law. American academics have written of the dangers of informal processes for vulnerable litigants. This article examines the threat that is posed by forms of compulsion in amplifying these effects.

Mediation in the developed West, in the second half of the 20th century, began as a movement from below with the idealistic San Francisco Community Mediation Boards in the 1970s. It was given academic authority and momentum by the intervention of Frank Sander in the National Conference on the cause of Popular Dissatisfaction with the Administration of Justice (The Pound Conference) in 1976 (Levin and Wheeler 1979). It only really took off within civil procedure after the imprimatur of the US Supreme Court's Chief Justice Warren Burger after his visit to the Peoples' Republic of China (PRC) at the invitation of the Ministry of the Interior in 1981, which included an opportunity to observe a people's mediation committee at work.² Warren Burger then famously called on those involved in civil litigation in the USA to search for a 'better way' (Burger 1982).

Development in Britain came a decade later. Community mediation in England began with the setting up of community police liaison groups in Lambeth during the aftermath of the Brixton riots and the foundation of Southwark and Newham Mediation Services (1984). The imbrication of its processes into civil disputes was given support with the founding of the Centre for Effective Dispute Resolution (CEDR) in 1990, with the backing of the Confederation of British Industry and the Trades Union Congress, and the imprimatur of Lord Woolf in his 1994 Presidential Address to the Bentham Club (Woolf 1994). Lord Woolf's 'Access to Justice: Interim Report' in 1995 marked a sea-change in its acceptance of alternative dispute resolution (ADR).

In one account of ADR mythology, greedy litigation-hungry lawyers drive naïve disputants, with an exaggerated prediction of their prospects of success in litigation, to unnecessary legal combat, hell-bent on maximising fees and displaying their prowess in court. In contrast, *litigation romanticism* (Menkel-Meadow 1995: 2669) presents courts as the pre-eminent site of Kantian justice where judges uphold the rule of law

² I am indebted to Michael Palmer for this insight.

against the executive and parliament, vindicating the rights of the powerless through impartial Solomon-like wisdom (Fiss 1984). Neither view is able to provide a very accurate or comprehensive picture of mediation. This article will argue that the crucial factor for the existence of high-quality mediation existing alongside access to high-quality public justice, an intrinsic aspect of the rule of law, is the maintenance of choice between these distinct but complementary processes (Moffit 2009; Neuberger 2010).³ This article will also examine how voluntary mediation serves important values of party autonomy and self-determination that complement the objectives of the rule of law, whereas compulsory mediation subverts both the rule of law and the values that mediation claims to serve. The first part of the article defines and discusses the terms that are used and introduces the different forms of compulsion and sub-principles of the rule of law. Part 2 then considers current practice in the UK in the context of relevant case law. Part 3 analyses different forms of mediation in the light of Bingham's eight sub-principles. Part 4 concludes with an examination of the contexts where there is an irreconcilable tension between the rule of law and forms of mandatory mediation.

[B] DEFINITION OF TERMS CONSIDERED

Mediation

Mediation is in essence third-party facilitated negotiation. For CEDR this becomes a 'flexible process conducted confidentially in which a neutral person actively assists the parties in working towards a negotiated agreement of a dispute or difference, with the parties in ultimate control of the decision to settle and the terms of resolution' (CEDR 2018: s 1). While it encompasses a spectrum of interventions, from informal facilitation of settlement to the Court of Appeal mediation scheme, and a variety of styles, from the narrowly evaluative to the broadly facilitative (Riskin 1996) including transformative (Bush and Folger 1994) and narrative forms (Monk and Winslade 2000), the fact that it is voluntary is central to its identity. Crucially, the parties' retention of the decision to settle depends on the existence of a process to adjudicate the case, as a long stop, if a party does not wish to settle. The European Mediation

³ Although some critics have taken issue and refuted the centrality of the court system to the rule of law, it remains an important aspect of Bingham's analysis.

Directive incorporates voluntarism both in its preamble and definition (Directive 2008/42/EC).⁴

Compulsion

Compulsion is a complex concept. Where does the threshold of compulsion lie? Is it an *ex post facto* negative costs order for not mediating or a judicial direction to engage with the process? If the latter then what does that engagement require and at what stage in the process? Is attendance on the day sufficient or will mediators be required to certify good faith and for parties to engage with the process for a minimum period and if so for how long? Should judges go further and compel not just attendance but resolution of the dispute? Some commentators, such as Ahmed and de Girolamo, argue that the Rubicon of compulsion has already been crossed, that this need not be lamented and the need now is for mediation to be given a clearer procedural framework within the civil justice system (Ahmed 2012) or for express legislative provisions (de Girolamo 2016). A body of academic commentary has drawn attention to the way that the process of mediation may undermine the interests of the vulnerable or powerless (Nader 1979; Abel 1982; Hofrichter 1982; Auerbach 1983; Fiss 1984): compulsion arguably reinforces this process by legitimating an erosion of rights. Sander (2007) distinguishes between two types of mandatory mediation: 'discretionary' judicial referral and a self-enforcing 'categorical' referral in which all cases of a certain type are referred.⁵ Walsh (2011: 110) has referred to 'tiered' resolution clauses that require the use of mediation prior to arbitration or adjudication. Quek (2010: 488) postulates a 'continuum of mandatoriness' across five levels and argues that the higher levels are more likely to blur a distinction between 'coercion into' and 'coercion within' mediation.

For the purposes of this article, I adopt the categories of compulsion used by the Civil Justice Council (2017: s 8) in its interim report on 'ADR and Civil Justice'. Types 1 and 2 involve Sander's 'categorical' form while Type 3 requires the exercise of judicial discretion. All three categories envisage that the duty of litigants is to engage with the process rather

⁴ Paragraph 13 of the preamble states: 'The mediation provided for in this Directive should be a voluntary process in the sense that the parties are themselves in charge of the process and may organize it as they wish and terminate it at any time.' Article 3 defines mediation as: 'a structured process, however named or referred to, whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator.'

⁵ For a more recent discussion which adduces a further category of quasi-compulsion, see Hanks (2012).

than to settle. In a stricter type, adopted in commercial contexts in the PRC, in certain cases judges effectively mandate settlement.⁶

- ◇ Type 1: a requirement that parties in all cases engage in or attempt ADR as a pre-condition of access to the court, with the claimant unable to issue proceedings until evidence of the appropriate efforts is produced.⁷
- ◇ Type 2: a requirement that the parties have in all cases engaged in or attempted ADR at some later stage such as any case management hearing.⁸
- ◇ Type 3: power of the court to require unwilling parties in a particular case to engage in ADR on an ad hoc basis in the course of case management.⁹

Mandated mediation has many forms. It can be provided by private mediators, at the choice of the parties, accredited mediators annexed to a court, or even by a judge who then recuses him or herself from hearing a case. What all forms have in common is that the option of mediation is no longer freely chosen by the parties as an alternative to adjudication but compelled, whether procedurally or judicially with an implicit or explicit sanction for non-compliance.

⁶ While not currently a prospect in the Anglo-American common law systems, in the PRC a highly evaluative form of mediation is integrated into the civil justice system. Guidance of the Supreme Court compels inferior courts to consider cases for mediation even where parties are reluctant. The same judge will hear evidence in mediation that may subsequently be admissible in court adjudication. Chinese judge-mediators 'show a way to cross the line of self-determination and make encouragement become coercion' (Fei 2015: 398). Judge mediators consult the law: to anticipate the losing party; to identify negative effects that might ensue from adjudication; and to propose a mediation scheme and create bargaining chips to induce settlement. There is, however, a complex interplay between adjudication and mediation in the cross-current of the relationship between the judiciary and the executive. Article 9 of the Civil Procedure Law of the PRC provides that when hearing a case 'the People's Courts shall conduct mediation in accordance with the principles of voluntariness and lawfulness'. This form of mediation illustrates the dangers of 'MedArb' or judicial mediation where the same judge mediates and tries a case. See, for example, Fu and Palmer (2017) on this complex and evolving issue.

⁷ See for instance: Hanks (2012), who cites New South Wales farm debt recovery scheme and Italian procedure as discussed in the *Rosalba Alassini* case, C-1317/08 and C 320/08. In a UK context examples would be a MIAM certificate in family cases or a C100 in employment tribunals confirming ACAS conciliation.

⁸ Under the Ontario Mandatory Mediation programme (CPR r 24.1) all civil (non-family) cases are assigned to a three-hour mediation session, to take place within 90 days of filing the defence unless the court orders otherwise (Prince 2007).

⁹ Arguably the court already has this power under r 26.4(2)(b) to direct mediation and to apply sanctions where it is refused. See, for instance, Ward LJ in *Wright v Michael Wright Supplies Ltd* (2013).

Rule of Law

The concept of the rule of law is both an ‘elusive and protean concept’ and a ‘criterion of civilization’ (Sedley 2015: 280).¹⁰ In the context of English law it was first defined and identified by A V Dicey in his 1885 *Lectures Introductory to the Study of the Law of the Constitution*, where he linked it uncritically with the ‘omnipotence or undisputed supremacy’ of Parliament and government (Dicey 2013: 95). It is a pivot of the constitution in its linkage between legal values and political morality,¹¹ now given express statutory recognition.¹² In its contemporary common law English form it has evolved from Dicey’s limited principles of: no punishment without law; resistance to discretionary powers; equality before the law; and the origin of these principles in the decision of the courts rather than the fixed constitution, to address the abuses of executive power in the 20th century which nevertheless followed a form of law.

In Thomas Bingham’s developed, substantive (or ‘thick’) form it includes equality and human rights and, implicitly, an ideal of justice, a democratic polity and separation of powers (Bingham 2010). While some jurists, such as Joseph Raz (1977), offer an account of a more limited formal (or thin) version, stripped of political morality, this article adopts the analysis of Bingham as most relevant to the present context, given his experience at the apex of the English legal system—as Lord Chief Justice, Master of the Rolls and senior Law Lord (2000 to 2008)—on account of its clarity, and for its engagement with the 21st-century legal values of substantive equality and fundamental human rights. Bingham’s analysis accepts the Diceyan account of the centrality of the judiciary in controlling arbitrary power; its formulation takes account of the development of administrative and corporate power in the second half of the 20th century and the need to ensure the integrity of an increasingly significant body of administrative decisions that has developed since Victorian England. The rule of law is not solely the creation of the courts. As Bingham (2010: 174) makes clear in his discussion of Ambrogio Lorenzetti’s fresco of *An Allegory of Good Government*, the rule of law is not only a criterion of individual justice but of the integrity of governance. Access to justice becomes a necessary

¹⁰ Its roots are in the Athenian philosophy that ‘it is more proper that the law should govern than any one of its citizens’ and that equality of access to the courts is a precondition of democracy (Aristotle 2010: 89).

¹¹ See, for instance: Edward Thompson’s identification of the rule of law as an ‘unqualified human good’ (Thompson 1975: 260).

¹² Constitutional Reform Act 2005, s 1, declares that it does not affect the ‘the existing constitutional principle of the rule of law’ in the context of reforms to the role of the Lord Chancellor.

precondition for social harmony and peace and the capacity of individuals to operate effectively within stable social structures.

In Bingham's account of the rule of law, set out in the Sir David Williams Lecture (2006) and subsequently published in *The Rule of Law* (2010), he identifies eight principles. These points can be characterised as follows:

1. The law must be accessible, intelligible, clear and predictable.
2. Questions of legal right and liability should be resolved by law not discretion.
3. Laws should apply equally to all.
4. Ministers and public officers must exercise their powers in good faith, and for their intended purpose.
5. The law must adequately protect human rights.
6. Means must be provided for resolving, without prohibitive cost or inordinate delay, civil disputes which the parties themselves are unable to resolve.
7. Adjudicative procedures provided by the state should be fair.
8. The state must comply with its obligations in international and national law.

[C] CASE LAW REGARDING CURRENT PRACTICE

Civil justice reforms in the 1990s sought to simplify civil procedures within the context of the most restrictive access to legal aid since its inception in 1949. The Heilbron-Hodge Report in 1993 concentrated on moving the litigation culture towards early settlement of disputes. Following this, Lord Woolf was commissioned to conduct a formal review of the civil justice system. His 1995 'Access to Justice: Interim Report' was a watershed moment in the development of ADR, striking a balance between the active encouragement of ADR and opposition to compulsion as an 'alternative or preliminary to litigation' (Woolf 1995: cxxxvi, paras 3-4).¹³ In his 'Access to Justice: Final Report' he remains 'of the view, though with less certainty than before, that it would not be right for the court to compel parties to use ADR' (Woolf 1996: lxi, para 18) and recommends:

Where a party has refused unreasonably a proposal by the court that ADR should be attempted, or has acted unco-operatively in the course of ADR, the court should be able to take that into account in deciding what order to make as to costs' (Woolf 1996: ccii para 41).

¹³ He attributes the prevalence of compulsory mediation in USA jurisdictions to the lack of court resources for civil trials.

Although Lord Woolf maintains the importance of preserving the citizen's common law constitutional right of access to the court (*R v Lord Chancellor ex p Witham* 1997; *R v Home Secretary ex p Leech* 1994), where active encouragement is buttressed with costs penalties for refusing to contemplate mediation this moves towards a Type 2 compulsion. The boundaries of this encouragement remain contested and unclear.

In November 2008, Sir Anthony Clarke, as Master of the Rolls, appointed Sir Rupert Jackson to lead a fundamental review of the rules and principles governing the costs of civil litigation and to make recommendations in order to promote access to justice at proportionate cost. He published a preliminary report in May 2009 and a final report in December 2009 (Jackson 2010a; 2010b). Following this review, the costs of seeking settlement or negotiation, including those of an unsuccessful mediation, are recoverable as 'work done in connection with negotiations with a view to settlement' (Civil Procedure Rules PD 47, 5.12(8)).

In the 'Civil Courts Structure Review' (2015; 2016), Briggs LJ, noting that small claims mediation was effective but underused, identified the relationship between the civil courts and the providers of ADR as 'semi-detached' but stopped short of recommending compulsion:

The courts penalize with costs sanctions those who fail to engage with a proposal of ADR from their opponents. But the civil courts have declined, after careful consideration over many years to make any form of ADR compulsory. This is in many ways, both understandable and as it should be (Briggs 2015: para 2.86).

He considers early settlement by mediation or conciliation an 'essential element in a new court designed for navigation by litigants without lawyers' (Briggs 2016: para 6.73), and that 'the choice of the most suitable conciliation process for each case should be a matter for the experienced, judicially trained and supervised, Case Officer in conjunction with the litigants themselves' (Briggs 2016: para 113).

The rhetoric of simplification and the reality of cost-savings have pulled in different directions. Ahmed (2012: 151-75) has argued that there is already an 'implied compulsory mediation' in the English jurisdiction. Compulsory Mediation Information and Assessment Meetings (MIAMs) in family law (Type 1 compulsion), Civil Procedure Rules exhorting mediation, and judgments prescribing cost penalties for not mediating have introduced an element of implicit coercion into mediation.

Case law has oscillated between reticence towards mediation and an enthusiastic endorsement of mediation with a willingness to embrace compulsion. The primary sanction to date for not mediating remains an

adverse costs order departing from the ordinary principle that ‘costs follow the event’. In *Burchell v Bullard* (2005) a party that ignored an offer to mediate at a pre-action stage was deemed to have unreasonably refused to mediate. In *R (Cowl) and Others v Plymouth City Council* (2001), Lord Woolf held that parties must consider mediation before starting legal proceedings, particularly where public money is involved, and in *Dunnet v Railtrack* (2002) the Court dismissed Mrs Dunnet’s appeal against Railtrack, refusing to order costs against her on account of Railtrack’s refusal to contemplate mediation prior to appeal. In this case of clear precedential value, Brooke LJ offered a vigorous exhortation of the importance of mediation and of the reality of a costs sanction:

It is to be hoped that any publicity given to this part of the judgment of the court will draw the attention of lawyers to their duties to further the overriding objective in the way that is set out in CPR Pt1 and to the possibility that, if they turn down out of hand the chance of alternative dispute resolution when it is suggested by the court, as happened on this occasion, they may have to face uncomfortable costs consequences (*Dunnet v Railtrack* 2002: para 15).

In *Hurst v Leeming* (2002), Lightman J marked a move towards incorporating ADR as a part of, rather than complement to, the justice system, holding that it was for a judge to determine whether a refusal to mediate was justified, arguing that ‘mediation is not in law compulsory, but alternative dispute resolution is at the heart of today’s civil justice system’ (para 9).

In *Halsey v Milton Keynes NHS Trust* (2004: para 9), Dyson LJ, in the Court of Appeal, went some way to redressing the balance in identifying six factors that needed to be considered regarding the reasonableness of a refusal to mediate and opined that ‘to oblige truly unwilling parties to refer their disputes to mediation would be to impose unacceptable obstruction on their access to the court’ and considered that compulsory mediation could infringe Article 6 of the European Convention on Human Rights (ECHR) 1950.¹⁴

In *Chantrey Vellacot v The Convergence Group plc* (2007: paras 218, 226), a case involving a counterclaim for professional negligence against a firm of chartered accountants which had initiated proceedings for non-payment of fees, Rimer LJ followed *Eagleson v Liddell* (2001) in ordering the recovery of costs, on an indemnity basis, against the director of the

¹⁴ The nature of the dispute; the merits of the case; the extent to which other settlements have been attempted; whether the costs of mediation would have been disproportionately high; whether any delay in setting up or attending mediation would have been prejudicial; whether the mediation had a reasonable prospect of success (*Halsey v Milton Keynes NHS Trust* 2004: para 16).

company, who was not a direct party to the proceedings as a witness who was found to be 'evasive and untruthful'. This included a failed post-proceeding mediation that was considered to fall within an expansive definition of section 51 of the Supreme Court Act 1981 as 'the costs ... incidental to the proceedings'.

