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FOREWORD

It is very gratifying as the Head of the SOAS School of Law to congratulate the editors of the SOAS Law Journal and commend this volume to you. Some of the articles are written by SOAS School of Law students or recent graduates from the undergraduate, postgraduate and PhD programmes. In the issue are three articles that look at aspects of family law. Taqbir Huda’s article considers Islamic jurisprudence on the subject of minor marriage, Harneel K. Lally’s article explores the complex relationship between law, traditional practices and the modern day reality of adoption in India, while Serene Reza’s article examines mediation and restorative justice in the context of family disputes. Two articles look at the judiciary. In the article by Judge Alfred Mavedzenge, the constitutionality of leases issued to judicial officers by the government of Zimbabwe and the repercussions of these land deals on judicial independence is questioned; Gavin Dingley’s article picks up the question of judicial impartiality in the International Court of Justice in its practice of appointing someone to sit on the bench as a judge ad hoc. This issue of the SOAS Law Journal is completed by an article by Viola von Braun which takes up the pressing issue of European policy on immigration and asylum against the existential threat to the EU itself and an article by Winibaldus Stefanus Mere which argues that the 1998 mass rapes of ethnic Chinese women in Indonesia is nothing short of genocide. The topics of genocide, immigration, asylum, religious laws, legal process and corruption together with the jurisdictions traversed – Southeast Asia, South Asia and Africa – and the different layers of law – municipal, regional and international – make this a thoroughly ‘SOASy’ issue of the SOAS Law Journal.

Professor Carol Tan
INTRODUCTION

We are honoured to present to you Volume 4, Issue 2 of the SOAS Law Journal. In an increasingly uncertain world, the editorial team has endeavoured to curate what we believe to be a topical set of articles, starting with the ongoing discussion on immigration and asylum procedure—as international conflicts rise at record rates, so do the number of displaced peoples and the inevitable discussions of nationalism, culture and policy. Keeping with SOAS’ penchant for international expertise and in the face of rising nationalistic and violent sentiment, we observe how a country deals with its crimes against humanity, through the lens of a Jakarta genocide. As international ties and politics are becoming increasingly shaky, we discuss the global legal impact of the appointment of international judges to the ICJ.

While the issues and articles we have chosen to publish are no doubt important in their own right, we would like to bring to light the lesser known, United Nations created, “Youth Day,” which coincides with the publication of this autumn Issue. Across the world, many countries hold Youth Days as an observation for the progression and importance youth hold in our lives, and in 1999, the United Nations agreed on an autumn date to celebrate the importance of the global youth community. The “youth” have been given a broad sweep by the media, their elders, and their psychologists—however, in these changeable times, it is clear that the youth, regardless of Gen X, Y or Millennials, have taken to the streets, both in protest and support of the values that they believe in. So many of the international and domestic occurrences that have happened over the past year will affect the world’s youth in unprecedented ways. As a result, we have selected what we believe to be a wide range of articles which demonstrate the Journal and the University’s long-standing dedication to inter-disciplinary legal study, and we hope that these be viewed through the lens of the next generation.

The Editorial Team would like to thank the Head of the Law School, Dr. Carol Tan, for her foreword. The support we receive from the SOAS Faculty and our partner universities is very important to the development of the Journal. Finally, without the insight, guidance and help from the Faculty, the Academic and the Honorary Boards, we would be unable to have been at the positions that we are at today.

In my previous Journal introduction, I expressed the concern that we should continue our debates on basic rights, morality and accountability as the world becomes an increasingly controversial place. As a completely student-run Journal, we are the “Youths” that will eventually go on to inherit the current world and its challenges. These articles have been chosen to reflect the Law Journal’s commitment to challenging the current world. Only through bringing to light important issues through different perspectives and people can the youth of tomorrow be poised to make the change and progress that will shape the future. As always, our hope is that the Law Journal will strive to continue to be an avenue of legal
discourse that shows that our generation is not daunted and defeated; we will continue to champion those who cannot speak for themselves, and our ambition for bridging the gap between worlds will outlive our positions at the Journal.

Kay Lee

Editor-in-Chief
Europe’s Policy Crisis: An Analysis of the Dublin System

Viola von Braun

The European Union is facing a ‘policy crisis’ in the field of asylum and immigration: The Dublin III Regulation is in need of a reform. The Regulation fails to ensure the rights of protection-seekers and distributes the responsibility for applications unfairly among Member States. Unable to find a joint solution, European Union institutions and States attempt to shift responsibility outside of their territory by cooperating with third countries such as Turkey at the expense of protection-seekers' rights. To tackle the ‘policy crisis’ a ‘true European response’ is needed. States must agree on a radical reform of the Dublin system in order to have the fundamental principles of solidarity and fair share of responsibility ensured. If not, the future of protection-seekers and economically weaker Member States will be at stake, and with that the very existence of the European Union itself.

Acknowledgements

Foremost, I would like to express my sincere gratitude to my supervisor Dr. Lutz Oette. I would also like to thank my parents, who supported me throughout the entire process.
### Abbreviations

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>AI</td>
<td>Amnesty International</td>
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<td>APD</td>
<td>Asylum Procedure Directive</td>
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<td>CEAS</td>
<td>Common European Asylum System</td>
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<td>DII</td>
<td>Dublin II Regulation</td>
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<td>DIII</td>
<td>Dublin III Regulation</td>
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<td>DIV</td>
<td>Dublin IV Proposal</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECJ</td>
<td>European Court of Justice</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EP</td>
<td>European Parliament</td>
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<tr>
<td>EU-Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<tr>
<td>HRW</td>
<td>Human Rights Watch</td>
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<tr>
<td>L6458</td>
<td>Law on Foreigners and International Protection (Turkey)</td>
</tr>
<tr>
<td>L4375</td>
<td>Asylum Law No.4375 (Greece)</td>
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<tr>
<td>Statement</td>
<td>EU-Turkey Statement</td>
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<tr>
<td>State</td>
<td>State subject to the Dublin system</td>
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<tr>
<td>TFEU</td>
<td>Treaty on the Functioning of the European Union</td>
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<tr>
<td>TPR</td>
<td>Temporary Protection Regulation (Turkey)</td>
</tr>
<tr>
<td>UDHR</td>
<td>Universal Declaration of Human Rights</td>
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<tr>
<td>UNHCR</td>
<td>United Nations High Commissioner for Refugees</td>
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Introduction