In *Royal Bank of Canada Trust Corporation Ltd v Secretary of State for Defence* (2003: para 9), where the Ministry of Defence rejected mediation in a case concerning the interpretation of a lease of property on the grounds that involved a point of law, Lewison J relied on the government's mediation pledge in determining that this did not make the case unsuitable for mediation.

The pendulum appeared to swing back towards compulsion in *PGF v OMFS Company 1 Ltd* in 2012. The court affirmed the role of ADR in civil justice and the view expressed by Jackson that to ignore a good faith invitation to mediate could justify a costs sanction. The Court of Appeal decided the case:

sends out an important message to civil litigants, requiring them to engage with a serious invitation to participate in ADR, even if they have reasons which might justify a refusal, or the undertaking of some other form of ADR, or ADR at some other time in the litigation (*PGF v OMFS Company 1 Ltd* 2013: para 56).

However, in the more recent case of *Gore v Naheed* (2017: para 49), Patton LJ, in the Court of Appeal, refused to interfere with the cost decision of the first instance judge and said:

speaking for myself, I have some difficulty in accepting that the desire of a party to have his rights determined by a court of law in preference to mediation can be said to be unreasonable conduct particularly when, as here, those rights are ultimately vindicated.

The current state of case law represents an uneasy truce between Dyson LJ's indicia for a test of reasonableness in refusing mediation and the courts' jurisdiction to compel parties to enter into a mediation. There is a precarious judicial consensus that compulsion could be viewed as a violation of a litigant's constitutional right of access to the court, but an adverse costs order does not amount to a fetter in a strict legal sense. Lord Phillips, as Master of the Rolls, while shrinking from compulsion, was favourable to court-annexed mediation, arguing that 'there should be built into the process a stage at which the court can require them to attempt mediation' (Phillips 2008). Lord Clarke, speaking extrajudicially, has criticised Lord Dyson's *Halsey* judgment and argued that mediation and ADR are 'not simply ancillary to court proceedings but part of them'

and the power exists to make them ‘an integral part of the litigation process’ (Clarke 2008: paras 14, 16). The logic of this, however, appears defective. As Lord Neuberger has reflected extrajudicially, requiring all individuals to mediate before gaining access to the court will have a disproportionate impact on different classes of litigants. Some will have the resources to afford mediation and litigation, and others will not.¹⁵ Neuberger anchors his analysis in the constitutional principle of the equal right of access to the courts (as a third branch of government) and the Ancient Greek concept of ‘equal participation in government’ (Neuberger 2010: 5). Financially based fetters therefore ‘run the risk of depriving all citizens of an equal right of participation in government’ (Neuberger 2010: 7). The commitment of the executive branch of government to make civil justice self-financing,¹⁶ coupled with the identification of mediation as a way of reducing costs and dockets, undermines this principle. This reflects a distinction between those judges such as Lord Clarke, Ward J and Lightman J who conceptualise ADR as integral to the litigation process, and those such as Lord Neuberger and Dyson LJ who prefer to consider it as more properly an adjunct or complementary.

[D] MEDIATION CONSIDERED IN THE CONTEXT OF BINGHAM’S EIGHT PRINCIPLES

One: The Law must be Accessible, Intelligible, Clear and Predictable

Accessibility to justice is a *raison d’etre* of mediation. It is, however, neither, strictly speaking, access to the courts, nor is it necessarily justice according to law. It is frequently argued that mediation costs less than litigation and its informality makes it more understandable to the non-lawyer. Parties to a mediation can explore the issues that they want to pursue rather than being constrained by the legal theory brought to a case by judge and counsel. The compromise of a case can be on terms that go beyond the context of the legal dispute. Mediation may not provide strict access to law but to a quality of justice that is distinct and reconcilable with legal structures.

¹⁵ Hazel Genn (2012: 405) has estimated that an unsuccessful mediation increases the costs for parties by between £1,500 and £2,000.

¹⁶ See, for instance, comments of Lord Scott, (then head of Civil Justice) on 16 May 1997: ‘A policy which treats the civil justice system merely as a service to be offered at cost in the market place, and to be paid for by those who use it, profoundly and dangerously mistakes the nature of the system and its constitutional framework.’: cited in Zander (2000: 39).

The argument regarding mediation in the light of this principle is not that justice will not be done in a specific dispute but that justice is not done according to law (Gardner 2018) and that a decisive shift towards ADR would inhibit the development of precedent and the public knowledge of normative guideline that contribute to the resolution of disputes.¹⁷ By divesting cases from the courts, mediation impedes the capacity of judges to make authoritative interpretations of the law. To reduce the argument to absurdity, a mediated settlement in *Brown v Board of Education of Topeka* (1954) that provided that Linda Brown could have a daily taxi to travel to Sumner Elementary School or private education at a multicultural school of her choosing would not have been an adequate response.

The essence of what Mrs Brown wanted was a public vindication of her rights. While it is a minority of cases that litigate matters of pre-eminent public interest, such cases may arise in contexts as unpredictable as snails in ginger beer (*Donoghue v Stevenson* 1932) or borstal boys boarding private yachts (*Home Office v Dorset Yacht Co Ltd* 1970), and it would be hard to identify a fail-safe filter that would ensure that such issues were not clouded by one party's partisan interpretation. This is not as rare as it may seem. In *R (Unison) v Lord Chancellor* (2017), Lord Neuberger makes the point that this happens frequently in employment disputes and cites *Dumfries and Galloway Council v North* (2013) concerning the comparability for equal pay purposes of classroom assistants and nursery nurses with male manual workers as illustrating:

that it is not always desirable that claims should be settled: it resolved a point of genuine uncertainty as to the interpretation of the legislation governing equal pay, which was of general importance, and on which an authoritative ruling was required (para 69).

The equation here, however, is not a simple one. It can be argued that selective mediation can concentrate judicial resources where they are most needed and thereby support the rule of law.¹⁸

At first sight, the small number of cases being mediated would seem to refute any significant effect impeding the development of precedent, but the process of erosion may be cumulative. The introduction of the Court of Appeal mediation scheme in the UK now requires consideration of mediation *after* cases have been identified as potential precedent. While

¹⁷ Gardner argues that justice being done according to law is primarily a public good, involving public guidance, and only secondarily a resolution of their dispute.

¹⁸ See, for instance, Menon (2017).

a majority of cases have always settled before trial,¹⁹ Linda Mulcahy (2013: 61) has highlighted a ‘rich stream of statistical accounts of diminishing use of public adjudication across subject matter, types of trial and jurisdiction’.²⁰ There is still a need for further statistical research and analysis regarding the impact of mediation on this diminution.²¹

CEDR estimates that the use of mediation increased by 35% in the two years following *Dunnett* (Phillips 2008) and has increased by a further 20% between 2016 and 2018, largely as a result of the growth of sectoral schemes. The market now comprises 12,000 commercial cases per year.²² Changes in civil procedure in Toronto resulted in 18,000 cases being subject to mandatory mediation in the first year, of which 40% settled outright, and a further 17% partially settled (Prince 2007: 86). This compares with CEDR’s estimate of 73% settlement rate in relation to voluntary mediation (CEDR 2005). Research in the USA estimates that the proportion of federal cases resolved by trial fell from 11.5% in 1962 to 1.8% in 2002 (Galanter 2004: 459) and to 1.7% in 2004 (Lande 2006; 217). While fewer litigated cases does not inevitably result in fewer precedents, the common law requires a significant pool of cases with precedent-setting potential. ‘Categorical’ compulsion will reduce this pool. Without some procedural filter to ensure that cases with precedent-setting value do not get strong-armed into mediation there is at the very least a risk that the vigour of the common law may atrophy. Mulcahy’s (2013: 62) research in the UK references a decline in the number of cases filed in the Court of Appeal that are disposed of by full trial from 1,756 in 1995 to 215 in 2009.

In *LaPorte & Another v the Chief Commissioner of Police of the Metropolis* (2015), for instance, the High Court reduced costs recoverable by the Metropolitan Police, where it had won on the substantive issues in the main case regarding the extent of its right to the use of anticipatory force against members of the public in excluding people from a public place to prevent a breach of the peace (*LaPorte & Another v the Chief Commissioner of Police of the Metropolis* 2014). Luban (1995: 2659, 2662) identifies the

¹⁹ Civil Justice Council extrapolates from Judicial Statistics for four quarters, ending on September 2016, that just over 145,000 out of 1.8 million issues cases of all types reaching allocation stage are defended and roughly 50,000 trials go to judgment (Civil Justice Council 2017: s 3.26).

²⁰ This study relates to a period prior to the hike in costs of initiating proceedings in the High Court, a factor that has probably reinforced the trend.

²¹ The Civil Justice Council (2017: s 4.10) notes, ‘statistics are hard to acquire, by reason of the very confidentiality that makes mediation work’.

²² CEDR in its ‘Eighth Mediation Audit’ (2018) estimates that the current mediation market amounts to 12,000 cases per annum with a total value of £11.5 billion.

United States v Microsoft Corp (1995) and *Georgine v Anchem Products Inc* (1994) cases as demonstrating the dangers of private dispute resolution in undermining the public good. In *Microsoft*, Judge Stanley Sporkin refused to ratify a proposed anti-trust settlement on the basis of its secrecy. In *Georgine*, pay-out schedules for asbestos claims provided for less generous pay-outs for future claimants than for the pre-existing clients on whose behalf the negotiating lawyers has been retained.

In Mulcahy's study of the government's Annual Pledge Reports, she refers to several cases involving important rule of law principles, including the deaths of British soldiers in non-combat situations and a group action concerning chemical weapons tests at Porton Down between 1940 and 1989 (Mulcahy 2013: 72). Hazel Genn's (2002: 71) analysis of the scheme identifies that the need to establish a precedent does not amount to a category of case unsuitable for mediation.²³ Legg and Boniface have calculated that, since the introduction of CPR, litigation in the High Court and County Court has reduced by 80% and 25% respectively (Legg and Boniface 2010: 40-41). It is notable that the greater decrease is where a disproportionate amount of precedent will be generated. For Richard Ingleby (1993: 450) the 'objective rules and the acknowledgment of opposing interests of professionalised justice' are preferable to incorporated justice. Compulsory mediation, without adequate safeguards, compromises this aspect of the rule of law.

Two: Questions of Legal Right and Liability should be Resolved by Law not Discretion

Mediation in its very essence involves the exercise of discretion, that of the parties in finding their own means of resolution. While that does not present a problem where parties retain access to the courts if a process of settlement fails, an element of compulsion can subject parties to a process where inequality of bargaining power and economic duress coerce parties to settle, leaving them with no redress except the ability of a mediator to require one party to listen to the other. Historically, critics such as Owen Fiss (1984), Jerold Auerbach (1983) and Richard Abel (1982) have identified this in relation to poorer litigants in civil mediation, and Tina Grillo (Grillo 1991) in relation to women in family mediation. In Fiss's argument, the imbalance of power in settlement negotiation flows from

²³ Lord Woolf emphasised that: 'We would hope that the guidance we have provided should enable the appeals to be settled without difficulty by the parties themselves, but if they are not we would hope that the parties would seek the assistance of ADR from the court before proceeding with the appeals. If they do not, this may be an appropriate matter to be considered when determining the order for costs which should be made.'

(a) unequal ability to assess the likely trial outcome, (b) a poor claimant's cashflow needs and (c) unequal ability to finance litigation. But all three factors primarily infect litigation and only derivatively do they impact on out-of-court settlement processes. Where mediation is voluntary, the choice may be an empowerment for the poorer parties in which timely non-court resolution can lead to earlier outcomes at lower cost.

While it is true that structural inequalities are inherent in bilateral negotiation, the compulsory nature of mediation fuels inequality in increasing costs. It promises a form of resolution but cannot provide the redress of a state-backed determination that can overturn imbalances of power, in the case of intransigence.

More recently Genn has encapsulated the spirit of these critics and highlighted the dangers of civil justice reform in the context of cuts to legal aid, opining 'the outcome of mediation, therefore, is not about *just* settlement it is *just about settlement*' (2012: 411; original emphasis). Informality masks power differentials that are brought into sharper focus with the more formal procedural requirements of adjudication (Winkleman 2011: 17-18). It is in the very nature of this informality that the distinction between a coercion *into* mediation by a judge and *within* mediation by a mediator, who in the case of compulsion derives her authority from a judicial or court order, can be eroded. While a party may be theoretically free to leave a mediation, few mediators relish the prospect of a failed mediation, and a judicial direction to mediate reinforced by the fear of an adverse costs order may make parties 'feel that they have little choice' (Genn 2012: 402).

Contemporary categories of cases that present this problem include litigants in person who in being delayed access to the courts may be pressured to settle without legal advice. There is equally a danger of injustice in actions for the enforcement of a debt where there is no substantive issue to be tried or where a spurious defence is pleaded for tactical reasons without any intention of seeking to substantiate it at trial. Both Types 1 and 2, especially in the case of lower-value claims, can impede access to the courts. In higher-value claims the additional costs of mediation are more likely to be proportionate to the amount in issue. Asymmetries of power, whether of resources, knowledge or contacts, however, pervade litigation as much as mediation. Neither can be accurately portrayed as a panacea of justice.

Mediation operates in the shadow of the law in that it depends on an informed prediction of how the law *might* apply in guiding the resolution of cases (Mnookin and Kornhauser 1979). No less obviously, it operates

in the shadow of the market. Where mediation replaces litigation as the dominant mode of resolving disputes the principle of the uniform application of the law is eroded by a process of bargaining in which the litigant cannot rely on an authoritative determination of his/her rights.

Three: Laws should Apply Equally to All

Mediation offers the opportunity for differentiation between cases and aspires to process equality rather than substantive equality before the law. Indeed, if mediation is only going to be compulsory in some disputes—i.e., consumer disputes—it undermines any principle of equality by offering twin standards of justice. In consumer disputes, the customer may seek public vindication of their rights, whereas the merchant craves confidentiality and management of reputational risk. In comparison with the ‘small claims court’, mediated consumer settlements tilt the balance away from the customer. Many consumer mediation schemes offer the advantage of free facilitation for the claimant as a *quid pro quo* for confidentiality for the merchant. Where consumers lack adequate resources to initiate litigation, mediation may at least provide a partial vindication of their rights and in doing so can be seen as providing access to a form of justice that furthers equality before the law.

Mediation encourages settlement of cases on a commercial basis rather than the rigorous and public application of legal principle to a factual context. It offers the suspension of strict law to enable the creative resolution of conflict. In civil mediation between two companies, it provides a pragmatic business outcome that both parties choose over court adjudication. However, in other cases, for instance employment, the relative strength of bargaining power of the parties may depend more on issues such as the management of reputational risks than legally objective differences.

Four: Ministers and Public Officers must Exercise their Powers in Good Faith and for the Intended Purpose

The role of the ombudsman system in public law, although not strictly mediation, can strengthen and complement a system of court-based justice. The crucial guarantor of the rule of law is that the decisions of an ombudsman, where they depart from the law, are required to give reasons for doing so and decisions are subject to judicial review at the instance of either party (*R (on the application of Aviva) v Financial Ombudsman Service* 2013).

In public law cases, the court is of necessity concerned not just with private rights but also with the rights and interests of third parties. The Public Law Project, in a research study by Varda Bondy and Others (2009), highlights some of the dilemmas involved in public law mediation and points out that principled objections raised by practitioners do not invariably prevent the use of mediation. Mediation in judicial review cases is less common than in private practice. Some 60% of cases resolve through dialogue after pre-action letter and the issue of proceedings, and some 60% are refused permission. When considered in conjunction with the filter provided by an application for leave, only 5% of initiated cases proceed to a substantive hearing.²⁴ The study highlights the risks of compulsory mediation, finding that many ‘arguments in favour of using mediation over adjudication cannot be justified and that the promotion of mediation by policy makers is based on little evidence’ and concludes that ‘the choice of redress mechanism must be made by practitioners together with their clients, and no one else’ (Bondy and Others 2009).

While there is scope for a form of mediation in public procurement disputes, the public body that is being reviewed has a responsibility not only to the party reviewing the decision but also to other parties potentially affected by a procurement decision and to the public purse. The rule of law here depends on the quality and integrity of lawyers in insisting that public law duties are adhered to, a duty which can be, but should not be allowed to be, vitiated by the existence of a confidentiality clause in mediation.

Five: The Law must Adequately Protect Human Rights

Since Dicey, the Universal Declaration of Human Rights 1948, the ECHR 1950 and its quasi-incorporation via the Human Rights Act 1998 have contributed to a metamorphosis of the rule of law. This aspect of Bingham’s theory marks the most radical departure from Dicey’s conception, for whom there was an unproblematic equation between the rule of law and the legislative supremacy of Parliament. The political experience of the 20th century with the Nuremburg Decrees and apartheid South Africa has demonstrated that the democratic will is impotent in restraining the tyranny of government.²⁵ Human rights, by infusing legal value with moral content, have attempted to reconcile this

²⁴ See [Judicial and Court Statistics](#).

²⁵ Although the ‘Velvet Revolution’ (1989) and ‘Arab Spring’ (2010) provide a more optimistic contrast.

tension.²⁶ Mediation, with the centrality of the doctrine of ‘mediator neutrality’, cannot afford protection of human rights. The privacy of mediation occludes human rights issues from the public eye. The confidentiality of the process of mediation, where compulsory, is a fetter on freedom of expression. The existence of a potential remedy in the European Court of Human Rights is often too distant and costly to cast a sufficiently deep shadow to influence mediation. Dyson LJ asserted *obiter* in *Halsey* (2004: 3007 E) that ‘*compulsion* of ADR would be regarded as an unacceptable constraint on the right of access to the court and, therefore, a violation of article 6’ (original emphasis). Despite an abundance of extrajudicial mutterings, no decided case has challenged this principle.