‘In Europe, the refugee crisis is first and foremost a policy crisis’.¹ This paper aims to confirm this sentence. More specifically, the paper focuses on the current Dublin system and its failure to safeguard the rights of protection-seekers² and to ensure the principle of solidarity among States subject to the Dublin system (States). The first chapter of this paper introduces the reader to the Dublin system. More specifically, it evaluates the Dublin III Regulation³ (DIII) with a particular focus on protection-seekers’ rights. Subsequently, the section portrays the structural weakness of the Dublin system in failing to address fundamental principles. The second chapter illustrates the immediate outcome of the failure of the Dublin system. At the expense of protection-seekers’ rights, the European Union (EU) aims to outsource responsibility to third countries. As an example the EU-Turkey Statement will be evaluated. The third chapter portrays three potential future pathways of the Dublin system: the non-European response, the status quo response, and the true European response. As an example for the status quo response, the recent proposal by the Commission to amend the Dublin system will be evaluated. Finally, the true European response will be introduced together with radical ideas for the much-needed joint approach of States.

Europe’s Responsibility for Protection-Seekers

States are obligated by an extensive legal framework to protect and respect the rights of asylum seekers. Firstly, Art.14 of the Universal Declaration of Human Rights (UDHR) provides everyone with the right to seek and enjoy asylum. Secondly, all States are signatories to the 1951 United Nations (UN) Convention and its 1967 Protocol Relating to the Status of Refugees (1951 Convention).⁴ The common policy on asylum, subsidiary protection, and temporary protection enshrined in Art.78.1 Treaty on the Functioning of the European Union (TFEU), and the right to asylum stipulated in Art.18 of the Charter of Fundamental Rights of the European Union (EU-Charter), must be guaranteed in accordance with the 1951 Convention. In the ‘spirit of international cooperation’, as stipulated in its Preamble, the 1951 Convention sets out the requirements to grant refugee status (Art.1), prohibits the imposition of penalties on irregular entry of migrants (Art.31), and obligates signatories to protect refugees from non-refoulement (Art.33). Thirdly, States are subject to a regional set of rights. The EU-Charter contains rights applicable to protection-seekers, namely human dignity (Art.1), protection from inhumane and degrading treatment (Art.4), protection from removal, expulsion, and extradition (Art.19.2), and the right to an effective remedy and a fair trial (Art.47). In addition, Art.6.2

² The scope of the Dublin system includes all applicants for international protection (Rec.10). The term protection-seekers will therefore be used throughout the dissertation to describe every migrant in the EU, whose request for sanctuary has yet to be processed.
³ Regulation (EU) No. 604/2013 on establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person [2013] L180/31.
TFEU obliges all States to respect fundamental rights of the European Convention on Human Rights (ECHR). The ECHR contains important rights for protection-seekers, namely, prohibition of torture (Art.3), right to liberty and security (Art.5), right to family life (Art.8) and right to an effective remedy (Art.13). Fourthly, the European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) established an extensive framework on rights for protection-seekers. Although the ECHR does not explicitly address asylum seekers’ rights, the ECtHR created jurisprudence for protection based on Art.3 ECHR regarding the principle of non-refoulement and extended the definition of ‘inhuman and degrading treatment’ to living and housing conditions of asylum seekers.\(^5\)

**Dublin III: A Fitness Check**

With the removal of internal borders through the enactment of the Schengen Agreement and its implementing Convention in 1995, applicants were given the opportunity to move across borders and apply for asylum in several States. This lead to the phenomenon of States not necessarily taking responsibility, but leaving applicants ‘in orbit’.\(^6\) Hence, a framework on responsibility allocation between States was needed. The ‘cornerstone’ of the Common European Asylum System (CEAS), the Dublin Convention, was drawn up in 1990 and came into force in 1997.\(^7\) In principle, the key rule of the Dublin system is that an application must be processed only once within the jurisdiction of only one State, which is determined by a hierarchy of criteria and procedures stipulated in the Regulation (Art.3.1 DIII). The Dublin Convention has since been reformed twice. Accepted in 2003, the Dublin II Regulation (DII)\(^8\) contained profound deficiencies in protecting fundamental rights of asylum-seekers and was soon in need of a recast. Consequently, the Commission issued a proposal for the reform in 2008, which was intensely debated for five years.\(^9\) Throughout the long-lasting negotiations, the ECtHR, the ECJ, as well as national courts were ultimately responsible to cover the deficiencies originating from DII through their case law. All except the United Kingdom (UK) and Ireland acceded to DIII in 2013, which came into effect in January 2014.

The following paragraph introduces DIII with a specific focus on protection-seekers’ rights. More specifically, the section evaluates DIII in comparison to DII, whilst highlighting the lack of protection-seekers’ rights in certain provisions.

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\(^5\) Samantha Velluti, *Reforming the Common European Asylum System – Legislative Developments and Judicial Activism of the European Courts* (Springer 2014) 82.


\(^7\) Convention determining the state responsible for examining applications for asylum lodged in one of the Member States of the European Communities [1997] 97/C 254/01.

\(^8\) Regulation (EC) No. 343/2003 on establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national [2003] L50/1.

\(^9\) Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (Recast) 2008/0243 (COD).
Europe's Policy Crisis: An Analysis of the Dublin System

DIII has two primary objectives stipulated in Rec.9. Firstly, - from the point of view of States – it aims to improve the effectiveness of the Dublin system. Secondly, - from the applicants’ point of view - DIII aims to enhance the protections afforded to applicants. Undeniably, the Preamble places a greater emphasis on humanitarian protection than its predecessors. It refers to the EU-Charter and the ECHR (Rec.14), to international human and refugee rights (Rec.21), to human dignity (Rec.24), and to case law of the ECtHR (Rec.32). Moreover, the Preamble lists specific fundamental rights of the EU-Charter, namely human dignity (Art.1), prohibition on inhumane or degrading treatment (Art.4), respect for family life (Art.7), right to asylum (Art.18), the rights of the child (Art.24), and right to an effective remedy (Art.47) (Rec.39). Consequently, this Preamble provides a useful tool for future human rights oriented interpretation of the Dublin system by the European and national courts.10

I. Scope of application

In addition to applicants for refugee protection, DIII applies to all applicants for international protection (Rec.10). However, in practice this amendment may result in certain obstacles; some States, e.g. Switzerland and Liechtenstein, have not enshrined the concept of subsidiary protection into their national law.11

II. Responsibility allocation

By far the most noticeable amendment can be found in Art.3.2, which outlaws the transfer of an applicant to a State with ‘substantial flaws in the asylum procedure and in the reception conditions’ in order to hinder ‘inhuman or degrading treatment’. The Preamble equally highlights the severe consequences of deficiencies in asylum systems (Rec.21). Consequently, the determining State becomes responsible. The provision integrates landmark case law from both European Courts into DIII. In M.S.S. v. Belgium and Greece, the ECtHR addressed the precarious situation where States do not adequately implement the legal framework of the CEAS. The Court stated that Greece’s ‘asylum procedure is marked by such major structural deficiencies that asylum-seekers have very little chance of having their applications and their complaints under the Convention seriously examined (…)’.12 Subsequently, the ECtHR held in Tarakhel v. Switzerland, that even though the Italian asylum system was not systemically deficient, the Swiss authorities were held to examine the applicant’s individual situation; here, a family with six minor children, should have protection from the Italian authorities guaranteed.13

In N.S. and M.E., reaffirmed in Bundesrepublik Deutschland v. Kaveh Puid,14 the ECJ responded to MSS, confirming inhumane and degrading treatment in accordance with

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12 M.S.S. v. Belgium and Greece App no 30696/09 (ECHR, 21 January 2011) para 300.
13 Tarakhel v. Switzerland App no 29217/12 (ECHR, 4 November 2014) paras 116-118.
14 Case C-4/11 Bundesrepublik Deutschland v. Kaveh Puid [2013] paras 33,35.
Art.4 EU-Charter, ‘(…) if there are substantial grounds for believing that there are systemic flaws in the asylum procedure and reception conditions for asylum applicants’.\(^{15}\) However, Art.3.2 lacks a precise definition of ‘substantial flaws’\(^{16}\). Consequently, the European Courts will continue to carry the responsibility of defining the term in order to prevent violation of rights. Cases concerning the possible violation of Art.3 ECHR through systematic flaws in the asylum procedure and reception conditions have already been communicated to the ECtHR in S.B. and Others v. Sweden,\(^{17}\) concerning Hungary and in Abo Kafshaa and Others v. Belgium\(^{18}\) concerning Italy.

III. Procedural rights

DIII provides protection-seekers with a set of procedural rights. Firstly, Art.4 enshrines the right to information. The ECtHR confirmed the importance of information in gaining access to relevant procedures in Hirsi Jamaa and Others v. Italy.\(^{19}\) Secondly, Art.5 provides for the right to a personal interview. Regrettably, the provision does not name the exact time for the interview, which could lead to differing practices among States.\(^{20}\) Further, both rights are poorly implemented in certain States. Interviews are severely delayed and lack quality, whilst the information received by applicants does not fulfil the requirements stipulated in Art.4.1 but rather contains ‘general information’.\(^{21}\)

DIII further addresses the importance of the right to an effective remedy and stipulates the right to notification, legal assistance, and legal aid (Art.26;27;Rec.19). The right to an effective remedy is enshrined in Art.47 EU-Charter and Art.13 ECHR. The widened scope of procedural rights leads to the conclusion, that applicants may have the right to challenge any breach of substantial rights enshrined in the Dublin procedure and are not limited to grounds based on Art.3.2.\(^{22}\) Previously, the limitation to Art.3.2 was affirmed in Abdullahi v. Bundesasylamt, according to which an applicant could only challenge a decision by pleading systemic deficiencies.\(^{23}\) However, Peers points out that these new procedural rights give evidence for the conclusion that DIII ceases to be an intergovernmental text, instead growing into a supranational policy.\(^{24}\) Hence, according to Peers, Abdullahi is no longer relevant. This view was recently confirmed in Ghezelbash

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16 Hruschka (n.11) 478.
19 Hirsi Jamaa and Others v. Italy App no 27765/09 (ECHR, 23 February 2012) para 204.
20 Hruschka (n.11) 478.
21 Proposal for a Regulation establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the States by a third-country national or a stateless person (recast) [2016] COM (2016) 270 final 9.
v. Staatssecretaris, in which the ECJ states that, ‘an asylum seeker is entitled to plead (...) the incorrect application (...) of the criteria for determining responsibility’.25

IV. Family life

The right to respect family life is a fundamental right enshrined in the EU-Charter (Art.7) and ECHR (Art.8). The DIII Preamble emphasizes that ‘respect for family life should be a primary consideration of Member States’ (Rec.14). Further, DIII expands the definition of family members further (Art.2g,h), and includes the broader term ‘other family relations’ (Rec.17;18).

However, DIII contains gaps in the protection of family unity. The scope includes only family ties existent prior to the application in the country of origin (Art.2.g). Consequently, families that formed in transit countries are not considered.26 Furthermore, DIII entails various different family criteria and combinations, an approach that has been described as not ‘coherent’ and to be ‘bound to confusion’.27 Further, national authorities do not accept evidence for family ties easily, and rather, demand documentary proof.28 In addition, Art.16, which regulates the relationship of dependency, is weaker than the protection offered in K. v. Bundesasylamt. Art.16.1 merely allows assistance merely by the applicant’s child, sibling or parent, while Art.16.2 generally determines the State’s responsibility, where the assisting party resides. In comparison, the ECJ ruled the State, where the dependant person lives, is to be responsible, and included ‘mother-in-law’ and ‘daughter-in-law’ to the definition of ‘family members’.29 According to Maiani, the broader scope of protection granted in the ruling, therefore, continues to be applicable under DIII.30