In European Court of Justice case law, *Rosalba Alassini v Telecom Italia SpA* (Joined Cases C-317/08 to C-320/08), a compulsory mediation process did not constitute a breach of EU Law. The decision related to the implementation of the Universal Service Directive.²⁷ The scheme introduced by the Italian government obliged a customer to go through a process of mediation before bringing a claim against a service provider. The decision involved a process that did not entail costs to the parties and where any resultant delay to litigation was likely to be no more than 60 days during which the limitation period is suspended. Advocate General Kokott concluded that the Italian compulsory out-of-court dispute resolution provisions were pursuing:

legitimate objectives in the general interest (i.e: a quicker, less expensive method of dispute settlement which also lightened the burden on the court system and was likely to produce a more satisfactory long term solution to the dispute) (Joined Cases C-317/08 to C-320/08: para 45).

The decision has not proved popular with ADR providers in Italy. Subsequent to *Alassini*, mediation in Italy has become a condition precedent for litigation involving a wider range of disputes. Where agreements cannot be reached, mediators may make recommendations which may have far-reaching costs penalties if not accepted (Nolan-Haley 2011: 1005).

²⁶ Thomas Bingham, however, elides the analysis of what happens in the theoretical problem of a clash between the unstoppable force of the supremacy of Parliament and the immovable object of fundamental human rights declining, in *R (Jackson) v Attorney General* (2005), to follow the conjectures of Lord Steyn, Baroness Hale and Lord Hope and instead putting faith in the ‘ties that bind’ of parliamentary process.

²⁷ Directive 2002/22/EC—a directive on universal service and users’ rights relating to electronic communications networks.

Six: Means must be Provided for Resolving, without Prohibitive Cost or Inordinate Delay, *Bona Fide* Civil Disputes which the Parties Themselves are Unable to Resolve

The right of access to the courts has become a well-recognised constitutional principle²⁸ in common law and protected by the ECHR.

For many proponents of the rule of law, Bingham's means for resolving civil disputes is synonymous with the courts. Sedley (2015: 273) paraphrases this principle as 'there must be accessible courts for the resolution of disputes'. In his discussion of this principle, Bingham (2010: 86), however, clearly states the value of mediation, both psychologically in 'avoiding the distress and humiliation of losing completely and the unpleasantness of antagonistic litigation' and, pragmatically, in recognising that a consensual settlement is more likely to be honoured. While mediation may save both cost and delay by providing a speedier and more economic resolution to a case, it may be that even with mediation parties are unable to resolve a case, and there is therefore a need for an 'authoritative ruling of the court'. In that case, costs may be increased by what becomes an additional stage of civil procedure.²⁹ Compulsion by interpolating an adjunct or additional stage to civil procedure potentially increases both cost and delay without the consent of the parties. This is particularly so with Types 1 and 2 compulsion where mediation is not free at point of use,³⁰ and there is no test regarding the proportionality of the additional cost of mediation to the financial value of the dispute.

While Type 1 compulsion does not necessitate that a case settle, without the safeguard of a judicial override it creates a fetter on the right of access to the courts, just as disproportionate court fees for employment tribunals impeded access in the *Unison* case (*R (Unison) v Lord Chancellor* 2017). Types 2 and 3 compulsion may be less problematic, where a case does not settle, they may nevertheless, (a) incur a costs penalty for parties refusing to mediate and (b) increase the overall costs of litigation.

²⁸ See, for instance, *R v Secretary of State for the Home Department ex p Leech* (1994: 201); *R v Lord Chancellor ex p Witham* (1998) and *R (on the application of Anufrijeva) v Secretary of State for the Home Department* (2003).

²⁹ Costs for CEDR's fixed price Panel Mediation amount to £1,250 per party for cases worth up to £250,000. These costs do not include attendance of lawyers or mediation advocates. See [CEDR Fixed Price Mediation](#).

³⁰ However, in the USA court-annexed mandatory mediation scheme, mediators often offer at least part of their services on a *pro bono* basis.

A stricter type of compulsory mediation, where parties are coerced into settlement as an alternative to state-backed determination of rights and responsibilities, clearly violates this principle. With other types probably what matters is the extent to which parties are not only compelled to try mediation but to persevere with it. Coercion into mediation does not necessarily translate into coercion within mediation. The crux here is civil disputes which the parties are unable to resolve themselves. While there may be a case for requiring two reasonable litigants to at least seek a facilitated resolution to their conflict via Type 3 mediation, there are inevitably many cases where one (or more) litigants are unreasonable and in these circumstances to induce a litigant to go through a charade of negotiation with an adversary who has no genuine intention of making a reasonable settlement becomes a travesty of justice.

The trend away from adjudication, identified in discussion of principle 2, is part of a wider international trend within common law jurisdictions, perhaps fuelled by a cultural shift away from the provision of legal aid. Many jurisdictions already have mandatory mediation.

In the United States, the Alternative Dispute Resolution Act 1998 empowered United States Districts to set up mandatory mediation schemes. Florida has undertaken mandatory court-directed mediation since 1987. Under the Florida Civil Procedure Rules, parties are able to request that mediation be dispensed with, but such applications are comparatively rare and around 100,000 cases are diverted from court adjudication to mediation every year (Quek 2010: 505). Australia has adopted a number of categorical mandatory schemes, frequently uses discretionary referral and has experimented with court-mandated mediation (Hanks 2012: 952). In Queensland parties to civil litigation may be required to attend a mediation orientation session (District Court of Queensland Act 1967, s 97). In New South Wales, Australian courts have the power to order parties to undertake compulsory mediation (Civil Procedure Act 2005). In Victoria, Australia, the courts may exercise a power to refer parties to mediation without their consent and such mediations may be taken by an associate judge (Supreme Court General Civil Procedure Rules 2005: 50.07.01) or judicial registrar (Supreme Court General Civil Procedure Rules 2005: 50.07.04). Canada has moved towards a presumption of mandating ADR as an ordinary step in litigation (Billingsley and Ahmed 2016: 207). This may take the form, according to jurisdiction, of (a) expressly requiring all litigants to participate in ADR before trial, (b) authorising the courts to mandate mediation in appropriate circumstances or (c) remaining silent as to whether parties can be compelled to participate in ADR (Billingsley and Ahmed 2016: 203).

In Ontario, a court-mandated mediation programme concluded that compulsory mediation speeded up cases, reduced costs, led to earlier settlement and led to greater litigant and lawyer satisfaction with a high proportion of cases (40%) being settled earlier in the litigation process (Hann and Barr 2001: 2). In Central London County Court (2004), an experiment conducted by the Department for Constitutional Affairs in which mediation became the default option was less successful. One or both litigants in 81% of cases objected to the referral (Genn and Others 2007: ii).

Seven: Adjudicative Procedures Provided by the State should be Fair

The fairness of mediation has been debated *ad nauseam*. Arguably, mediation safeguards the process rather than the substantive outcome. While a judge has an obligation to ensure *substantive* fairness, ADR replaces that with a negotiation between equals where the best that an experienced mediator can provide is *procedural* fairness. The guarantor of fairness is the maintenance of court determination as a fall-back position.

Mediation as a genuine alternative to adjudication augments fairness, but compulsion erodes it, not just in denying the opportunity of an authoritative outcome, but also in undermining the primary purpose of adjudicative justice in providing public guidance to pre-empt future disputes and the principle that justice should not only be done but ‘seen to be done’ (*R v Sussex Justices, ex p McCarthy* 1924: Hewart CJ).

From a rule of law standpoint these criticisms highlight the need for adequate legal aid for parties to ensure equality of arms as a component of the rule of law. Only Type 3 can match, this incorporating the safety net of judicial discretion and which needs to be exercised within the spirit of the other principles.

Eight: The Rule of Law Requires Compliance by the State with its Obligations in International as in National Law

Questions of international law are beyond the scope of this article, but arguably the very absence of a binding, compulsory, international court of universal jurisdiction illustrates the problem with the domestic proposals for compulsory mediation. The rule of law *is* too important to be delegated to belligerents or legal litigants and requires the protection of judges.

[E] DIFFERENT TYPES OF COMPULSION CONSIDERED

Whether on the basis of Bingham's seminal understanding of the rule of law, or indeed a thinner version, mandating parties to settle would be a clear breach of the rule of law, but what about the types of compulsion that are canvassed by the Civil Justice Council?

Voluntary mediation as an alternative to litigation augments the quality of, and access to, justice in dispute resolution. The back-stop of court adjudication remains. It is inimical to neither 'thick' or 'thin' versions of the rule of law, except in so far as third parties are denied a determination of rights as a guiding legal precedent. Proponents of mandatory mediation such as Sander (2007: 16) argue for it as a 'kind of temporary expedient, à la affirmative action' where it is combined with (a) judicial oversight and (b) the maintenance of a pathway to adjudication without disproportionate costs penalties. But the parallel is an uneasy one in that the objectives of the two address very different purposes. Affirmative action in relation to race is designed to redress deep-seated structural inequalities, whereas mediation is designed to provide a different form of dispute resolution and to deal with defects in the present justice system.

Ahmed (2012) contention that the cost-sanctioning of mediation refusers is a form of implied compulsion overstates the case, particularly post *Gore v Naheed* (2017), but illuminates an inconsistency in a precarious consensus on compulsory mediation. In *Halsey*, Dyson LJ suggested that a court-directed mediation would be a denial of the ECHR Article 6 right to a fair trial. Yet a party who has the temerity to exercise that right runs the risk of being punished for doing so. Why should a direction to attempt to settle by mediation (Type 3) be any more objectionable than a direction that experts should meet to attempt to reach agreement? Neither blocks access to a rights-based adjudication. Both are an interpolation of an additional step that may, or may not, avoid the need for trial, reduce the scope of the issues for trial or streamline the trial. A judge who, at one point in a case management conference, declines on Article 6 grounds to direct the parties to attempt to settle the dispute by mediation may at a later point direct that the experts should meet to attempt to reach agreement.

The distinction is that the direction regarding a meeting of experts addresses a necessary aspect of the evidence that courts will inevitably need to consider to reach a just determination by applying legal principle to the facts, whereas a direction to mediate creates an ancillary stage of

proceedings which, if unsuccessful, will increase costs and is properly speaking in parallel to litigation.³¹ The extent to which it fetters access to the courts will depend on the proportionality of the costs and the degree to which it becomes embedded in civil procedure.

Advocates of mandatory mediation argue that, although coercion within mediation may violate the rule of law, coercion into mediation does not. Quek considers that, while ‘categorical’ referral is ‘synonymous with arbitrariness’, ‘discretionary’ referral may retain a clear distinction between coercion ‘into’ and ‘within’ mediation. In practice, however, the distinction is less clear. In judicial mediation the fact that a judge has ‘directed’ mediation may be perceived by the party bringing a case as an ‘indication’ of his or her opinion of its weakness, and a litigant, especially when unrepresented, may feel undue pressure into settling. Parties may experience coercion from a judge into the process with a wider loss of autonomy and self-determination. The scrutiny necessary to ensure compliance within mediation may itself undermine a sense of voluntariness of the process. Quek finds research demonstrating a nexus between mandatory mediation and coercion is equivocal. She considers that ‘there could be a very faint distinction between coercion to enter mediation and coercion within mediation’, concluding ‘there may well be an acute danger that mandatory mediation could undermine the essence of mediation’ (Quek 2010: 488, 509). While a liberty to opt out at any time may appear to counter some of the arguments against mandatory mediation, for an impecunious litigant the right may be more illusory than substantial. Ingleby’s research demonstrates the impact of a constellation of factors in creating an environment in which ‘third parties who enjoy the authority of the court and are accorded expertise as settlement professionals in fact exercise quasi-adjudicative authority’ (Ingleby 1993: 448).

Mandatory mediation has been used to describe a variety of different forms of coercion from ‘soft’ costs penalties to ‘hard’, fettering access to the courts in what Ahmed and Quek Anderson (2019: 7) characterise as a ‘continuum of mandatoriness’. A mandatory direction to parties to settle a case (Type 3) will always breach principles and values inherent in the rule of law. Whether Types 1, 2 and 3 will breach these principles (discussed above) is more complex. A categorical directive to mediate as a condition of access to the court (Type 1) will breach rule of law principles where there is a charge for the service, if it causes undue delay, or if it bars access to the courts or where limitation periods have not been suspended for the duration of the time allowed for mediation. A categorical

³¹ I am indebted to Rabah Kherbane for this distinction.

requirement to mediate at an interlocutory stage (Type 2) will undermine the rule of law *except* where there is judicial scrutiny combined with a discretion to waive the requirement where appropriate. A judicial discretion to order mediation (Type 3) need not undermine the values of the rule of law, and indeed may augment access to justice, unless the increase in costs becomes disproportionate, or there is coercion within the mediation or undue delay is caused to an aggrieved party in its access to justice.

While Type 1 and Type 2 may be reconcilable with a ‘thin’ version of the rule of law, the problems with both types of compulsion in relation to a ‘thick’ version are that they fail to distinguish cases such as action for repayment of a debt and those of significant precedential value. They would therefore, in their general application, undermine the rule of law, in relation to Bingham’s first three principles. While a tiny minority of cases that are filed result in judgments with precedential value, it is not always easy to identify those that will. Litigants in person present a further obstacle, in that whereas a judge has a responsibility to safeguard their rights and interests, a mediator, under the present understanding of the role, is unable to offer legal advice. A mediation potentially presents an opportunity for a legally represented party to brow-beat or coerce an unrepresented party to settle on terms less favourable than those offered by a court adjudication where an effective mediation advocate could persuade a litigant that their claim is effectively discounted to nuisance value. Here, although voluntary mediation might help to find a swift and just resolution, Types 1 and 2 forms of compulsion would offend against Bingham’s sixth principle both in terms of adding additional cost and delay where a legally represented party does not wish to settle and in the potential for manipulation of ADR processes as a form of discovery against an unrepresented party.

Type 3 compulsion is less problematic as it retains a safeguard of judicial oversight and is not, in any sense, an absolute bar to the courts. Judges already have the power (CPR, rule 1E) to actively manage cases by ‘encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure’ under the over-riding objective of ‘enabling the court to deal with cases justly and at proportionate cost’ (CPR, rule 1.1). Dyson LJ has described the form of an ADR order in the Admiralty and Commercial Court as requiring:

the parties to exchange lists of neutral individuals who are available to conduct ‘ADR procedures’, to endeavour in good faith to agree a neutral individual or panel and to take ‘such serious steps as they may be

advised to resolve the disputes by ADR procedures before the neutral individual or panel chosen' (*Halsey v Milton Keynes* 2004: para 30).

In medical negligence cases, an Ungley order³² pre-shadows Type 3 compulsion, in taking the form that:

The parties shall ... consider whether the case is capable of resolution by ADR. If any party considers that the case is unsuitable for resolution by ADR, that party shall be prepared to justify that decision at the conclusion of the trial, should the trial judge consider that such means of resolution were appropriate, when he is considering the appropriate costs order to make. The party considering the case unsuitable for ADR shall, not less than 28 days before the commencement of the trial, file with the court a witness statement, without prejudice save as to costs, giving the reasons upon which they rely for saying that the case was unsuitable (*Halsey v Milton Keynes* 2004: para 32).

A form of mediation where a court were to direct parties to settle, by proceeding with mediation where there is an obvious and settled lack of willingness to do so, would amount to a rule against litigation and conflict directly with the principles of the rule of law in 'thick' and 'thin' versions. The analogy that is sometimes made with an arbitration clause is specious in that whereas an arbitration agreement has a determinative outcome (the arbitration award), mediation does not. This type of compulsion falls foul of the principle articulated by Lord Ackner in *Walford v Miles* (1992: 138) that an agreement to agree is unenforceable, where he opined, 'the concept of a duty to carry out negotiations in good faith is inherently repugnant to the adversarial position of the [negotiating] parties'.

[F] CONCLUSION

While some of the arguments against mandatory mediation could be construed as litigation romanticism, the obverse of a naïve ADR idealism, there is a more persuasive reason why mediation should not be compulsory: the identity and integrity of the mediation process itself depends on mediation being voluntary and complementary to litigation. Once mediation becomes compulsory—whether *de facto* or *de jure*—it inevitably becomes an aspect of civil procedure and no longer an alternative. Mediation ceases to be a subtle process of cooperation within an adversarial process and instead becomes a judge-mandated settlement conference subject to judicial oversight. Mandatory mediation undermines the principles of both party autonomy and self-determination. It 'privatises a dispute at the behest of the public system' (Hughes 2001: 202).

³² Named after Queen's Bench Master Ungley who first gave an order in this form.

Compulsion would compromise confidentiality, since it is only by piercing the veil of trust that judges would be able to determine questions of unreasonableness during the course of mediation or reasons for refusal to mediate (Bartlett 2015). While mediators can give legal information, they cannot currently give legal advice. In the case of compulsion this rule would unfairly prejudice the interests of litigants in person who would no longer have the long-stop of judicial determination of rights.

Compulsion would therefore require a change in the nature of mediation, to safeguard the interests of litigants in person and not unfairly prejudice the right of an impecunious litigant to bring a case to court. Compulsion would inevitably require a greater degree of judicial oversight of the process of mediation that would in turn increase the dominance of the role of lawyers within mediation and require a form of regulation and registration that could sit uncomfortably with the skills of non-legally qualified mediators.

Compulsion favours the more narrowly ‘evaluative’ as opposed to the ‘broader’ and ‘facilitative’ styles of mediation that enhance party empowerment (Riskin 1996; Akin Ojelabi 2019: 69). Since parties in a common law system are at liberty to conduct settlement conferences at any time, compulsion offers little more than an interim evaluation that might be better achieved by a process of judicial early neutral evaluation.