V. Time limits

The Dublin procedures can be severely delayed which leads to the postponed access to protection and halts the applicants’ integration process. DIII addresses this precarious issue, and stipulates various time limits for certain procedures, namely, for take charge and take back requests (Art.23;24), and for the transfer of an applicant (Art.29). However, the Commission indicates that the length of the procedures has not shortened.31 The ‘normal’ Dublin procedure can take up to ten months (take back requests) or eleven months (take charge requests) before the procedure for examining the claim for international protection begins.32

26 Maiani, ‘DIII’ (n.10) 120.
27 Hruschka (n.11) 477.
28 ibid.
30 Maiani, ‘DIII’ (n.10) 124.
31 Commission, DIII (n.6) 4.
32 ibid.
VI. Detention

Some States detain protection-seekers at the very beginning of the Dublin procedure, while others do so when the transfer request has been issued. Both European Courts have ruled on cases considering the violation of the right to lawful detention enshrined in Art.5 ECHR and Art.6 of EU-Charter. Concerning the Returns Directive, the ECJ ruled on the maximum duration of detention, and prohibited detention based on the mere resistance to leave the territory. In Saadi v. United Kingdom, the ECtHR listed necessary conditions for lawful detention; a ruling, which was heavily criticized by dissenting judges for lacking a definition of an acceptable duration of detention. In June 2016, the ECtHR ruled in favour of an Iranian detainee as the Hungarian authorities did not conduct an individual assessment of the case nor did they take the applicants’ vulnerability into account.

DIII stipulates that a person can only be held in detention when there is ‘a significant risk of absconding’ (Art.28.2;2.n;Rec.20). Art.28 raises two questions. Firstly, is the risk of absconding the sole legitimate reason for detention? Peers affirms this question due to the importance of lawful detention. Secondly, what is the correct definition of absconding? The lack of a common definition in DIII may lead to individual interpretations by States and, thus, result in the risk of further arbitrary detentions. Consequently, both questions are left to be answered by the European Courts. Recently, the ECJ ruled in Policie v. Al Chodor, that Art. 2.n requires the objective criteria defining the existence of a risk of absconding to be defined by the national law of each State.

VII. Early Warning Mechanism

Under DII, certain national asylum systems were feared to collapse. Therefore, the early warning mechanism was adopted to alert of particular pressure on and deficiencies in asylum systems (Art.33;Rec.22). To date, Art.33 has not been invoked, resulting in the actual scope and effectiveness of the provision remaining uncertain. According to some States, the conditions for the mechanism are never fulfilled, whilst others lament the lack of clear criteria provided in Art.33. Indeed, noticeably, Art.33 stipulates little obligations.
for States. Critically observed, the provision uses an ‘open-ended wording’ with a certain ‘vagueness’, and does not clearly establish which procedures or tools are given.

**Solidarity and Shared Responsibility**

The fundamental principles of solidarity and shared responsibility remain unaddressed in DIII; only the symptoms have been treated. This chapter highlights the lack of solidarity among States, the lack of equal treatment of applicants, and the general lack of implementation of DIII.

I. **Definition**

For functioning refugee protection, cooperation between states is inevitable. The 1951 Convention emphasizes that ‘a satisfactory solution (...) cannot (...) be achieved without international co-operation’ (4th Consideration). The EU follows a similar approach through the fundamental principles of solidarity and of fair sharing of responsibility. As stipulated in Art.67.2 TFEU, the EU aims to form ‘a common policy on asylum, immigration and external border control, based on solidarity between States’. Further, Art.80 TFEU entails important features of the concept of solidarity. Firstly, solidarity and shared responsibility govern the EU policies on asylum (Art.80.). Secondly, the EU is obliged to create policies that redistribute unequal responsibilities between States (Art.80.2).

Art.80 TFEU, a provision of primary law, mentions solidarity without explaining its scope, nature, or content. Even the Commission describes the principle of solidarity as a ‘nebulous concept’, given EU law lacks a definition. The European Parliament (EP) merely lists examples for internal solidarity, namely ‘mutual recognition of a asylum decisions, operational support measures and a pro-active interpretation of the current Dublin Regulation’ and ‘resettlement, humanitarian admission and search and rescue at sea’ for examples of external solidarity. DIII mentions solidarity multiple times, but equally fails to provide a clear definition; it refers to the Stockholm Programme (Rec.7), calls for European Asylum Support Office (EASO) to provide solidarity measures (Rec.8), and urges balance between responsibility criteria in a spirit of solidarity (Rec.25).

Other words used in EU law help to shape solidarity, namely, mutual trust and fair sharing of responsibility. DIII states that ‘solidarity (...) goes hand in hand with mutual trust (Rec.22).’ Mutual trust can be defined as ‘the reciprocal trust of States in the legality
and quality of each other’s legal systems’. Further, solidarity can only be assured, when responsibility is fairly shared. Shared responsibility aims to distribute applicants fairly between States in accordance with their economic and geographical capabilities. This is a central part of solidarity, works as an incentive, and can be understood as ‘sharing norms, money, and people’. As described by Gray, ‘sharing norms’ is implemented by the legal framework of the CEAS, ‘sharing money’ is demonstrated through the incorporation of European Funds, whilst ‘sharing people’ is based on a much weaker approach only determined by a hierarchy of criteria listed in DIII. Lastly, Oxford Dictionaries defines solidarity as ‘mutual support within a group’. Thus, solidarity can be understood as a ‘general notion’ of support that applies to all States and EU Institutions, whilst shared responsibility is an actual ‘expression of solidarity’.

II. Responsibility Allocation Criteria

DIII, like its predecessor, fails to construct a system based on shared responsibility. In principle, the first-entry State becomes responsible for examining the application. According to Art.13.1, a State becomes responsible for examining the applications of protection-seekers, who enter its territory irregularly. In the scenario where no State can be held responsible, Art.3.2 imposes the responsibility on the State, in which an application was lodged. In addition, there are only two possible voluntary approaches to determine responsibility, namely, the sovereignty clause in Art.17.1 and the humanitarian clause in Art.16.1.

In 2014, only 8% of the accepted take back and take charge requests led to physical transfers of applicants. Considerably, the study names additional reasons for the lack of physical transfers in 2014, namely: lengthy procedures until 2015, appeal procedures, or the high rate of absconding. Nevertheless, the low transfer rate, implies that the first-entry State remains responsible. The Commission declared the lack of ‘consistent and correct implementation’ as the most profound problem of DIII. Equally, the EP affirmed that DIII has failed to achieve its goals. The Dublin system is not capable of processing a
high number of applications, and the Recast has made it even more difficult to assign responsibility, resulting in the need for mechanisms like Eurodac and detention.\(^{39}\)

### III. Infringement of Art.80 TFEU

To be fair, the Dublin system was not originally designed as a mechanism to share responsibility.\(^{60}\) The Commission refers to the Dublin system as a ‘responsibility assigning measure’, rather than a ‘responsibility-sharing tool.’\(^{61}\) Nevertheless, as mentioned above, the EU has the duty to adopt asylum and immigration policies that are governed by the principle of solidarity. According to Bast, the failure of solidarity measures by the EU infringes Art.80 TFEU. The violation fulfils the conditions under ‘failure to act’, stipulated in Art.265 TFEU, which gives States and EU institutions the right to have an infringement established by the ECJ.\(^{62}\) Even the Commission affirms (albeit carefully) that the Dublin system ‘may have led to an unfair burden and may, according to some, therefore arguably be in violation of Article 80 TFEU’.\(^{63}\)

### IV. Protection of Applicants

This lack of shared responsibility comes with grave consequences for applicants. Rather than achieving mutual trust between States, a ‘fundamental distrust in each others practices and real intentions exist’.\(^{64}\) States are required to compensate the cost of registration, screening, reception, procedures, and possible returns, which triggers defensive behaviour.\(^{65}\) In practice, Malta, Greece, Italy, Spain, and Cyprus are left vulnerable due to their geographical position at the external borders of the EU, and are forced to diminish the influx of applicants into their territory. For example, in Italy the authorities conducted push back practices. These practices were condemned in Hirsi Jamaa v. Italy when about two hundred individuals within Italy’s jurisdiction were transferred via military ships back to Tripoli in 2009.\(^{66}\) Bulgarian authorities have been criticized for lengthy detention periods, lack of reception conditions, the inability to

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\(^{39}\) EP Resolution 2015/2095 (n.48) 34.

\(^{60}\) Susan Fratzke, *Not Adding Up, The Fading Promise of Europe’s Dublin System* (Migration Policy Institute, March 2015) 4

\(^{61}\) Commission, *DIII* (n.6) 17.

\(^{62}\) Bast (n.50) 297.

\(^{63}\) Commission, *DIII* (n.6) 17.


\(^{66}\) *Hirsi Jamaa v. Italy* (n.19).
process applications, the lack of integration perspectives, and xenophobic mannerisms. Hungarian authorities have been condemned for the construction of a fence on the border to Serbia, Greece, and Turkey, for criminalising the irregular entry of protection-seekers. Thus, contrary to the Stockholm Programme, similar applications are not treated alike in all States. Facilities for protection-seekers are in inadequate condition, applicants are not registered, procedures are delayed and asylum procedures become inaccessible. Accordingly, States violate the obligation to ensure access to asylum. Consequently, applicants have an incentive to travel to more ‘desirable’ States. As a result, the DIII leads to ‘severe imbalances’. In 2015, Germany, Sweden, Italy, France, and Hungary took in close to 70% of the absolute numbers of first-time asylum applications submitted in the EU in 2014. Hence, the first-entry criterion is counter-productive to establish solidarity within the CEAS; it does not take into account migration patterns or the geographic locations of States. As a result, States oppose each other, and the discussion of shared responsibility turns into a ‘dialogue of the deaf’. There are recent signs of a steady hardening of attitudes. In 2015, the Council adopted a decision on the relocation of 120,000 protection seekers from Greece and Italy to other States. Slovakia and Hungary voted against the adoption of the decision and asked the ECJ to annul it. The ECJ dismissed the actions. Further, the Commission launched infringement procedures against the Czech Republic, Hungary and Poland for non-compliance with their obligations under the decisions on relocation.

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72 Commission, DIII (n.6) 4.
73 Maiani, ‘DIII’ (n.10) 112.
74 Commission, DIII (n.6) 11.
75 Bast (n.50) 296.
77 Council Decision 2015/1601 of 22 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and Greece.
78 Cases C-643/15 and C-647/15 Slovakia and Hungary [2017].
Interim Conclusion

Contrary to its goals in Rec.9, DIII fails to safeguard protection-seekers as well as economically weaker States. As such, the root causes for the failure of DII have not been erased in its Recast. On the contrary, the responsibility criteria lead to an unequal distribution among States contrary to the principle of solidarity. As a consequence, States with a higher influx of applicants diminish their protection standards in a joint race to the bottom, leaving protection-seekers unprotected.

The Consequence: The EU-Turkey Statement

Unable to find a joint solution, the prevention of new arrivals into the Dublin territory amidst grave consequences for protection-seekers appears to be jointly agreed upon. As an immediate consequence to the failure of DIII, the EU-Turkey Statement (Statement) will be evaluated in this chapter.

I. Background

Collaboration with non-EU countries is vital for Europe’s migration policy. Especially European Readmission Agreements (EURAs) are used as a mechanism to counter irregular immigration. EURAs must pass through the legal procedure stipulated in Art.218 TFEU, combined with Art.79.3 TFEU, which is jointly conducted by the Council, Commission, and EP. In order to implement the Return Directive successfully, the EU has negotiated agreements with 17 non-EU countries to return individuals to their original country, one of which is Turkey. The EU and Turkish authorities signed the agreement in Ankara on 16 December 2013, which came into force on 1 October 2014.

The agreement obliges Turkey to readmit its own nationals (Art.3) and, in principle, third country nationals and stateless persons (Art.4). However, Turkey negotiated a three-year delay (until October 2017) before the EURA applies to third country nationals as well. Notably, EURAs are criticised for attempting to relieve the asylum procedures of States while transferring responsibilities to (mostly) less economically and politically stable third countries. As a consequence, the third country increases its border controls to third

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transit countries. The collaboration with Turkey proves this course of action - a government proven to be politically instable (latest) since the night of the coup in July 2016 followed by numerous arrests and arbitrary detentions and subject to many human rights violations in ECtHR judgements.