There are persuasive arguments for mediation as a distinct process from adjudication, building on engagement between the parties, restoring party autonomy and empowering parties to take control of the boundaries of the dispute. It is unclear, in the light of the growing prevalence of mediation, why these arguments need to be buttressed by affirmative action. While Types 1, 2 and 3 may be reconcilable with the rule of law in its ‘thin’ version, only Type 3, a judicial direction that parties *attempt* to settle, can fully comply with Bingham’s more substantive version. Costs of doing so need to be disproportionate, there must be a genuine willingness of the parties to engage in the process with good faith and the structural inequalities must be no greater than in litigation.

This article has concentrated on civil mediation. While in some ways family mediation is distinct from other forms of civil mediation,³³ many of the same arguments apply equally forcefully. MIAMS—properly an assessment of whether mediation is suitable—are already compulsory with certain exceptions. To go beyond this point and to compel truly

³³ Financial data revealed for the purpose of an Open Financial Statement is not protected by without prejudice privilege; mediation is not ordinarily conducted in the presence of lawyers; agreements generally require the imprimatur of a court to be binding.

unwilling parties to engage with mediation would require victims to engage with erstwhile abusers in a uniquely intimate relationship without the safeguard of judicial oversight. The process dangers are not only for women (Grillo 1991). Here, a facilitative style could re-enforce abuses of power in a process that could not be vitiated by judicial oversight whether by court or consent order.

Some commentators have sought to recalibrate the rule of law to accommodate ADR by seeking to redefine the concept in the context of two complementary dispute resolution processes, but such a redefinition represents a fundamental misconception as to the nature of and difference between the two processes. It is no longer sufficient, as Menon CJ, contends to conceptualise the rule of law as rooted in an exclusively adjudicatory setting, but to characterise the ‘ideals’ of a modern system for the resolution of disputes as ‘Affordability, Efficiency, Accessibility, Flexibility and Effectiveness’ represents a dilution of the rule of law in its developed form. The inconsistency between forms of mandatory mediation and the rule of law is more than a ‘semantic issue’ (Menon 2017: 9).

Mediation serves both as a complement (Winkleman 2011) and at times competitor to adjudication. Justice, however, is a multivalent concept. The rule of law is intrinsic to an institutional or ‘transcendental’ form of justice, which, as Sen (2010) has argued, is only one aspect that may be in tension with a realisation focused or ‘comparative’ justice that prioritises social outcomes.³⁴ Mediation at its best is more concerned with the latter pragmatic sense and its quest for the minimising of injustice rather than a perfect outcome. Where mediation is voluntary, the tension between these two aspects can be a creative one. Its voluntarism is the guarantor that it will not replace the constitutional right of access to the courts. While mediation augments access to a form of justice, it can only do so provided it is voluntary and the right of access to the courts remains. Rather than making mediation mandatory, a more appropriate form of compulsion might be to ensure that mediators remind the litigants of their liberty to discontinue the process of mediation at any time.

The rule of law and the provision of public justice is a public good that needs, especially in times of austerity, to be robustly defended. The argument, however, is stronger in that the courts are not just a public service but, as Lord Neuberger (2010) points out, an aspect of government itself. To refer cases compulsorily from the courts to mediation is to

³⁴ Sen relates these two aspects to the distinct concepts of *niti* and *nyaya* justice in early Indian jurisprudence.

transmute a plea for individual justice, to be decided by an independent judge, into a matter of negotiated or distributional justice, a matter of private ordering that is not the province of the judiciary. In delegating what is a non-delegable duty, it crosses the line of the separation of powers. Mandatory mediation cannot be a substitute for the adequate provision of civil legal aid or the right of unrepresented access to judicial decision-making, however uncomfortable that may be.

Compulsory mediation, in its harder forms, should be resisted in equal measure to protect the rule of law and to defend the integrity of a potentially transformative process³⁵ (Bush and Folger 1994: 1) that does something very different from litigation in returning autonomy to the parties and suspending strict law as an alternative to court-based adjudication. Where compulsion in mediation is not subject to judicial discretion, it is no longer an alternative and instead becomes a threat to the rule of law.

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³⁵ For Bush and Folger transformation is served by a shift from self-centredness to responsiveness in a process of empowerment and recognition (Bush and Folger 1994: 54–56).

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FAIRNESS IN ALGORITHMIC DECISION-MAKING: TRADE-OFFS, POLICY CHOICES, AND PROCEDURAL PROTECTIONS

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Abstract

This article discusses conceptions of fairness in algorithmic decision-making, within the context of the UK's legal system. Using practical operational examples of algorithmic tools, it argues that such practices involve inherent technical trade-offs over multiple, competing notions of fairness, which are further exacerbated by policy choices made by those public authorities who use them. This raises major concerns regarding the ability of such choices to affect *legal* issues in decision-making, and transform *legal* protections, without adequate legal oversight, or a clear legal framework. This is not to say that the law does not have the capacity to regulate and ensure fairness, but that a more expansive idea of its function is required.

Keywords: algorithmic decision-making, machine learning, fairness, criminal justice, administrative law

[A] INTRODUCTION

In June 2019, the Law Society of England and Wales launched a report on the use of algorithms in the criminal justice system of England and Wales, examining current and potential use cases in the United Kingdom, as well as related legal challenges and consequences (Law Society 2019). The report raised a number of concerns related to algorithmic decision-making, including the potential to produce biased and discriminatory decisions, the oversimplification of complex issues because of the methods of quantification employed, the loss of autonomy for those individuals who must enter the processes of the legal system and be decided about, a lack of transparency as to the reasons why a particular decision has been made, and the hindering of legal scrutiny of decisions, among others.

What each of these concerns share is a general common theme related to questions of fairness and justice in the legal system. Were any of these concerns to be realised in an operational algorithmic (or part-algorithmic) decision-making process, this would hinder the quality of justice being provided and ultimately undermine trust in the protections and capacities of the English legal system. This in itself is concerning because it demonstrates how each *design* question—whether minor or not—in the construction of an algorithmic decision-making process, is fraught with danger and can have significant consequences for the perception and practices of the wider legal system. This involves more than explicit technical design decisions and trade-offs, however, and any effort to analyse these tools should also incorporate the policy choices of public authorities which choose to incorporate them into decision-making processes.

This article aims at beginning to explore these design questions, including how they are made and how they are justified, in order to ask how they may affect the function of the legal system, and whether they can transform longstanding principles and concepts of legal protection in England and Wales, including procedural rights. It does so firstly by briefly discussing the context of algorithmic decision-making in the UK, before moving on to discuss technical trade-offs around fairness, inherent to machine learning and algorithmic tools. Next, it contextualises these trade-offs within the context of public policy and operational decisions made by public authorities, before finally analysing how this may affect and transform procedural rights in the English legal system, where the majority of clearly applicable current protections focus on issues relating to data protection.

[B] PUBLIC AUTHORITIES AND ALGORITHMIC DECISIONS IN ENGLAND AND WALES

Algorithmic decision-making is most notably being used in two specific areas of the English legal system: to automate, supplement and support *administrative* decision-making at the national and local council level; and to do the same for *criminal justice* in the context of resource management, surveillance, and risk assessment for policing, as well as more general offender management at varying post-arrest and pre-trial stages. Algorithmic decision-making for the purposes of immigration management spans both areas, depending on the type of decision being made.

Administrative Use

The types of administrative decision which have been targeted for automation include those relating to welfare and tax, immigration and residence checks, and social care. The extent to which these programmes have been developed and implemented varies, with some remaining in pilot status, while others have been fully implemented. For example, at the national level, Her Majesty's Revenue and Customs (HMRC) and the Department for Work and Pensions (DWP) have both attempted to improve 'service delivery' through the automation of decision-making processes. Through the 'Making Tax Digital' programme, and the 'Connect' database, HMRC intends to have fully digitalised services in the UK through the integration of real-time data streams to correct tax-code errors, automatically provide tax rebates, ensure debt collection, and to increase fraud detection capacities (Government Digital Service 2017).

The DWP, building on HMRC's real-time system, has been making use of available data to automatically assess individual Universal Credit claims, and to detect and pursue fraud (Government Digital Service 2017). This information is also central to the European Union EU settlement scheme, where EU citizens and their families must apply for 'settled status' following the UK's exit from the European Union. A system of initially automated checks makes the decision as to whether these citizens receive 'indefinite leave to remain' (settled status), 'limited leave to remain' (pre-settled status)—lasting for a period of five years—or are rejected and must provide further evidence to a human caseworker (Tomlinson 2019).¹ Simultaneously, local councils in England have begun to make use of algorithmic modelling for the purposes of predicting risk and the need for interventions in the home care of children. These are all separate systems, developed in-house and by private companies, and are not part of a wider policy (Dencik and Others 2018).

The Criminal Justice System

The picture in the criminal justice system is largely similar, in that current projects are still in development, and many make use of the same style of algorithmic modelling and risk prediction. However, algorithmic tools are also being used in the criminal justice system to enable other kinds of technologies, including live facial recognition and hotspot mapping.

For example, Durham Constabulary's Harm Assessment Risk Tool (HART) is designed to aid the decision-making of a custody officer

¹ EU Settlement Scheme guidance booklets for caseworkers.

immediately following the arrest of an individual within County Durham. If a charge is to be brought forward, the custody officer on duty is required to decide whether to ‘bail (conditionally or unconditionally), hold in custody, prosecute, or divert [the suspect] from the Criminal Justice System (CJS) with an out of court disposal’ and HART helps in doing so by sorting said suspects into three risk groups: high, medium and low (Urwin 2016).

A similar system is being developed by West Midlands’s Police—the ‘Data Driven Insights’ Programme (DDI)—alternatively attempts to identify high-risk individuals for intervention before they have committed any crimes (Alan Turing Institute and Independent Digital Ethics Panel for Policing 2017). West Midlands Police are also helping to develop the National Data Analytics Solution (NDAS), which is using algorithmic technologies with the goal of moving law enforcement ‘away from its traditional crime related role and into wider and deeper aspects of social and public policy’ by facilitating interventions for individuals at risk of harm (Alan Turing Institute and Independent Digital Ethics Panel for Policing 2017: 3).

London Metropolitan Police’s Gangs Matrix is currently used to identify individuals who are members of a ‘gang’, at risk of becoming recruited as a gang member, or at risk of becoming a victim of gang violence. This is achieved through data analysis, which gives individuals a ‘gang score’ based upon their activities, interests and friendship groups (ICO 2018). London Metropolitan Police are also responsible for trialling Live Facial Recognition (LFR) systems within the capital and have come under significant scrutiny alongside South Wales Police for similar practices (Fussey and Murray 2019).

[C] TRADE-OFFS IN MACHINE LEARNING

A substantial body of literature exists on the ways in which fairness is defined, redefined, and operationalized within machine-learning systems; so much so that it would be beyond the scope of this article to cover sufficiently and in full detail. What is important for this article to acknowledge though is that within this literature there is a general recognition of the existence and requirement of trade-offs when defining fairness because of the limitations of algorithmic analysis (Berk and Others 2017).

One operational algorithmic decision-making in the United States, COMPAS, has received significant public attention because of these very issues. In 2016, journalists from ProPublica took a sample of 11,757

people that had been processed through the COMPAS system in Broward County, Florida, between 2013 and 2014. Their COMPAS scores were then compared with the county's records and analysed for their accuracy in predicting actual recidivism rates within two years of the initial risk assessment. The two-year standard is used by Northpointe, the developers, for its own validation studies (Northpointe 2015).

Following the study, ProPublica concluded that black defendants were 77% more likely to be classified as higher risk (medium to high), compared to white defendants, for violent recidivism risk, and 63% more likely for general recidivism risk. This discrepancy remains when looking at 'misclassifications' or errors in risk calculation. Here, black defendants who did not commit crimes within the next two years were almost twice as likely to be misclassified as higher risk (45% compared with 23% of white defendants), and white defendants who did commit crimes within the next two years were almost twice as likely to be labelled low risk (48% compared with 28% of black defendants). Figure 1 shows a visualization of the risk scores in this sample, including the more even distribution of scores for black defendants, contrasted with the low-risk heavy bars for white scores (Angwin and Others 2016a).

Later in the same year, COMPAS developers responded with a validity study claiming 'predictive parity' between black and white defendants in Broward County. The main counterpoint to ProPublica's findings, they argue, is that by splitting defendants into separate groupings of black and white, and therefore analysing the accuracy of this tool on a different basis, this shifted white defendants to a lower base risk 'relative to the norm' (Dieterich and Others 2016: 4-5).

Northpointe entirely rejected any accusations of bias by stating this information 'does *not* show evidence of bias, but rather is a natural consequence of using unbiased scoring rules for groups that happen to have different distributions of scores' (Dieterich and Others 2016: 8; original emphasis). 'Natural consequence' is used here because it is the algorithms within COMPAS that attempt to roughly split up the norming group into ten 'decile scores' of risk, from one to ten (Northpointe 2015: 8). The company makes the argument that once fed back into the system as a single grouping, the risk scores of white defendants will demonstrate a more even distribution.

While this is statistically justified, ProPublica still made the case that 'when you compare black and white defendants with similar characteristics, black defendants tend to get higher scores', which would suggest that the COMPAS algorithm could be setting in stone systematic

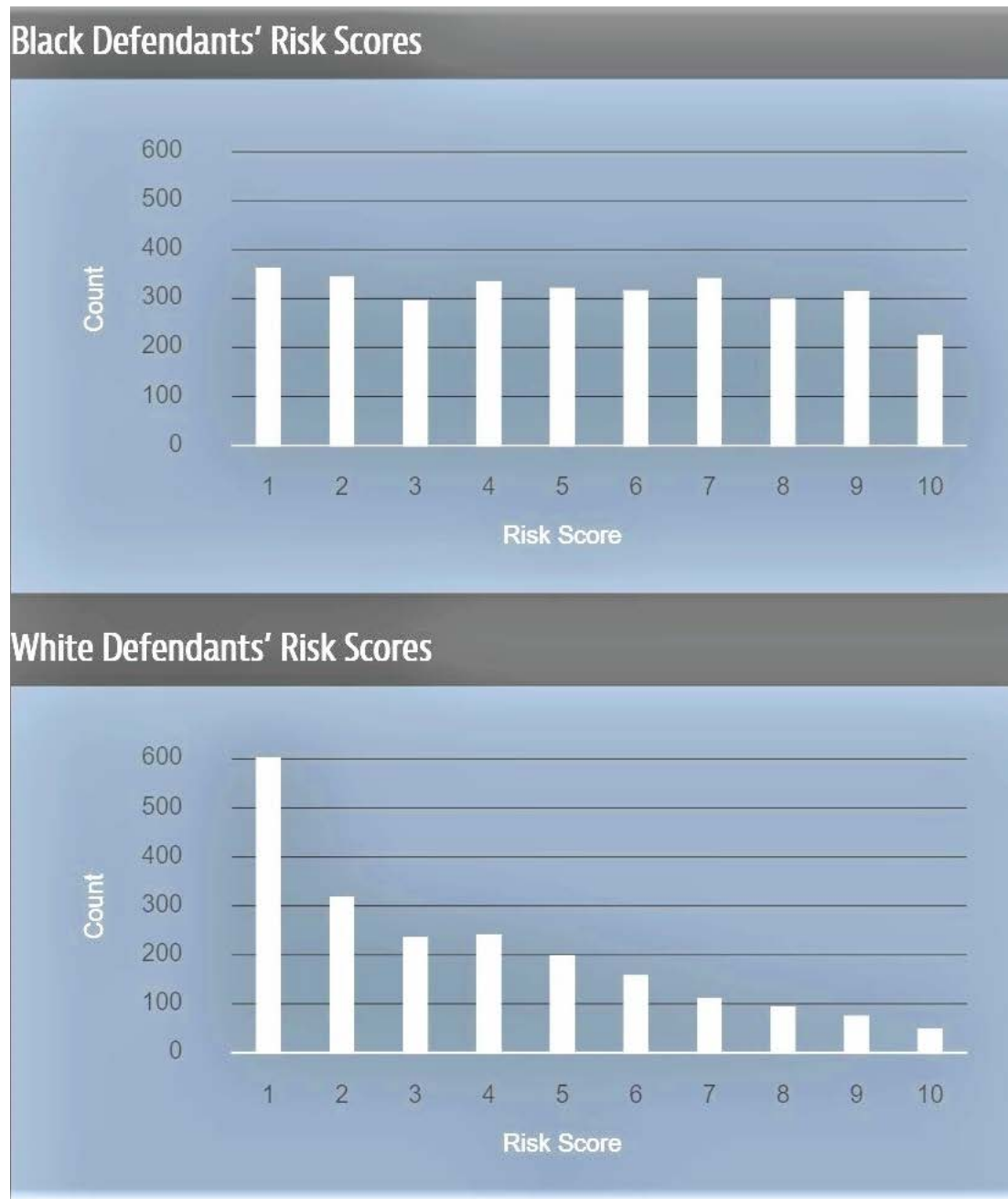


Figure 1: Distribution of risk by race in ProPublica's validation study of COMPAS. Source: Angwin and Others 2016a.

racial basis, already pre-existing within the Broward County criminal justice system (Angwin and Others 2016b). While COMPAS developers were making an argument of statistical fairness, ProPublica's represents one of political and legal fairness. Incorporating the two into one system is no mean feat. Often, constructing a 'fair' system requires decisions to be made regarding competing notions of fairness which are potentially incompatible.

[D] THE COMPLEXITY AND CONSEQUENCES OF POLICY CHOICES

Harm Assessment Risk Tool

In the UK, similar trade-offs have been made which go beyond specific technical concerns, incorporating, and being justified by, public policy decisions. The best example of this is Durham Constabulary's HART. Because in the belief that 'not all errors are equal', HART is designed to be overly cautious and prioritise false positives over false negatives (Urwin 2016: 53, 75). In practice, this means that, if a decision between two risk groups is borderline, HART's algorithms are designed to predict a higher level of risk for the given individual. This is done in order to avoid the most dangerous errors, which would be when a person is classified as low risk, but goes on to commit a serious offence and therefore actually represented high risk to the community. Similar design choices may have been made with COMPAS, but this cannot be said with any certainty as the tool is proprietary, and available literature does not discuss choices like this (Brennan and Dieterich 2018).