In recent years, Turkey has gained valuable bargaining leverage concerning Europe’s migration management. Turkey registered 3,320,814 Syrian refugees within its territory. The border between Turkey and Greece has become one of the main entry points for migrants to enter the EU. Therefore, numerous meetings between the EU and Turkey were conducted over the past year, finally resulting in the ‘EU-Turkey Statement’ (Statement) on 18 March 2016, which came into effect on 20 March 2016.

II. Content

The action points of the Statement are as follows. The first half of the Statement sets out the practical measures of reducing irregular migration flow to the EU. First, in accordance with international and EU law, all new irregular migrants crossing from Turkey into Greek islands will be returned to Turkey; costs will be covered by the EU (1). Second, for every Syrian returned from Greece to Turkey, another Syrian will be resettled from Turkey to the EU (2). Peers describes this mechanism as a ‘trade in human misery’; a mechanism based on UN Vulnerability Criteria will be established for the process. Individuals who have not entered or attempted to enter the EU irregularly in the past will be given priority. Third, Turkey will prevent new irregular migration sea and land routes to the EU (3).

The second half of the statement mirrors incentives for Turkey. The compromises for Turkey are conditional to the fulfilment and/or outcome of the above-mentioned approach. First, visa-free travels for Turkish citizens will be provided by all participating States until the end of June 2016 (5). The deadline has now been postponed to October 2016 as the legal framework on terrorism and organized crime remains to be addressed.

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by Turkey. Second, both parties welcome the upgrade of the Customs Union (7). Third, the procedure of accession will be re-energized (8). The EU has always had a special relationship with Turkey, who formulated its wish to accede to the European Economic Community as early as in 1959. 16 out of 35 chapters of the accession negotiations are currently open. Following the passage of the constitutional referendum and the arrest and arbitrary detention of numerous Turkish and foreign citizens, Turkish accession talks have effectively stopped in 2017. Third, the EU and Turkey will jointly improve humanitarian conditions inside Syria, especially near the Turkish border, to give refugees more safe areas to live (9). Fourth, a Voluntary Humanitarian Admission Scheme will be implemented (4) and the EU will contribute EUR 3 billion to projects for refugees in Turkey concentrating on health, education, infrastructure and food by end of March 2016; the EU will mobilise additional EUR 3 billion until the end of 2018 (6). The financial assistance is long overdue. Regrettably, Jordan and Lebanon, who host the greatest (relative) amount of refugees, are not included into the scheme.

III. Implementation

The implementation of the Statement began immediately. On 1 June 2016 the Turkish parliament extended the application of the EURA to third country nationals. Once the Turkish Council of Ministers decides on the application of the law, the transfers of third country nationals can be realized. In the meantime, the bilateral readmission protocol between Athens and Ankara of April 2002, as amended in March 2016, poses the legal basis for the return of irregular migrants under the Statement. In total, 1,896 irregular migrants were returned to Turkey until September 2017 while 8,834 Syrians have been resettled from Turkey to the EU. The number of irregular migrants arriving from Turkey has decreased significantly. Prior to the Statement about 1,740 individuals crossed the Aegean Sea to the Greek islands each day, while 47 individuals arrived on average per day since 1 May 2016, which recently increased to 93 persons per day. However, it is

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98 Commission, 2nd Report (n.95) 4; Commission, 7th Report (n.97) 2.
possible that migrants now enter the EU from Italy through crossings from Libya. Moreover, Egypt has also received more migrants and refugees since the implementation of the Statement.

IV. Evaluation

The Statement contains legal uncertainties and leaves many questions answered. For what period of time will the Statement be applied? What will happen to families whose members have entered the EU irregularly prior and others past 20 March 2016? What happens to migrants found in Greek waters instead of Greek islands? What will happen to non-Syrian refugees in Turkey? What will happen to refugees residing in Lebanon and Jordan? Will the planned safety zone at the border to Turkey really be safe enough for Syrians to return to their country? Who will protect migrants when using new and possibly more dangerous routes to reach the EU?

Contrary to the EURA, the drafters of the Statement did not follow the legal procedure of Art.79.3 and 218 TFEU. Thus, the statement is not legally binding and cannot be legally challenged as such; instead it can be described as a political commitment. This was confirmed by the ECJ on February 28, 2017. In its opinion, the Court lacks jurisdiction to decide on the actions against the Statement brought by three protection seekers as the Statement is not considered an act of an institution of the EU, but rather an act of States with their Turkish counterpart. However, its implementation in individual cases through specific Greek and Turkish laws can be disputed in court.

In J.B. v. Greece, the ECtHR communicated the first case concerning the implementation of the Statement. Prior and in accordance with the Statement, Greek authorities had decided for a Syrian of Armenian origin and Christian religion to be returned to Turkey, without examining the living conditions or assessing the particular circumstances for specific minorities on site. On May 18, 2017, the court communicated to the Greek authorities their questions on the right to an effective remedy for the applicant (Art.3 in conjunction with Art.13 ECHR) as well as the detention and reception conditions in Turkey in relation to the applicants’ origin, religion and state of health (Art.3 ECHR). Hence, Greek and Turkish asylum procedures have to be taken into consideration in order to evaluate the Statement.

The following chapter is limited to the evaluation of the first paragraph of the Statement, according to which irregular migrants crossing from Turkey into Greek islands will be returned to Turkey. This part poses the gravest legal uncertainty when concentrating on

101 Cases T-192/16, T-193/16 and T-257/16 NF, NG and NM [2017].
102 Peers, ‘EU/Turkey Deal’ (n.90).
protection-seekers’ rights. The evaluation of domestic asylum legislation will be limited to certain examples, as a complete evaluation would exceed the volume of the paper.

Access to asylum in Greece

The deficiency of Greece’s asylum system has been subject to various rulings by the European Courts, ultimately leading to the suspension of transfers by other States under the Dublin system. As a consequence, the EU assigned a significant amount of funding for the field of asylum to Greece, namely, €294.5 million of the Asylum, Migration and Integration Fund; €214.8 million under the Internal Security Fund; €60 million of FRONTEX funding; €25 million for EASO in Greece; €133 million under emergency assistance, and €50.6 million under the European Refugee Fund.104 However, as affirmed by the Commission in February 2016, the Greek asylum system and reception capacities continue to lack in efficiency.105 The Commission estimated that the implementation of the Statement in Greece will cost an additional €280 million over the first six months.106

The Greek asylum law 4375 of 2016107 (L4375) has been amended to further the implementation of the Statement in accordance with the Asylum Procedures Directive (APD).108 The implementation of the Statement increased the number of asylum applications. According to UN High Commissioner for Refugees (UNHCR), 163,949 persons arrived Greece by sea in 2016.109 ‘Virtually all migrants’ have applied for asylum in Greece since 20 March 2016 in order to prevent the immediate transfer back to Turkey.110 Overcrowding, staffing shortfall, and the lack of an effective registration system lead to many unattended applications.111 Consequently, 141 Frontex and EASO

105 Commission, Recommendation Greece (n.104) para 17.
106 Neville and others (n.96) 18.
110 Commission, 2nd Report (n.95) 4.
employees are currently working in Greece as interpreters, asylum experts, and escort officers.  

I. Individual Assessment

Protection-seekers arriving from Turkey mostly originate from Syria, Iraq or Afghanistan and, are therefore likely to be granted asylum. Hence, only by declaring the applications inadmissible can Greece justify the immediate return of these protection-seekers to Turkey. According to APD, an application for international protection is inadmissible, if a third country is considered as a ‘first country of asylum’ (Art.33.2.b) or a ‘safe third country’ (c). Recently, the legal standards of L4375 have been lowered. While Art.54 and Art.56 list first country of asylum and safe third country as inadmissibility reasons, Art.55 has been fully abolished fully. In the past, Art.55 required the Asylum Service to consider the safety criteria of the safe third country provision in order to determine whether a country qualifies as a first country of asylum.

APD enshrines the obligation for authorities to apply a methodology of case-by-case consideration in order to determine whether a particular country can be considered safe for a particular applicant (Art.38.2.b). It is uncertain whether Greece fulfils this obligation, and instead - contrary to the assurance in the Statement - conducts collective expulsion violating Art.19.2 EU-Charter and Art.4 of Protocol No.4 to the ECHR. To be fair, the Statement assures that transfers to Turkey will only take place in accordance with international and EU law. However, due to the above-described deficiencies in the asylum system, it is highly unlikely that Greek authorities are even capable of assessing each case individually. Simultaneously, the Statement limits the case-by-case consideration for transfers to Turkey to three categories: individuals who have not applied for asylum will be sent back to Turkey; individuals who received temporary protection will be sent back to Turkey, the first country of asylum; and individuals who have not received temporary protection in Turkey will be sent back to Turkey, the safe third country. Hence, the Statement functions as a ‘pushback agreement’.

II. Appeal Procedure

In February 2016, the Commission criticised that the mandate of the Greek Appeal Committee ceased in September 2015 without the establishment of a new body.

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112 Commission, ‘EU-Turkey Statement’ (n.104).
113 Peers, ‘EU/Turkey Deal’ (n.90).
114 Peers and Roman (n.83).
117 Commission, Recommendation Greece (n.104) para 18.
Accordingly, the newly amended L4375 introduces welcoming amendments to the appeal procedure, e.g., extended time limits to appeal a decision (Art.61). Further, applicants are granted a residency permit on humanitarian grounds in case their appeal procedure has been pending for over five years (Art.22.1.a). About 7800 of the 18500 appeals in current backlog will be eligible for the permit. However, applicants continue to have limited possibilities to present their individual facts in the appeal procedure. L4375 contains provisions with legal uncertainties, e.g., visionary time limits for the appeal procedure at the border.

In case of a high influx of arrivals, appeals are examined within three days from their submission, and a decision will follow only two days later (Art.60.4.e), while the applicant has only one day to prepare for the interview (Art.60.4.c). Further, Art.60.3 does not mention an automatic suspensive effect for appeals; on the contrary, the court decides whether the applicant is allowed to stay ‘until the decision on the legal remedy is taken’. In addition, the actual implementation of provisions, e.g., of free legal aid remains uncertain (Art.40.7). Moreover, a personal hearing, stipulated in Art.26 Presidential Decree 113/2013, was not conducted in 6,502 appeal procedures in 2015. Thus, a high risk of violating Art.3 and Art.13 ECHR continues to exist.

III. Lawful Detention

Art.46 L4375 allows detention of applicants under strict conditions, e.g., in case of the risk of absconding (Art.46.2.b) or danger to national security (2.d). The provision also stipulates a reduced maximum duration of detention, namely 45 days with a possible renewal (Art.46.4.b). Especially migrants arriving in Reception and Identification Centres on hotspots face a high risk of the violation of their right to liberty, and hence, lawful detention, enshrined in Art.5 ECHR. Third-country nationals and stateless persons entering Greece irregularly ‘shall be directly led (...) to a Reception and Identification Centre’ (Art.14.1) and receive a ‘status of restriction of liberty’ (Art.14.2). Contrary to EU law, the provision provides the authorities with the legal basis of systematic detention. According to Amnesty International (AI), detention centres of Lesvos and Chios operate ‘automatic’ without assessing protection needs of the individual applicant.

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118 ICJ and ECRE, ‘M.S.S. v. Belgium and Greece’ (n.111) 5.
120 Neville (n.96) 25.
121 Strik (n.119) 10.
122 ICJ and ECRE, ‘M.S.S. v. Belgium and Greece’ (n.111) 12.
123 AID (n.115).
124 ibid.
‘threat to national security and public order’ are applied systematically. In addition, detainees, including pregnant women and children, have limited access to services and legal aid.