The crucial point here is that these choices of what is considered 'fair' and 'safe' have been *designed* into the tool. While there is a level of complexity in terms of how the algorithms analyse available data itself, there is also a level of control available to policymakers as to what direction the analysis should take and how individuals are treated. In this situation, the decision has been made to treat potentially innocent individuals more harshly, on the basis of an algorithmic prediction.

HART in contrast uses 34 risk predictors—taking information on the defendant at time of arrest and combining this with Durham Constabulary's pre-existing records. The majority of these relate to the individual's criminal history, along with age, gender, two forms of postcode data, and the number of police intelligence reports collected on that person, for example (Oswald and Others 2018). The data from these parameters is combined to construct 509 different decision trees, including 'classification' and 'regression' trees, or CARTs (Oswald and Others 2018). Each of these 'trees' essentially represents a separate algorithm that analyses a random sample, or 'case profile' of an individual's data to categorize (classification) and make predictions (regression).

When each decision tree is completed and has come to a conclusion on how risky someone is, the tool draws from the 'wisdom of the crowd' by

High Risk Error Type	Case Study	Votes		
		High	Moderate	Low
False Negative	1	18	37	454
	2	115	196	198
	3	114	78	317
False Positive	4	308	165	36
	5	264	213	32
	6	248	242	19
True Positive	7	228	217	64
	8	279	217	13
	9	414	87	8

Figure 2: Case Study of ‘majority voting’ in HART. Source: Unwin 2016: 10 (Fig 10).

combining the trees, so that each one casts a ‘vote’ on whether the person at hand is low risk, medium risk, or high risk (Gollapudi 2016). Through an example of this voting process, it is possible to see how borderline decisions are treated. Figure 2 demonstrates a number of test case studies (see Urwin 2016). Case studies 5 and 6 are both borderline examples. In either of these, the individual in question could be either high or moderate risk. Moderate risk would enable them to be processed through an ‘out-of-court disposal’, however, in this example, the individual was required to continue through the courts process, along with the more extensive socio-legal consequences that this would cause.

Other Tools

As with HART, operational choices and non-technical definitions are crucial in other examples of decision-making systems, including the Gangs Matrix. For example, the following questions must be decided before a tool like this could be used: what level of association does one need to have in order to be considered a gang member? And how is the meaning of gang defined in this instance? A recent enforcement notice from the Information Commissioner’s Office (ICO) demonstrates this exact problem. This showed that victims of gang crime were often assigned a risk score and included within the main database of the matrix itself as a potential risk, either because of the belief that this demonstrated gang associations, or it was registered as part of their crime history (ICO 2018: 9-11).

Concerns have also been raised regarding the NDAS and one of its designated purposes and justifications being to reduce ‘harm’ (West Midlands Police 2019). Harm is not defined in this situation, yet the different ways this term can be used could have a significant impact both on the decision being made and the capacities of the machine learning involved. This is particularly the case given West Midlands Police’s determination to move into areas of ‘social and public policy’, beyond traditional policing, and thus expanding their powers of intervention.

These are certainly questions about fairness because they clearly impact upon the types of decision being made, as well as the treatment which an individual will receive as they are faced with various arms of the legal system. They are not technical issues—in that they are not questions surrounding the efficacy or efficiency of the algorithmic tools—yet they add layers of complexity through their interaction with technical choices that must be made during the design process, and can change the technical parameters of a decision based on how a given term is defined. Ensuring fairness therefore, requires more than an analysis of the ways in which the machine-learning model of a particular tool produces a risk score, but must also incorporate how this is interpreted by the public authority, how this authority has influenced the design process, how it has decided to make the decision-making system operational, and how its use has been justified, both legally, and in the language of ‘social and public policy’.

[E] PROCEDURAL CONFLICTS

Much has been spoken so far regarding the types of technical and policy choices and trade-offs that must be made during the design process of an algorithmic decision-making tool and which affect fairness in the legal system, but less attention has been paid towards a crucial aspect of this: the law. Depending on how algorithmic decision-making is implemented, these tools sit at an important intersection of a number of different bodies of law.

As a result, legal frameworks from administrative law, data protection law, criminal law and criminal justice can all have an effect on how these systems are treated legally, and on their legality more crucially and generally. Much work has already been carried out from the perspective of data protection, particularly related to automated decision-making and concepts such as the right to an explanation.² Administrative law is also

² See, for example, among many others: Edwards and Veale (2018).

becoming a focus for this area, with research beginning to tackle algorithmic decision-making more seriously, using traditional concepts and principles (Oswald 2018; Cobbe 2019). This is the case for human rights law too, including international human rights law frameworks (McGregor and Others 2019). Much less has been written regarding the perspective of criminal law and criminal justice in the UK, though at least one project is working on this specific issue at the moment (Yeung 2019).

Tackling algorithmic decision-making, and analysing it through the perspective of each of these strands of law, is certainly crucial. This provides insights as to how traditional legal principles can be affected by this style of decision-making. Currently, the lack of combined and targeted legal frameworks (outside of the UK Data Protection Act 2018 and associated Data Protection Impact Assessments), means that the actions of public authorities in designing and implementing algorithmic tools are ensuring that it is largely public policy which is dictating what can be considered 'fair' in these circumstances, including the work of government bodies like the Centre for Data Ethics and Innovation.

This leaves questions over fairness in somewhat of a legal vacuum—in that the legal basis for these technologies has not been adequately identified or confirmed (Fussey and Murray 2019) when it should be the law which is primarily defining and protecting this concept. Data protection plays an important role in attempting to prevent such developments, as seen above in relation to the Gangs Matrix inclusion of victim's data and associate implications. However, this was primarily raised as a data retention issue, and one regarding the fair processing of data, rather than the specific question of what can be considered to be a fair decision (ICO 2018: 9-11).

To conceive of what is legally fair in this situation, requires an understanding of how legal concepts are affected, such as discretion, the duty to provide reasons, the right to liberty and the right to a fair trial—which are brought into question by the relative lack of transparency in the tools involved, as well as their predictive capabilities, and the ways in which they may constrain human decision-makers. This means that they are not approached simply from the perspective of the 'rules' of each individual legal area, but considered through the frame of fairness for the entire legal system as a whole. Given that these are legal concepts, they should also only change through legal methods, whether through the courts or legislation. Allowing such concepts to be transformed through policy actions may produce unwelcome shifts, without due care.

To achieve this, we must consider the design of the decision-making process from beginning to end and understand where trade-offs exist, where policy choices can apply, and decisions must be made as to how to secure a clear legal basis for algorithmic decision-making, where it is central to high stakes tasks. The creation of algorithmic decision-making tools is ultimately an extremely flexible process, as even where the limitations of machine learning have been reached in a given situation, further non-technical choices can be made which increase technical and legal complexity.

[F] CONCLUSION

Algorithmic decision-making is becoming more widespread in the United Kingdom, affecting an increasing number of procedures of the English system, including risk assessment by law enforcement for targeted intervention in crime prevention, the management of individual defendants, and the identification of *potential* offenders. It is also becoming important for administrative procedures, such as its central role in the EU Settlement Scheme.

This article has demonstrated that the design of these algorithmic tools involves a number of technical trade-offs and policy choices that can have a severe effect on the form of ‘fairness’ which a given tool can provide. These must be considered as being on a par, as their combination produces further complexity within the legal system and its associated procedures. Further, it has argued that these choices and trade-offs potentially result in legal fairness being treated as a public policy, where these tools exist within a certain degree of a legal vacuum. This should be prevented, and it should be the structures of the law which set out and define the kinds of choices that can be legally made in this area and which are legally fair. For example, decisions such as whether it is fair to treat an individual more harshly, based on a higher risk score which may be a false positive, should only be decided through the perspective of the law.

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RESOLVING DISPUTES IN 18TH-CENTURY ENGLAND

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*English Arbitration and Mediation in the Long Eighteenth Century*¹ will be published in November this year (see launch details in 'News and Events' section). Here, co-author Dr Francis Calvert Boorman gives a brief preview of the book.

Standard histories of the 18th century give little or no attention to mediation and arbitration. These processes of dispute resolution have, perhaps, been hiding in plain sight; activities that were so routine, contemporaries rarely felt the need to explain or justify them at length. Our book (co-written with Derek Roebuck and Rhiannon Markless) uncovers the practices of mediation and arbitration going on at every level in 18th-century life. It is the latest volume in Derek's monumental history of arbitration, covering England from Roman times onward, all published by HOLO Books. This latest volume sets out to show how arbitration and mediation changed across the long 18th century—taking in arbitration legislation a little beyond the boundaries of 1700 and 1800—yet continued to be essential to the functioning of economy and society.

Today, arbitration is usually understood as a quasi-legal process and is most often deployed in international commercial disputes. Mediation is perhaps most associated with family court and disputes between unions and employers. In the 18th century, arbitration and mediation were much more flexible and were called for wherever disputes were found. Eighteenth-century England was a society experiencing demographic expansion and rapid urbanisation, with political unrest at home and frequent conflicts with European neighbours and in a widening sphere of imperial influence. The sources of contention were many. The courts were

¹ By Derek Roebuck, Francis Boorman and Rhiannon Markless, published by HOLO Books. The book is now available for pre-order. See [website](#) for details.

accused of being slow, expensive and often unjust. As a character in a play of 1795 proclaimed: 'Never, never go to law; leave the whole business to arbitration, for if you don't at first, the lawyers, after emptying your pockets, will only do it at last' (Reynolds 1795: 25; act 2). The areas in which dispute resolution were deployed certainly included the merchant community and families, but also sectors as diverse as local government, sport and religious groups.

The structure of an arbitration was well established by the 18th century, which at its most basic required the two parties who were in dispute to agree to a reference. Each chose one or more arbitrators, who might be friends, colleagues or respected members of the community, and an umpire was usually selected, in case a decision could not be reached. The parties generally signed arbitration bonds, which obliged them to forfeit a sum of money if they did not comply with the decision of the arbitrators. The arbitrators then attempted to come to an agreement over all matters in dispute. They would hear any relevant evidence from witnesses and examine accounts, at hearings that were often held in taverns. With many arbitrators offering their time for free, the bar tab could sometimes be the major cost for the parties. The arbitrators made their award or, if they still couldn't agree, the umpire was called upon and his decision was final.

However, the variations on this theme were numerous. Many disputes were referred from the courts, where arbitration agreements could also be registered and enforced, as set out in the Arbitration Act of 1698, designed by the philosopher John Locke. All courts, including the assizes, Chancery and King's Bench made these referrals. Judges made many positive statements; Lord Chancellor Eldon called arbitration 'that more wholesome mode' of settling disputes (*Waters v Taylor* 1807); Lord Chief Justice Ellenborough found it 'desirable to lean in favour of arbitrators' (1802); Lord Chief Justice Kenyon could be found 'earnestly' recommending arbitration (1799). Lord Chief Justice Mansfield did the most to encourage court-approved arbitration and cases registered at the King's Bench increased markedly under his stewardship (Oldham 1992).

Land and shipping were particularly important subjects for arbitration. Although the textbooks of the time insisted that land was not a fit subject for arbitration, practice shows otherwise. Arbitrators were frequently asked to make fair divisions of land, determining balancing cash payments, often in cases of disputed inheritance. As a maritime power, British ships traversed the globe. Arbitrators were called upon to

determine the value of stock seized at sea in times of war, or salvaged by local sailors off the coast.

Justices of the Peace (JPs) were the frontline of both the criminal justice system and state-sanctioned mediation and arbitration, spending the greater part of their time negotiating peace in their community rather than prosecuting offenders. They kept no official records, but some ‘justicing’ notebooks have survived, which supply ample evidence of their activities. Like magistrates today, JPs volunteered their time and were often local landowners or clergymen, like the Reverend Edmund Tew, of Boldon in County Durham (Morgan and Rushton 2000). Tew negotiated the settlements to so many disputes that he often just noted down ‘Agreed’, or even ‘A’, but in those cases where he went into more detail, the most frequent reason for his intercession was assault. The modern reader may be surprised to find that assaults were often settled with an apology or a payment to the victim. Money also changed hands to bring peace following other incidents that should really have been criminal matters, including theft and in one case rape. JPs were called upon to arbitrate or mediate in finding settlements in wage disputes, and between masters and apprentices.

A particular source of strife amongst the middle classes (or middling sorts) was the provision of public services, paid for by a tax on property and organised by parish. Arbitrators were called in to decide if properties were fairly rated and what outstanding sums were owed. They might also decide questions of responsibility for maintaining roads and flood defences, or for supporting poor people and bastard children, even setting parish boundaries where these were in question. Disputes about the payment of tithes to maintain the clergy were also referred, perhaps unsurprisingly when arguments could be as arcane as whether a share of a swarm of bees had to be paid in kind (they did, but generally in wax and honey, rather than a tenth of the bees).

Many arbitrations were privately arranged between individuals, and other forums existed that routinely arranged arbitrations, with no involvement of courts or state officials. Of religious communities, the Quakers showed the most profound commitment to mediation and arbitration. Quaker meetings would mediate in commercial disputes between members, while Friends who repeatedly refused to submit disputes to arbitration, or declined to act as an arbitrator, could be disowned. The Sephardic Jewish community in London held its own arbitration tribunal, chiefly to settle small debts between poorer members. A similar institution was set up in the very different context of the Crowley

Ironworks at Winlaton Mill, established to settle differences between employees. Wagers made at gentlemen's clubs were decided by the arbitration of members. So too were the outcomes of sporting events, with an arbitration panel to adjudicate on horse races set up by the recently formed Jockey Club in 1771.

There are many examples where arbitration was used to resolve disputes in newly emerging economic activities in the 18th century, from insurance to engineering. Arbitration continued to respond to the needs of parties, not least because it was ideally suited to cases of great complexity. It was essential to unpicking financial entanglements, and partnership agreements contained a standard clause stating that all future disputes between the partners would be referred to arbitrators. When brothers John and William Wilkinson, co-owners of several steelworks around the country, fell out over the sale of their works at Bersham, one brother brought a suit in Chancery. However, the judge warned the case might take 150 years to conclude and suggested reference to an arbitrator, 'the most unfettered Judge in the world' (*Telegraph* 1795).

Experts were often called upon as arbitrators, for instance, architects or carpenters in disputes surrounding the fractious building industry. A diverse range of professions offered their services, where the arbitrator needed the practitioner's eye for quality of work, from leather breeches makers to veterinarians. Expertise became essential when disputes involved new inventions, such as the steam engine. Famed barrister William Garrow was counsel in a trial concerning the output of a steam engine, but he freely admitted he was not qualified to estimate the horsepower and that the damages owed should be referred to an arbitrator. Engineers and inventors like Richard Arkwright, James Watt and Thomas Telford all referred disputes to arbitration or acted as arbitrators themselves.

Disputes reflected wider trends in the 18th century. In an era when politeness was an aspiration and interpersonal violence was increasingly frowned upon, arbitration was seen as a solution to quarrels that still preserved the honour of the parties. This trend is best exemplified by the case of two officers of the Derbyshire militia who began squabbling over payments for breakfast and, when one threw a handful of nuts at the other, a duel was proposed. Thankfully, the situation was defused by the arbitration of a third officer, before any weapons were drawn.

Of course, not everyone complied with these emerging norms. Laurence, Earl Ferrers, agreed to an arbitration to decide terms of

separation from his wife Mary, after even excommunication failed to persuade the violent Earl to comply. He and Mary entered into bonds for the huge sum of £20,000, but the Earl gave a false account of his estates and then used force to disrupt the arbitrators. The separation was eventually confirmed by Act of Parliament, but when a trusted servant went to collect rents due to Mary under the terms, the Earl shot him dead. For this crime, Ferrers was the last peer in Britain to be hanged.

Although we don't pretend to offer any advice to the arbitrator today, there are many differences in the way that mediation and arbitration worked in the 18th century that might provide pause for reflection, particularly as we have also observed the emergence of some modern practices during the era under study. Perhaps the most profound difference was the procedural flexibility found in 18th-century dispute resolution. There was a fluidity between negotiation, mediation and arbitration that in some ways belied our distinct modern understanding of the terms. This should not be interpreted as a lack of sophistication, but simply a different emphasis, on outcome over procedure.

This was also a time when the legalisation of arbitration was taking root, but was by no means ubiquitous. An arbitration might be recognisable to current practitioners. Commercial arbitrations were sometimes quite formal and legalistic, both parties with legal representation. Or an arbitration could be a highly informal and very personal affair, like the wedding party called upon to decide which of two brothers should marry a woman when the ceremony was just about to begin. Either way, parties generally treated the decision as binding; the brothers were switched at the altar and the newspaper report of the incident describes no dissent. Enforcement was still social in many situations, not exclusively contractual.

A section of the book examines the sources we used and part of our purpose is to encourage further research. We hope that our multidisciplinary approach will challenge legal historians to broaden their outlook and look beyond the law reports. Our diverse range of sources show that the modern observer will miss perhaps the majority of mediation and arbitration in the 18th century if we look for evidence solely in the records of courts or even of lawyers.

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CLOCK: A TRANSFORMATIVE EXPERIENCE

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This 'Note' presents a brief overview of the Community Legal Companion scheme (CLOCK)² and its impact on students, litigants in person and lecturers who are involved in the project. The following discussion, which is not intended to be exhaustive, draws upon my experience since 2016 as academic co-lead of CLOCK at the University of Sussex.³

Recognizing the difficulties that litigants in person⁴ often face in going to court and inspired by the principles of access to justice as well as in reaction to some of the negative consequences of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), CLOCK was established to support litigants in person in court. CLOCK was first created by Jane Krishnadas and launched in 2012 by the School of Law at Keele

¹ I wish to thank Jane Krishnadas, Jeanette Ashton and George Harrison for agreeing to share their experience of CLOCK with me. All errors are mine.

² Community Legal Outreach Collaboration Keele: see the [CLOCK website](#).

³ The School of Law at the University of Sussex runs the Clinic Legal Education programme which includes a variety of projects. For further information see the [Sussex Clinical Legal Education website](#).

⁴ According to the Practice Guidance issued by the Master of the Rolls in 2013, a litigant in person is an individual who conducts legal proceedings on her or his own behalf. Litigants in person face financial, procedural, and emotional difficulties. Before the launch of CLOCK, Moorhead and Sefton (2005) suggested that 11 indicators of vulnerability characterize litigants in person: being a victim of violence; depression; alcoholism; being a young lone parent; drug use; history of imprisonment; mental illness; living in temporary accommodation with children; illiteracy; terminal illness; involvement with social services. To these indicators other characteristics of litigants could be added, including ethnic minority status and possessing limited language skills. Further research has shown how, following the cuts to legal aid in 2012, cases with at least one litigant in person have increased significantly in private family law cases (Trinder et al 2014).

University.⁵ Explaining the reasons for developing this initiative, Jane Krishnadas suggested to me:

The Community Legal Outreach Collaboration Keele, was designed as an active application of the ‘transformative methodology’ [Krishnadas 2008] based upon listening to the experiences of women in the post-earthquake reconstruction process, as they sought to claim their rights as legal subjects across the family, communities, the state and international context.

My research engaged with Eastern and Western feminist rights discourse to ask whether rights strategies can ever be transformative? ... This question was raised in my later research listening to women survivors of domestic violence ‘Voices of Experience’: where after the significant withdrawal of legal aid (LASPO), women were faced with the critical and fearful dilemma; whether to leave an island of abuse or enter the shark infested waters of the legal system, alone. CLOCK centres women’s voices, to understand how access to rights are based upon: i) the complexity and intersectionality of identities, ii) multiple needs, and iii) across public and private spheres of justice, to affect who, what and where rights could be claimed.

The students who participate in CLOCK are trained to become Community Legal Companions—a role which (although with some differences) draws upon the notion of the McKenzie Friend. Before taking on this role, the students attend a training which is divided into five days: academic training; legal training; third-sector training; court training involving guidance and study of court forms; and legal training in court. Once in court CLOCK Legal Companions support the litigants in person, helping them to complete court forms, assisting with the preparation of case bundles and during the hearings, and signposting the litigant to the law firms, mediation practices and charities which are partners in the project. At the end of every one of their shifts in court, the Legal Companions write an ‘end-of-shift’ report. Assisting litigants in person includes also answering their queries via dedicated email accounts. However, CLOCK Legal Companions are not allowed to give legal advice.

As Jane Krishnadas suggests:

CLOCK designed the role of the Community Legal Companion to connect and empower all marginalised person as a relational method to exercise their agency, create capacity to access legal aid, and mobilise across the private and public legal spheres, to become agents of change and transform sites of justice.

Although students are the main actors in the project, CLOCK develops concrete collaborations with law firms, mediation providers, courts, police,

⁵ With regards to Law Schools, CLOCK is currently being offered by: Keele, Brighton, Sussex, Canterbury, Wolverhampton, Leicester, Salford, and Liverpool John Moores.

the local council, charities and the civil and criminal justice system. The range of cases Legal Companions deal with is broad and includes child arrangements orders, housing, child adoption, child abduction, child welfare, employment, domestic violence (and in particular breach of non-molestation orders) and passport applications. In general, litigants ask Legal Companions to assist with case bundles, proofreading of statements, submission of forms, and taking notes during hearings.

But has CLOCK been transformative? It is contended here that CLOCK does have a transformative impact on students, lecturers and litigants in person. As one former Legal Companion points out:

CLOCK provides an invaluable service which is vital to the local community, as it allows people to access the legal information and moral support they need which is extremely important, more so now that legal aid for most private family law matters has been cut since the Legal Aid, Sentencing and Punishment of Offenders Act 2012. Having been a CLOCK Legal Companion for the past year, I have experienced first-hand the tremendously positive impact the service has had on litigants in person who otherwise might have struggled with understanding and dealing with the complicated litigation process.

The findings of a small-scale research project concerning the possible benefits of CLOCK on the Legal Companions at Canterbury Christ Church University and the University of Brighton indicate that CLOCK enhances students' knowledge of the law, their ability to be reflective and their employability (Waters and Ashton 2018).

More generally, based on some ethnographic data I have collected during these past few years, two significant transformations characterize the impact that CLOCK has had on Legal Companions. First, the project has helped Legal Companions to be aware of the various shapes barriers to access to justice might assume (Moscati 2017). When attending the preparatory training students are asked to offer examples of barriers to access to justice which in their view litigants in person might face. Their answers mainly focus on legal and procedural barriers such as lack of legal representation, complicated procedural rules, and difficulties when filling in court forms. After some experience in court assisting litigants in person, Legal Companions become more aware of other issues such as emotions, power imbalances between two disputants (when, for instance, one litigant is represented and the other is not), language, relationships between the disputants, and the overall intimidating pressure that the court system creates. They see such issues as representing significant barriers to access to justice. As one former Legal Companion put it, that in addition to legal knowledge, 'CLOCK is also about empathy.'

A second transformative impact that CLOCK has on Legal Companions is to encourage within them a broader conceptualisation of the role of lawyers and a greater awareness of cause lawyering (and the discourse it has generated). Students often move away from an initial, rather narrow, understanding of lawyering. So that they come to see the work of lawyers as more than offering legal advice and legal representation and to include also an access-to-justice driven role for the lawyer—one which aims to encourage social change, creating greater rights awareness, and valuing collaborations with different members of society.

As far as the impact on litigants in person is concerned, raising awareness and empowerment double the practical aid that CLOCK offers to litigants in person. Indeed, as a former litigant in person wrote:

Today I attended my hearing with ... as my Companion. Without her I would not have got through it. She did all that she said she would do, that she couldn't advise me but made me think about what I needed to say to the judge. She gave me great support and just having her there to take notes and reassure me was all I could ask. I wish you well ... and thank you once again.

Academic Leads involved in CLOCK, such as myself, find in this project an opportunity to instil a broad approach to access to justice within legal teaching. Overall, and as widely suggested, legal clinical education represents an opportunity to offer some legal support to those who encounter difficulties in accessing justice. Through CLOCK, in my view, such opportunities increase as to include the community outreach. In practical terms, our role as academic leaders consists of supervising the work that Legal Companions do in court, and in preparing for hearings, liaising with local community and creating connections with law firms, charities, and courts, and supporting CLOCK with our research. However, there is more. As suggested by my colleague Jeanette Ashton:

Establishing and running CLOCK in Sussex has enhanced my role as a lecturer in a number of ways. A key element of the CLOCK project is collaboration and working with other universities; students across various year groups; the local legal community and courts is very rewarding. We can, as lecturers, naturally be focused on our subject and the day to day tasks of the role, without feeling part of the 'bigger picture'. Being part of CLOCK enables lecturers, and the students on the project, to be part of that wider community. On a personal level, I value the connections I have made through reaching out to the community for assistance with the project. From a wider university perspective, alongside the employability skills gained by students, there is the benefit of enhanced relationships with the local legal community.

The benefits which the students cite include gaining practical experience which complements their academic studies and a sense of making a positive contribution to the local community. I feel the same benefits as a lecturer and non-practising solicitor, with the practical challenges of the role giving me a greater understanding of the current challenges for the legal profession.

CLOCK is an ongoing journey and criticisms, resistance and defection are accompanying luggage. However, the transformations it brings suggest that it is adding a new important dimension to access to justice, and that the journey is well-worth continuing in the years ahead.

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REGIONAL APPROACHES TO INTERNATIONAL LAW

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[A] INTRODUCTION

International law is often presented as a universal system that applies in the same way across different countries and regions of the world, yet, in recent years, this view has increasingly come under challenge. Different regions and countries, especially outside the West, have developed practices and views towards international law that show that international law is perceived and practised differently in different parts of the world. The rise of countries outside the West, particularly Brazil, Russia, India, China and South Africa (BRICS), has also shown these countries to be more assertive on the international stage, including on issues of public international law. The idea of ‘comparative international law’ has also received more academic attention in the literature (Roberts et al 2018). The book *Is International Law International?* (Roberts 2017), for instance, challenges the concept that there is one view of international law, demonstrating how different regions have developed diverging understandings of international law. The phenomenon of regional approaches to international law is not new, however, and the different approaches taken towards international law can often be explained by looking at issues such as the region’s history, politics, religion and economic development.

The theme of regional approaches to international law was the subject of a workshop held on 3 July 2019 at City Law School, University of London.¹ The need to understand the historical, political and economic reasons that drive regional approaches to international law emerged as one of the key themes. Lauri Mälksoo, University of Tartu, discussed his research on Russian approaches to international law (Mälksoo 2015).

¹ The workshop was part of the [GLOBALLAW@CITY Research Dialogue Series](#). For a report on the series, see Fahey et al (2019).

These have developed both at the level of the Russian government, as well as in Russian scholarship. Professor Mälksoo discussed the implications of Russian approaches to international law for the claimed universality of the field in Europe and globally, and whether comparative perspectives can be drawn for the study of international law generally. Wim Muller, University of Maastricht, discussed the concept of ‘International Law with Chinese Characteristics’, a title that refers to the concept of ‘socialism with Chinese characteristics’ used by the People’s Republic of China (PRC). Just as socialism is to be adapted to the social and economic conditions of China, international law may also undergo a similar change, whereby international law is adapted to suit the situation of China. Muller discussed how, with China’s economic rise, there has also been a more assertive attitude towards international law, but that this assertiveness is sometimes curtailed by China’s historic experience with international law. Mauro Barelli, City Law School, continued with this theme in ‘China and the Responsibility to Protect’. Although China has asserted that sovereignty is a central part of its foreign policy, Chinese policy has shown to be more pragmatic and influenced by developments in international politics. This is an example of a common theme in the debate: what is the relationship between rhetoric about international law, both in academia and official statements, and the practice of international law, and how do they shape each other?

Russian Approaches to International Law

Lauri Mälksoo began with the complex question as to whether there was, or could ever be, a discipline labelled as ‘comparative international law’? Anthea Roberts ignited a significant debate on this topic, examining its subject contours, content and intellectual limits. Mälksoo asked whether there are truly regional approaches to public international law. Moreover, he asks, where did this question come from? Those studying international law have always known of different approaches to international law, such as the approaches of dualism and monism, but they did not appear to be important enough to challenge the universality of the established shared European vision. The interest in regional approaches, Mälksoo argues, comes with the relative rise of powers outside the West.

Mälksoo reflected on how his study of Russian approaches to international law has been informed by his personal experience living in Estonia during the breakup of the Soviet Union and after. Having lived through different political discourses and regimes, this awakened his sense for the relativity of things and allowed him to notice the ideology behind the law. For instance, human rights were viewed in the West

(relatively recently) as of primary importance, whereas in Russia, there were other values that were of importance. Was there something in the Russian, Eastern European or the Orthodox world that made the reality of international law different? Mälksoo points out that in Russia (communist and post-communist), political discourse and literature spoke a lot about international law, but that it was predominantly used as a political weapon, particularly against the West. When Western states criticised the Soviet Union for a lack of respect for human rights or democracy, it could respond by arguing that it was in fact Western countries that were violating those principles.

Mälksoo also discussed the importance of language in the study of international law. In the past, European international lawyers were expected to speak English and French, perhaps also German or Italian. Today, international law scholarship in the West is predominantly in English, and the principal journal of international law, the *American Journal of International Law*, publishes articles that do not include non-English language sources. Even the challengers to the Anglo-Saxon tradition, the German scholars, publish largely in English, he argued. Mälksoo argued that the same could not be said of discourse on international law outside the West. There are entire debates and discourse on international law in languages other than English. Mälksoo also commented on the phenomenon of different academic accents when writing in different languages. A Russian scholar may feel comfortable writing things in Russian for a Russian audience that they would not write for a wider audience, in English.

So what is a Russian approach to international law? Mälksoo noted that, for the most part, public international law has *not* been universal; in the 19th and early 20th centuries, it was used to govern ‘civilised nations’. Russia sat in an awkward position. It saw itself as the Eastern-most country of the ‘civilised nations’, but was also told by Western states that it was not civilised. Such disjuncture, sitting in between traditions, can also be seen in the development of the Chinese approach to international law, discussed below.

Mälksoo discussed how domestic concepts of law can influence approaches to public international law. Mälksoo notes a paradox in the way that international law is viewed. On the one hand, Russia argued that, in its tradition, it would rather regulate without law, a view informed by the legal nihilism in Russian and Orthodox tradition. On the other hand, Russia saw itself as a protector of international law in its international relations. Mälksoo notes how the Russian tradition is not a

rejection of international law, but more an emphasis on certain principles. The UN Charter, for instance, starts with the principles of the non-use of force and the principle of non-intervention. While the emphasis on human rights and democratic legitimacy increased in the West, nothing had changed the central importance of state sovereignty. Indeed, such Western interventionism could be viewed as a *violation* of international law. Mälksoo finds this ‘clash’ of visions to be related to underlying differences in political philosophy. Similar to the Chinese approach, discussed below, Russia not only emphasises the importance of sovereignty, it views it as a core value of international law.

Another related feature of the Russian approach was a certain distrust towards international adjudication. While supporting public international law in its ‘propaganda’, Mälksoo shows how Russia was reluctant to utilise international dispute settlement bodies, especially to resolve legal disputes with post-Soviet states. As an example, he discussed how in the Alabama arbitration, the United States and the United Kingdom shared the same language and religion and could ‘trust’ one another. The same could not be said of Russia, which looked at the imperialists as the enemy, and which had a different concept of what international law is.

Mälksoo makes an interesting parallel between the United Kingdom and Russia regarding the relationship with its former colonies. Diverging approaches to international law can be seen, and are most acute, when empires disintegrate and there remains a phantom understanding of the spheres of influence. In both situations, countries became independent, but the former empire was not willing to accept them as *de facto* fully sovereign. Today Moscow views the former empire in these terms: they are separate, but not foreign countries. The same approach is taken by the United Kingdom, which, although it recognises the compulsory jurisdiction of the International Court of Justice, has made a reservation regarding disputes with current or former members of the Commonwealth. In this post-imperial experience, there appears to be a disjuncture between the law and reality, one where public international law may apply in theory, but has no connection with reality. According to the maps, and to public international law, Transnistria, South Ossetia, and Crimea are not part of Russia, but this does not accord with the reality on the ground, and will not likely change in the near future.

Chinese Approaches to International Law

Wim Muller highlighted the need to understand history in international law. Lawyers tend to think of international law as universal and

unchanging, Muller argues, especially if they have only had training in law. This does not fit with reality, and there is a tension in international law between universality and regional variation. Looking at history, and regional approaches to international law, also helps us understand the deeper function of public international law in international society. As discussed by Mälksoo, one should look at the links between approaches to law and political philosophy, and the question of what goals international law sets out to achieve. International law can be limited to the relations between states and resolving inter-state disputes, but it can also take multiple other forms, including one that deals with rights of individuals. Studying regional approaches thus allows us to understand these different views about the underlying purpose of international law.

Muller emphasised the need to understand the role of Chinese history in the development of a Chinese approach to international law. The modern international legal system is not indigenous to China and had a disruptive effect when it was introduced. China historically viewed itself as the centre of an empire and a world order. Such perception was challenged up the invasion of foreign powers. International law was further used to open up China, for instance, when the British used international law arguments to sell opium in China (although not a correct reading of international law at the time). The League of Nations did little to prevent the Japanese invasion of China. Such treatment was indicative of the century of defeat and humiliation suffered by China. Such feelings of distrust towards international law, based in feelings of humiliation, continued after the end of the Second World War, when China was invited to be a member of the UN Security Council (UNSC), but the PRC did not take up the seat until 1971. Such non-participation at the UNSC furthered this narrative of humiliation.

China itself was also undergoing a turbulent period. When the PRC replaced the Republic of China (ROC) in 1971, its foreign policy also changed. During this period, China accepted the international legal order and would seek to achieve its aims within that order. Its foreign policy identified three core interests: territorial sovereignty, regional security, and development. Since 1989, the foreign policy goals of China evolved further. China undertook market reforms in service of its development in the 1990s, and the fruit of such change was seen in the 2000s. China sought to assuage concerns about the 'rise of China' by coining the term 'peaceful rise', emphasising that Chinese economic development would not lead to it becoming a military or other threat. The 1989 Tiananmen incident also put the issue of human rights on the agenda, as the world community had concerns about human rights and democracy in China.

Until 2010 China pursued these three ‘modest’ goals and did not want to be seen as an aggressive power.

Under the leadership of Xi Jinping, China has found itself becoming more ambitious and assertive on the world stage. Such global ambition has called into question its traditional foreign policy and its place in the international legal order. China’s foreign policy priorities, moreover, are reflected in its approach to the international legal order. First, it seeks to adhere to the principles in the Charter of the United Nations, of which sovereignty is viewed as an overarching value. China’s five principles of co-existence, which were included in a peace treaty with India, are presented as one of China’s main contributions to public international law. These principles include the respect for territorial integrity, non-aggression, non-interference in the internal affairs of other states, and the principle of equality and mutual benefit. Muller reminds us that such importance placed on state sovereignty is linked to China’s history. From a Chinese perspective, sovereignty is the main foundation of international law, and as Wang Tiewa (1990: 290) argues ‘a legal barrier protecting against foreign domination and aggression’.² Moreover, as Xue Hanqin (2011), now judge of the International Court of Justice, has argued, there is also an important cultural dimension. International law is a relatively new system for China, compared to European states. Muller argues in this vein that for China international law is not as familiar as it is in Western Europe. China’s emphasis on state sovereignty can also be seen as connected to other approaches to international law, such as the Soviet approach, or the Third World Approaches to International Law (TWAIL) approach with its emphasis on colonial history. While China takes this position on sovereignty, its practice is sometimes more pragmatic than expected, Muller argues.

Since around 2014, China no longer has a ‘modest’ approach to international law and has sought to challenge the interpretation of norms or shape international law. The Fourth Plenary Session of the 18th Communist Party of China Central Committee (2014) Outcome Document states that China will:

vigorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, strengthen our country’s discourse power and

² Wang Tiewa developed his point thus (1990: 290): ‘The PRC sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the only main foundation upon which international relations and international law can be established and developed. The Chinese put emphasis on sovereignty because it is the hard-worn prize of their long struggles for their lost sovereignty. They take sovereignty as a legal barrier protecting against foreign domination and aggression.’

influence in international affairs, use legal methods to safeguard our country's sovereignty, security and development interests. (Communist Party of China Central Committee 2014)

The development of the law is thus at the centre of Chinese Communist Party policy. While China seeks to be a shaper of international norms, the way in which this occurs is subtle, and is beginning to unfold. There are a number of areas where China seeks to shape international law. In the area of human rights, for instance, China accepts the universal character of human rights, but asserts that the way they are interpreted and applied must take into account history, culture, and the specific circumstances of the country. China assumes that the interpretative authority of human rights is biased in favour of Western cultures.

Another area of engagement has been in the South China Sea arbitration. The Philippines brought the case before an arbitral tribunal, as both states are party to the United Nations Convention for the Law of the Sea (UNCLOS). Although China challenged the jurisdiction of the tribunal, it was not confident enough to make these arguments before the tribunal itself, and declined to participate in the proceedings. For Muller, this was a strategic error on the part of China. It also puts China in the same group as other major powers such as the United States and Russia, which have refused to appear before international dispute settlement bodies. China is different, Muller argues, as China remains insecure about how to use international law arguments. As China is viewed as a rising power, it may appear strange that China is not confident enough to assert its legal position. This is an example, Muller argues, of how China's unfamiliarity with international law still plays a role and shapes the ability of China to use international law.

China also seeks to be a power and shaper of international norms in the field of cybersecurity. China argues that 'cyber sovereignty' should be a guiding principle regulating cyberspace. So far, such view has gained little traction, although some states, including Russia, align with this position. This is an example, Muller argues, of an emerging gap between Western and non-Western states.

China and the Responsibility to Protect

Barelli continued with the discussion of Chinese approaches to international law by focusing on China's approach to one debate in particular: the responsibility to protect (Barelli 2018). The contemporary debate in international law about the responsibility to protect doctrine (R2P) has forced China to confront its traditional opposition to

intervention and intrusions into state sovereignty. While conducting research on the use of force, and in particular on humanitarian intervention, Barelli became interested in the idea about how different regions, and states, have very different understandings and interpretations of international law, and the development of the R2P principle is a case in point.

In essence, the principle of R2P means that when a state allows or commits atrocities against its people, the responsibility to protect these people can shift from the state to the international community. This, of course, is a question that goes to the very heart of sovereignty. Barelli points out that China was recently criticised for failing to live up to its responsibility, as a permanent UN Security Council member, to resolve the unfolding crisis in Syria. While China called for a political resolution to the crisis, it vetoed any UN resolution that would impose sanctions, or allow the use of force, against Syria.

This presents a potential dilemma for China. China has an interest in maintaining the principle of respect for sovereignty, the non-use of force, and non-intervention. It is often used as a ‘shield’ against criticism of China, as it views such criticism as ‘meddling’ in its internal affairs and an affront to its sovereignty. At the same time, however, as China has become a military and economic power, it has interests in maintaining international stability, as its continued prosperity and economic growth are tied to peace and stability. How, then, has China sought to reconcile these differences?

While R2P is recognised as a principle—it is a ‘guiding principle’, rather than a rule, Barelli argues—there remains uncertainty about how it applies and under which circumstances. It is emerging as a recognised tool to shape the international response to atrocities, but the precise contours have not been shaped. It is still viewed as an exception. It recognises that the international community should do ‘something’, but there are different conceptions of what this entails. R2P is understood as comprising three main pillars. The first, and least controversial, is that states have the primary responsibility to protect their population against atrocity crimes—genocide, war crimes, ethnic cleansing, and crimes against humanity. According to the second pillar, in cases where the state does not, or cannot protect its population, the international community may intervene peacefully to assist a state. This includes diplomatic and other support, or the use of peacekeeping, with the consent of the state. Like the first pillar, China views this as being in accordance with the principle of state sovereignty, since intervention can only take place with

the consent of the state. The third pillar, on the other hand, means that, if the circumstances require, the international community should be willing to take coercive measures, including military intervention. In order for such measures to be compatible with the R2P principle, they must be authorised by the UN Security Council.

Rather than outright rejecting the validity of the third pillar, China has sought to engage with it. When discussions on R2P took place in international forums, including the UN Security Council, China actively took part in the process. This is an example, as discussed by Muller, of China moving from a 'rule-taker' to a 'rule-maker', as China sought to shape the emergence of a new principle. How did it do so? First, it sought to limit as much as possible the circumstances that would trigger the third pillar. It also endorsed the so-called sequential approach under which military intervention would only be considered once all other options had been tried. Such an approach, however, was not accepted by the international community, and a report of the UN Secretary General argued against such an interpretation. China has consistently argued that every effort should be made to resolve the crisis with consent of the state involved, but it has not ruled out the use of intervention authorised by the UN Security Council. The position of China is that it supports R2P, but only as long as it does not challenge state sovereignty. Clearly, there is a contradiction in such an approach, as R2P challenges unlimited state sovereignty by its nature.

Barelli argues that it is important to also look at the practice of China, rather than focusing on rhetoric and official statements. Here, a more pragmatic picture emerges. On some occasions, China has shown a willingness to support R2P, such as in the case of Libya. While China supported sanctions against Libya and the referral of the situation to the International Criminal Court, it abstained on a resolution authorising the use of force. In this case, China did not object to the use of force in response to a humanitarian crisis.

It is understandable, Barelli argues, that China would take such an ambivalent position. China cannot take action, either rhetorically or in practice, that expressly undermines its commitment to the principle of state sovereignty. However, the practice of China, including the use of peacekeepers and implicit support of R2P operations, is beginning to challenge this. Interestingly, states in the Association of South East Asian Nations (ASEAN) have taken a position very similar to China as far as understanding the concept of R2P goes (e.g., support of pillars 1 and 2, and reluctance to accept pillar 3). Yet, ASEAN states have not taken the

same approach taken by China on the ground (also because of China's privileged position as one of the UNSC). This shows how different states and regions can take different approaches to international law, but also that such approaches are ultimately guided by political considerations. Slowly, China has begun to align itself with the position taken by a majority of other states, showing that its principled support of state sovereignty can also be mediated by politics.

[B] CONCLUSION

A number of key issues emerged from the debate. All the speakers emphasised the importance of looking to history in understanding how regional approaches emerge, and how they continue to influence the way states approach international law. Moreover, it is important to look at both the rhetoric—what academics and government statements say about international law—and the actual practice of states. While Russian and Chinese approaches emphasise the importance of sovereignty as an underlying value of international law, the practice of those states shows a more complex story. Regional approaches to international law tend to show a different emphasis or accent on certain values or principles (sovereignty, human rights, international adjudication), but they have not presented a fundamental challenge to those norms as such. At what point do such different conceptions of international law move from regional variation, to be expected in a decentralised legal order, to regional fragmentation?

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WG HART WORKSHOP FOR 2019
ON
PENSIONS: LAW, POLICY & PRACTICE

On Thursday 20 and Friday 21 June 2019, the Institute of Advanced Legal Studies, Slaughter & May and the UCL Faculty of Laws jointly held the WG Hart Legal Workshop for 2019 on Pensions: Law, Policy & Practice. Over 80 academics and practitioners attended the conference, to discuss and debate many challenging problems and questions of public policy and legal practice in the pensions area.

Nine sessions were held over the two days. The first began with a presentation by Scott Donald (UNSW) on the pension fund as a ‘virtual’ institution, in which he explained how network analysis can help to identify nodes which are systematically important in the running of pension schemes but are often unmonitored by regulators. Charles Cameron (Slaughter & May) then examined the meaning of ‘prudence’ in trustee decision-making and urged employers and trustees to engage in greater dialogue and information-sharing to help calibrate trustees’ exercise of their discretionary powers. Deborah Mabbett (Birkbeck) then critiqued the backward-looking outlook of most pension fund trustees, arguing that they are excessively concerned for the rights of existing members and insufficiently concerned for the rights of future members.

In the second session, Brian Sloan (Cambridge) gave an overview of the impact of ‘pension freedom’ reforms of 2015 to the rules governing the assessment of liabilities to pay for social care, while Hilary Woodward and Rhys Taylor (Pensions Advisory Group (PAG)) introduced the work of the PAG which aims to provide better guidance on pensions matters to parties seeking divorce settlements at the family court and their legal advisers.

In the third session, David Pollard (Wilberforce Chambers) discussed whether the rules governing interpretation of pension documents differ from the rules governing the interpretation of other legal documents, while

Paul S Davies (UCL) considered whether different rules govern the rectification of pensions documents as opposed to other legal documents.

In the fourth session, Lydia Seymour (Outer Temple Chambers) reviewed the recent firefighters' and judicial pensions cases, in which the government's new rearrangements have fallen foul of the law against age discrimination. Alysia Blackham (Melbourne) then offered an analysis of the mandatory superannuation system in Australia and its implications for our normative discussions of 'fairness'.

The final session of the day was led by Sinéad Agnew (UCL) who gave a paper on the history of the use of the trust form in 19th-century pension schemes and argued that the Rowntree and Cadbury's choice of the trust form at the turn of the 20th century reflected a gradual rather than a revolutionary advance on previous scheme structures. Finally, Jo Grady (Sheffield) gave an overview of the Universities Superannuation Scheme dispute and the empowering effects which this has had in encouraging members of the scheme to enter into dialogue with their employers.

The second day of the conference opened with a paper by Jessica Hudson (UNSW) and Charles Mitchell (UCL) on the legal consequences of the flawed exercise of powers in pension schemes. This was followed by a paper from James Kolaczkowski (UWE) on the normative role and purpose of occupational pension schemes and their handling by courts in recent cases.

In the second session of the day, Debbie Webb (Willis Towers Watson) introduced delegates to the recent history of changes to actuarial practice, focusing on significant changes to the premises on which pension-funding obligations are assessed, as a result of 1990s legislation, and the increased role of the regulator, following changes made in the 2000s. Paul F Brice (Grant Thornton) then presented an overview of the employer covenant and the bases on which employers can adjust their level of financial commitment to pension funds and the degree of investment risk undertaken by trustees. In the last paper of the session, Sandeep Maudgil (Slaughter & May) and Hans van Meerten (Utrecht) explained the extent to which the Netherlands currently has collective defined contribution pension schemes and examined the feasibility of introducing such schemes into the UK.

The final afternoon began with a discussion by Bernard Casey (SOCIAL ECONOMIC RESEARCH) and Noel Whiteside (Warwick) of the phenomenon of members leaving (as opposed to opting out of) pension schemes, a problem which is often caused by workers changing their employment

status. Debora Price (Manchester) then spoke about the important and oft-neglected role of the state pension, which continues to provide the primary means of subsistence for a majority of people in old age, particularly women given the persisting gender pensions gap, which exceeds (and will continue to exceed) the gender pay gap.

The last session saw a robust three-way exchange between Lord Sales (UK Supreme Court), Alan Bogg (Bristol) and Mark Freedland (Oxford) and Dan Schaffer (Slaughter & May), on the meaning and desirability of recent cases in which the courts have drawn on public law principles to resolve pensions disputes. Lord Sales argued against such developments in his critique of *IBM v Dalgleish*, contending that the public law principles of legitimate expectations and ‘*Wednesbury* reasonableness’ are designed to resolve different types of problem, and that sufficient scope exists to develop private law principles to reach fair and justified results in pensions cases. Bogg and Freedland countered that rolling back the law in this way would undo the beneficial advances which have been made in recent years by the infiltration into employment law of public law doctrine. Schaffer argued that the *Wednesbury* irrationality standard identified in the *Braganza* case leaves decision-makers with an appropriate degree of discretion and provides a certain principle on the basis of which clear legal advice can be provided to trustees.

Conference delegates contributed their own insights to all the foregoing discussions in the open sessions that followed each presentation, and the wide variety of perspectives which they brought to bear on these made for a highly stimulating and thought-provoking event. All the participants were introduced to new ways of thinking about familiar problems and agreed that interdisciplinarity of this kind is a significant aid to understanding and innovative thinking.

The conference organisers, Sinéad Agnew, Paul S Davies and Charles Mitchell, will publish the proceedings as an edited volume in 2020.

ANTHONY DICKS—OBITUARY

MICHAEL PALMER

SOAS and IALS

Law teacher and practitioner who drew upon extensive experience in Hong Kong to become a pioneering scholar of Chinese law.

The comparative law scholar and legal practitioner, Professor Anthony Dicks SC, who has died aged 82, was a distinguished expert in Chinese law. His scholarship, rooted in years of research in Hong Kong, yielded an impressive corpus of work.

For much of his academic career he taught at the School of Oriental and African Studies (SOAS) at the University of London. Outside of SOAS, he made important public service contributions. He was a member of the Executive Council of the Universities' China Committee in London, and joint editor of the *Law in East Asia* series. He contributed to the official Hong Kong government report on *Legal and Procedural Arrangements between Hong Kong and Mainland China* (1992), a document important in the 1997 return of Hong Kong to the People's Republic of China (PRC). He was a member of the 1991 delegation, led by Lord Howe, which visited the PRC to exchange ideas with the Chinese authorities on the observance of human rights. He also assisted in founding the law school at the Chinese University of Hong Kong.

His academic writings were published in a series of elegant, insightful, essays in leading academic journals. In addition, he contributed important commentaries in professional periodicals and in unpublished professional opinions—often crucial in key cases involving Chinese law, in courts in Hong Kong and London.

Educated at Westminster School, he read law with distinction at Trinity College, Cambridge, after completing his National Service. His pupillage

was conducted under the guidance of Robert MacCrimdale at Essex Court Chambers. He was called to the Bar in 1961.

In 1962 he was awarded a prestigious fellowship by the Washington-based Institute of Current World Affairs. At that time US lawyers could not travel to the PRC and the Institute sought a foreign lawyer to study the legal system of mainland China. In preparation, Anthony studied Chinese language at SOAS and then moved to Hong Kong.

In 1968, Anthony was appointed a Fellow and Assistant Lecturer in Law at Trinity Hall, Cambridge, before returning after several years to SOAS, where he established the Law School as a major centre for Chinese legal studies—traditional and modern.

Anthony was admitted to the Hong Kong Bar in 1965, where he practised full time from 1975, taking silk in 1994. He was very important in commercial practice and arbitration in Hong Kong, and became the leading expert at the Bar in Chinese law.

After 20 years he returned to London to become Professor of Chinese Law at SOAS and to resume practice at Essex Court Chambers.

An inspiring teacher, he continued to be very generous with his time and expertise after retiring from SOAS in 2002. Post-retirement he continued to assist the school as a Professorial Research Fellow and he contributed to the Lord Chancellor's Training Scheme for Young Chinese Judges. His doctoral student, Professor Carol Tan, is the current head of the SOAS School of Law. He became a visiting professor at Ca' Foscari University in Venice. His inspirational influence endures, and he made friends and was respected immensely for his erudition and kindness.

Anthony, one of two sons of the distinguished psychiatrist, Dr Henry Dicks, is survived by his wife Vicki, two sisters, a brother, four nephews, three nieces, nine great-nephews and great-nieces, and a great-great nephew.

The SOAS School of Law has created the [Professor Anthony Dicks Bursary](#) in memory of its former Head.

Note: a fuller account of the life and work of Professor Dicks, as well as a full list of his publications, will appear in *The China Quarterly* later this year.

Anthony Dicks: born 6 January 1936; died 8 November 2018.

JOHN GARDNER—OBITUARY

NICOLA LACEY

London School of Economics and Political Science

TIMOTHY ENDICOTT

University of Oxford

Our friend John Gardner, who has died aged 54 of cancer, had a glittering academic career as an expert in legal philosophy and served as Professor of Jurisprudence at Oxford University.

Born in Glasgow to Sylvia (née Hayward-Jones) and William, who were both lecturers in German at the city's university, John attended the Glasgow Academy. In 1983 he went to New College, Oxford, to study law.

Dazzling his tutors and fellow students alike, he graduated with a first in 1986 and won the Vinerian Scholarship for the top Bachelor of Civil Law degree. A notable academic career followed: as a Prize Fellow at All Souls College, Oxford (1986-91); as a Fellow at Brasenose College, Oxford (1991-96); Reader in legal philosophy at King's College, London (1996-2000); and in 2000—at only 35—Professor of Jurisprudence at Oxford and a fellow of University College.

He became an Honorary Bencher of the Inner Temple in 2003 and a Fellow of the British Academy in 2013 and returned to All Souls as Senior Research Fellow in 2016. From that year, too, he was Professor of Law and Philosophy at Oxford.

John published three philosophical books on law: *Offences and Defences* (OUP 2007), *Law as a Leap of Faith* (2014) and *From Personal Life to Private Law* (2018). In his final weeks, with superhuman strength, he finished *Torts and Other Wrongs* which will be published posthumously by Oxford University Press.

John worked across an unusually broad canvas, bringing not only legal and philosophical acumen but also a wide array of literary reference points to bear on all he wrote. In general jurisprudence, he reinvigorated the effort to formulate a universal, descriptive theory of law, very much

in the tradition of his distinguished predecessor H L A Hart; in the philosophy of criminal law, he tackled core questions such as which wrongs should be criminalized and the nature of responsibility, as well as arguing that judgments of wrongdoing should be understood as evaluations of the quality of an agent's character as constituted by their actions; in private law, he showed that technical legal rules and obligations closely echoed more general understandings of duty across personal and social life; and in anti-discrimination law, his trademark emphasis on the moral centrality of reasons for action underpinned a fresh understanding of the wrong of discrimination as founded in the discriminator's reasons.

He took his work seriously, but his intensity of purpose was lit up by an infectious and lively enthusiasm for everything he took on. That extended not just to his work, but to his outside interests in cooking, design, literature and music, and to his relationships with friends, students and work colleagues.

John's exceptional qualities of warmth and commitment underpinned a happy family life.

He is survived by his wife, Jennifer (née Kotilaine), a barrister, whom he married in 2012, and by their children, Henrik, Annika and Audra, his mother, and a brother, David.

This Obituary is an extended version of the Obituary published earlier this summer by *The Guardian* and republished here in a slightly longer form with the kind permission of Guardian News & Media Limited (see '[John Gardner Obituary](#)', 22 July 2019).

NEWS AND EVENTS

Good progress with the IALS Transformation Project

Work began in the autumn of 2018 to transform the Institute's iconic building at 17 Russell Square and is progressing well. It is on budget and on time for completion in 2020. The Institute of Advance Legal Studies (IALS) and its library remain open and in full operation, continuing the high level of services and programme of events for its many users.

Major improvements

The IALS Transformation Project seeks to meet the changing needs of our users and will replace the services infrastructure of the whole building with new heating, cooling, ventilation, cabling and Wi-Fi. IALS library will be completely refurbished and redesigned. There will be a new transformed library entrance on the second floor into an area looking out over Russell Square, plus:

- ◇ 50 additional study desks to increase capacity – particularly for the postgraduate law programmes of the university;
- ◇ two bookable group study rooms;
- ◇ a new group training-room with increased capacity;
- ◇ a reference advice room for one-to-one training;
- ◇ a fully equipped special needs room;
- ◇ private library research carrels redesigned and increased by eight;
- ◇ new desk and chair furniture;
- ◇ more control over reading-room heating and cooling;
- ◇ secondary glazing to reduce the impact of outside traffic noise;
- ◇ more self-issue laptops;
- ◇ the installation of a new book security system;
- ◇ and improved IT services.

The academic and administrative spaces on the fifth floor will also be redesigned and refurbished to meet the future needs of our academic and administrative staff, fellows and researchers. Finally, the entrance of the building will be enhanced with a new external lift providing improved accessibility.

Good progress so far

In early 2018 the University of London approved £11.5 million of funding towards this major Transformation Project for the complete redesign and refurbishment of the IALS building. Burwell Architects was appointed, and planning



One of the refurbished reading rooms

approval, procurement and the appointment of Overbury plc as the main building contractor was successfully undertaken.

The IALS Transformation Project started as planned in June 2018. By January 2019 Overbury had successfully completed the refurbishment of the library fourth-floor reading-room and by July 2019 had refurbished the library third-floor reading-room. It is planned that the new library second-floor entrance will be completed by November 2019 and that the academic, administrative and research offices on the fifth floor will be completed by March 2020. Necessary improvements to the building's ageing plant equipment and services infrastructure are being undertaken in parallel.

Additional funding of £2 million for the project is currently being sought through a fundraising

campaign led by the University of London's Development Office. This funding will be used primarily to refurbish the library L2 floor, the archives room and the library L3 floor (closed basement). It is hoped that this work will be undertaken by Overbury from March 2020.

Continuity of services

Throughout the IALS Transformation Project, the building, seminar rooms, lecture theatre and main reading-rooms of the library continue to remain open. All the library collections remain on site and e-resources will continue to be available onsite and offsite for researchers. Research skills training sessions continue to be offered and law library staff are available on site for research assistance and consultation. Temporary arrangements are in place for the entrance to the library and for the Issue &

Enquiry Desk to be located in the fourth-floor reading-room.

Arrangements have also been agreed with the contractors to minimise the amount of noise after 10am each day.

Regular information updates are being sent to all current users and stakeholders to keep them as up-to-date as possible with the progress of the project.

IALS and its staff wish to thank our users for being so understanding during the current major Transformation Project. The Institute is excited to be able to bring new high-quality spaces to the service of a growing and dynamic national legal research community, while preserving the architectural integrity of this well-regarded Denys Lasdun building.

David Gee
IALS Librarian



IALS welcomes Dr Colin King

IALS is pleased to announce that Dr Colin King joined the Institute as Reader in Law on 1 October 2019. Colin was previously based at the School of Law, University of Sussex, where he cofounded the Sussex Crime Research Centre. Prior to joining Sussex in 2015, he taught at the universities of Manchester and Leeds. He received his LLB in Law and

European Studies, as well as his PhD, from the University of Limerick.

Colin has recently published two books, *The Handbook of Criminal and Terrorism Financing Law* (Palgrave 2018) and *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery and Deferred Prosecution Agreements* (Palgrave 2018). His comparative analysis of civil recovery in Ireland and the UK, will be published by Oxford University Press.

Colin is also working on a British Academy-funded project entitled 'Corruption, Dirty Capital, and the London Property Market' and an AHRC Leadership Fellowship for empirical research on civil recovery law and practice. Colin will become Director of Postgraduate Research Students upon joining IALS.

The governance of data-sharing for genomic and other health-related data in Africa

The shift toward open access datasets in research and science is becoming more pronounced, with funders increasingly specifying open access as part of their requirements – such as Science Europe’s Plan S to accelerate the realisation of open science by 2020. Indeed, it is broadly accepted that data-sharing stipulating is now an ethical imperative for research institutions. Despite this global shift, numerous challenges are faced in actualizing and governing data-sharing across research institutions in the African region. Many of these challenges relate to the key tension (whether perceived or otherwise) between open access and the research promotion activities of academics and research institutions on the one hand, and the push from government and regulators to ensure security and confidentiality of data on the other.

This has led to either overly cautious compliance or even simply non-compliance with data protection laws and related standards by research institutions. Coupled with a lack of resources to adequately train

researchers and Research Ethics Committee members on the interpretation of data protection laws and ethical data-sharing (including beneficitation for communities and participants), this culture of non-compliance may significantly hinder the opportunities of African-based research institutions to develop cutting-edge research and compete for research funding on a global level. More broadly still, there is a critical need to move beyond the privacy and confidentiality paradigm of data-processing regulation, and to embed those ethical values and principles that have particular importance for the African region, including equity, community engagement and beneficitation.

These themes were explored in detail at an international workshop convened between Dr Nóra Ni Loideain, Director of the [Information Law and Policy Centre](#) (ILPC) at IALS, Dr Ciara Staunton (Middlesex University) and Associate Professor Jantina De Vries (University of Cape Town). Funded by a grant awarded from the Wellcome Trust, the workshop was held in Cape Town in February 2019. This two-day workshop comprised an interdisciplinary expert group of more than 30 representatives from Africa and Europe, including the ILPC’s post-doctoral researcher Dr Rachel Adams. Speakers and



From left: Dr Jantina De Vries, University of Cape Town; Thuli Madosela, Stellenbosch University; Dr Nóra Ni Loideain, IALS; Dr Ciara Staunton, Middlesex University

participants included academics, regulators, and practitioners from various fields of research, ethics, law and health. A journalist from *Science* magazine also attended the workshop and published a write-up of the proceedings later that month.

Two subsequent publications also directly resulted from the workshop. First, the workshop coordinators and participants co-authored an article on data protection legislation governing the use of health-related data and the legality of broad consent in South Africa (the Protection of Personal Information Act). Secondly, a special issue of the Oxford University Press peer-reviewed journal of *International Data Privacy Law* (of which Dr Ni Loideain is on the editorial

board) to be published later this year will feature a number of papers presented at the workshop.

While the February workshop canvassed a number of significant challenges relating to the governance of data-sharing of genomic and health-related data in South Africa, and Africa more broadly, and identified a number of key findings and actionable next steps, it is clear that further research is required to address the issue on a continental level.

Nóra Ni Loideain
IALS

WG Hart Workshop 2020: New Perspectives on Jurisdiction and the Criminal Law

29-30 June 2020

In recent years there have been significant challenges to traditional concepts of jurisdiction in the criminal law. The increasing complexity of certain financial transactions and the advent of technologies like cryptocurrencies have raised questions about where conduct has taken place, and the authority of certain nationally based agencies to investigate and prosecute offences. In response, states have claimed jurisdiction over conduct which takes place in foreign countries where its only nexus is based on the nationality of the actors or victims, particular state interests implicated by the crime, or indeed, even the ‘wrongfulness’ of the conduct. In addition, the development of the internet continues to raise complex questions about the relationship between ‘cyberspace’ and particular geographical localities altogether.

The academic literature on jurisdiction has been slow to respond to these challenges. There is an extensive practical/practitioner literature, primarily

focused on the development of solutions to issues as they come up in practice, while other jurisdictional debates are occurring in academic silos without broader engagement with the overarching concepts. The concept of territorial jurisdiction remains central to both the investigation and prosecution of criminal offences today notwithstanding the new developments. The aim of the workshop would thus be to bring together practitioners and academics to reflect on the challenges to concepts of jurisdiction and to stimulate new perspectives on jurisdiction and the criminal law.

*Lindsay Farmer
University of Glasgow*

WG Hart Legal Workshop 2021: Call for Workshop Proposals and the Nomination of Academic Directors

The Institute of Advanced Legal Studies is seeking proposals and Academic Directors for the 2020 WG Hart Legal Workshop from law schools across the UK.

See [Call for Proposals](#) for full details. Closing date: **10 January 2020**.

IALS forthcoming events

Official Book Launch:
English Arbitration and Mediation in the Long Eighteenth Century

Date: 6 November 2019

Venue: Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

IALS is delighted to host the official launch of the latest volume in Professor Derek Roebuck's landmark study in the history of arbitral practice, *English Arbitration and Mediation in the Long Eighteenth Century*.

Hosted by Professor Carl Stychin, Director of the Institute, the event will begin with a welcome from international arbitrator V Veeder QC of 24 Lincoln's Inn Fields/Essex Court Chambers.

Lead researcher, Dr Francis Boorman will present a short summary of the book's findings, to be followed by a panel discussion featuring Karyl Nairn QC, European co-head of the International Litigation and Arbitration Group of Skadden, Arps, Slate, Meagher & Flom LLP.

Co-authored with Dr Francis Calvert Boorman and Dr Rhiannon Markless, the book examines alternative dispute resolution practices from 1700–

1815 (see page 97 for a preview of the book by Francis Boorman).

During the reception, copies of *English Arbitration and Mediation in the Long Eighteenth Century* will be available to purchase or order at a discounted price of £35(RRP £40). Please note, only cash and cheque payments will be accepted.

See [website](#) for details.

Sir William Dale Annual Lecture: From Canon to Confusion—Is our Statute Book Fit for Purpose?

Date: 7 November 2019

Venue: Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

Speaker: Dylan Hughes, First Legislative Counsel, Office of the Legislative Counsel, Welsh Government

In recent decades statute law has increasingly been overriding the common law, often replacing long-established and well-understood principles. But are perceived benefits of legislation, such as clarity and comprehensiveness, being compromised by a proliferation of often lengthy, complex and interdependent statutes? This lecture is free but advance booking is required. See [website](#) for further details.

Digital Rights in Brexit: Changes and Challenges

Date: 22 November 2019

Venue: Institute of Advanced Legal Studies, 17 Russell Square, London WC1B 5DR

The IALS Information Law and Policy Centre's Annual Conference and Lecture will take place on Friday 22 November 2019, followed by an evening reception. This year's Annual Conference and Lecture constitutes the Centre's fifth annual event of this nature. The conference seeks to consider the changes and challenges facing the protection and enjoyment of digital rights in the UK and elsewhere as a result of Brexit.

Policymakers, practitioners, industry, civil society and leading

academic experts will address and examine the key legal implications posed by Brexit to the enjoyment of digital rights in the UK and elsewhere.

Key speakers, chairs and discussants at the Annual Conference will provide a range of national and international legal and policymaking insights from the UK and Europe including.

See [website](#) for further details.

IALS events

See the IALS website for full details of all [upcoming events](#).

The website also has a vast resource of [recordings and podcasts](#) of past events.

IALS 2019-2020 Visiting Research Fellows

Inns of Court Fellow

THE HON JUSTICE ANTHONY JAMES BESANKO

Federal Court of Australia

Subject of research: Comparative examination identifying the convergence and divergence between Australian law and the law of the UK concerned with the doctrine of legal unreasonableness in public law.

Visit dates: January-March 2020

Visiting Research Fellows

PROFESSOR VALENTINA BARELA

University of Salerno

Subject of research:

Competition and trade

Visit dates: October 2019-July 2020

PROFESSOR ANTONIO CUCINOTTA

Università degli studi di Messina

Subject of research: Antitrust law and economics

Visit dates: June-October 2020

DR AGATA FIJALKOWSKI

University of Lancaster

Subject of research: The Contribution of Polish lawyers to international criminal law and the war crimes trials from 1946-1948

Visit dates: January-July 2020

MR JAMIE GRACE

Sheffield Hallam University

Subject of research: The regulation of algorithmic police intelligence analysis tools

Visit dates: June-September 2020

DR PAOLA MAGGIO

Università degli Studi di Palermo

Subject of research: The effects of the judgments of the European Court of Human Rights in Italy and in England: a comparative analysis

Visit dates: June-August 2020

DR KAZUHIRO MATSUMOTO

Graduate School of Law, Kyoto University, Japan

Subject of research: Legal history and legal theory; legal studies

Visit dates: October 2019-March 2020

DR RASUL OLUKOLU

University of Lagos

Subject of research: Statelessness and the nationality laws in Africa: lessons from Europe

Visit dates: October-December 2019

PROFESSOR ANDRÉ TIMOTHY POTIER

Moscow State Institute of International Relations

Subject of research: Avoiding a surfeit of standards in international law: towards an accepted (hard and soft law) international legal framework

Visit dates: January-August 2020

PROFESSOR JAEJIN SHIM

Sogang University Law School, Korea

Subject of Research: Comparative-law study on the personal scope of labour law in the UK and South Korea

Visit dates: March-August 2020

Profiles of contributors to Articles and Notes

THE HONOURABLE MADAM JUSTICE
MARY V. NEWBURY

Justice Mary Newbury has been a justice of the Court of Appeal for British Columbia since 1994; prior to that, she practised corporate-commercial law in Vancouver, British Columbia, until her appointment to the trial court in 1991. She obtained her legal education at the University of British Columbia and Harvard. She wrote her paper for the current issue while in residence as Inns of Court Visiting Fellow in 2018.

MICHAEL BARTLET

Michael Bartlet is a Senior Teaching Fellow in alternative dispute resolution (ADR) at the School of Oriental and Africal Studies (SOAS), University of London, where he also teaches public law. He is a board member of Mediation Hertfordshire and has trained as a civil, family and community mediator. He was also a Trustee of the National Refugee Council (2005-2012) and has been a chair of the Asylum Rights Campaign (2003-2006). Email: mb108@soas.ac.uk.

FRANCIS BOORMAN

Francis Calvert Boorman is a researcher on the history of arbitration for the Access to

Justice project, currently focused on 18th-century England, and based at the Institute of Advanced Legal Studies. He is a social historian with a PhD from the Institute of Historical Research. Dr Boorman has publications on arbitration in Elizabethan England, the origins of the professional arbitrator, and the history of London. Email: francisboorman@hotmail.com.

ADAM HARKENS

Adam Harkens is a Research Associate at Birmingham School of Law and specializes in algorithmic decision-making in the criminal justice system. Dr Harkens is currently working with Professor Karen Yeung and four German research teams (computer science, neuropsychology, law and political science) on the Volkswagen Stiftung-funded FATAL4JUSTICE? project. This project critically analyses algorithmic decision-making in the criminal justice system from multiple intersecting disciplinary perspectives.

Dr Harken's other current work explores the socio-legal and theoretical implications of new and emerging technologies on decision-making, data protection law, surveillance, and platform

technologies – including legal, technical and ethical modes of regulation and control. Email: a.j.harkens@bham.ac.uk.

MARIA-FREDERICA MOSCATI

Maria Federica Moscati is Senior Lecturer in Family Law at the University of Sussex. An Italian advocate and trained mediator, she holds a PhD from SOAS, University of London. Before undertaking her doctorate she worked for Save the Children Italy, specializing in children's rights. Her main research interests are ADR, access to justice, comparative family law, children's rights, and sexual orientation and gender identity. She is the author of *Pasolini's Italian Premonitions: Same-Sex Unions and the Law in Comparative Perspective* (Wildy, Simmonds & Hill 2014). Several of her research projects have been awarded funding by the EU Commission and, along with Dr Peter Dunne (University of Bristol), Dr Moscati is co-director of the Centre for Cultures of Reproduction, Technologies and Health and is currently working on reforms to the Gender Recognition

Act 2004 and children's rights. Email: m.f.moscati@sussex.ac.uk.

JED ODERMATT

Jed Odermatt teaches at the City Law School, City, University of London, and is a member of the Institute for the Study of European Law and International Law and Affairs Group. Prior to his appointment at City, he was a post-doctoral researcher at the Centre of Excellence for International Courts (iCourts) at the University of Copenhagen, a Max Weber Fellow at the European University Institute (EUI), Florence, and a Research Fellow at the Leuven Centre for Global Governance Studies, University of Leuven.

Dr Odermatt's research interests include public international law, the law of international organizations, and EU external relations law. Email: jed.odermatt@city.ac.uk.