**Safe Return to Turkey?**

On 5 May 2016, the Commission recommended to the Greek authorities to declare Turkey as a safe third country and first country of asylum as ‘all necessary legislative and other measures were conducted by Turkey’. This section evaluates whether Turkey meets the legal criteria of a first asylum country or a safe third country. A first country of asylum is a country where an individual has or will receive refugee status (Art.35.a APD), or other sufficient protection, including benefiting from the principle of non-refoulement (b). A country is considered as a safe third country, when ‘life and liberty are not threatened’ (Art.38.1.a), the principle of non-refoulement is respected (c); and the request of refugee status protection in accordance with the 1951 Convention is possible (e).

I. Refugee Status in Turkey

Turkey has improved its asylum legislation. The Law on Foreigners and International Protection No. 6458 of 2013 (L6458) came into force in April 2014. L6458 incorporates general principles of international and EU law, as well as case law of the ECtHR. It specifies requirements for assessing a safe third country similar to the APD (Art.74), and incorporates a new office for refugees and foreigners, the Directorate General of Migration Management (Art.103). It further strengthens the cooperation with UNHCR, whose employees gain access to applicants for international protection (Art.92). In addition, Turkey is a state party to the ECHR, recognizes the UDHR, and has ratified relevant international human rights treaties such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.

However, on 20 May 2016 an appeals tribunal in Lesbos overturned a transfer decision to Turkey - contrary to the Statement. According to the tribunal, the protection offered by

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127 AI, ‘Detention’ (n.123).
128 Commission, 2nd Report (n.95) 5.
130 Bulent Cicekli, ‘Reforms Introduced by the Act on Foreigners and International Protection into the Turkish Law onForeigners and Refugees’ [2016] 12 Review of International Law and Politics 117.
132 Apostolis Fotiadis and others, ‘Syrian Refugee Wins Appeal Against Forced Return to Turkey’ ([The Guardian](http://www.theguardian.com), 20 May 2016)
Turkey is not equivalent to the rights required by the 1951 Convention. Indeed, in Turkey Syrians are classified as temporary protection applicants. While Turkey is signatory to the 1951 Convention, it has maintained the geographical limitation for refugees arriving from Europe. Hence, only individuals from European origin are included into the scope of the 1951 Convention; L6458 is shaped accordingly allowing a person of European origin to claim refugee status (Art.61). In comparison, other individuals from outside of Europe can apply for the conditional and temporary refugee status (Art.62), or subsidiary protection (Art.63), which do not entitle them to gain long-term residency permits (Art.42.2). Accordingly, Syrians cannot receive the same legal status as a refugee under the 1951 Convention as dictated in Art.35.1.a and Art.38.1.e APD.

II. Sufficient Protection in Turkey

This section evaluates whether Turkey offers ‘sufficient protection’ as a possible alternative to being selected as a first country of asylum (Art.35 APD). While the APD does not define sufficient protection, UNHCR sets high standards, namely, ‘no risk of persecution; no risk of onward refoulement; adequate standards of living, right to work, health care and education; legal residence; assistance of persons with specific needs; and timely access to a durable solution’. Proven by a vast number of landmark cases, both European Courts follow a similar approach: The actual implementation of legislation is essential in order to determine whether it is safe to transfer an individual to a certain country. In MSS, the ECtHR evaluated housing, living, and detention conditions in Greece to determine the violation of Art.3 ECHR (para.233;263;334). In the ruling, the Court took the opinion of UNHCR (para.292) and the Greek Helsinki Monitor (para.334) into account who both warned of the risk of direct or indirect refoulement to Turkey (para.192). Further, in NS, the ECJ highlighted violation of Art.4 EU-Charter through systematic deficiencies in asylum procedure and reception conditions (para.94). Hence, in order to determine whether individuals can safely be transferred back to Turkey, the housing, living, and detention conditions as well as the overall functionality of the asylum procedure must be taken into account.

Access to Asylum

According to Peers, access to asylum can hardly be ensured in Turkey. In his opinion, a ‘dysfunctional asylum system’ and ‘inequalities in access to protection’ prevail. Strik agrees and describes the new asylum system as ‘not fully operational’ because of the

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134 ibid 226.
135 UNHCR, ‘Legal Considerations on the Return of Asylum-Seekers and Refugees from Greece to Turkey as Part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the Safe Third Country and First Country of Asylum Concept’ (23 March 2016) 3 http://www.refworld.org/docid/56f3ee3f4.html <accessed 3 September 2016>.
136 Peers and Roman (n.83).
overwhelming number of applicants. Moreover, interviews conducted by Human Rights Watch (HRW) have ascertained that many protection-seekers have to wait for months until they can register for temporary protection. The Commission is well aware of the backlog of pending applications and, therefore, welcomes Turkey’s new approach to significantly reduce the number of applications. Turkey’s solution comes at the expense of non-Syrians whose applications will now be fast tracked in order to process future applications within six months. Thus, Turkey cannot currently offer ‘timely access to a durable solution’ as described in the definition of sufficient protection of UNHCR.

Principle of Non-Refoulement

L6458 addresses the principle of non-refoulement (Art.4). However, recent reports condemn refoulement practices in Turkey against protection-seekers arriving from Syria or Iraq. Research of AI revealed that Turkish authorities have expelled about 100 Syrian men, women and children per day to Syria since the middle of January. Previously, Turkey has been subject to the violation of Art.3 ECHR before in the past. For example, in M.B. and Others v. Turkey, the ECtHR condemned the planned transfer of individuals back to Iran, despite their recognition as refugees under the UNHCR mandate. Thus, contrary to the definition of sufficient protection of UNHCR, the risk of refoulement continues to exist.

Housing and Living Conditions

In combination with Art.91.2 L6458, the Temporary Protection Regulation (TPR) specifies the reception conditions of protection-seekers in Turkey. TPR stipulates access to health care (except access to private health institutions), education, the labour market, and social assistance (Art.26-28). However, it is highly doubtful that Turkey provides for sufficient housing and living conditions. Firstly, the legal text of L6458 and TPR contain gaps in protection. The texts employ the word ‘may’ rather than ‘shall’ for certain obligations of the government; thus, they cease to create a mandatory obligation. According to L6458, ‘applicants and international protection beneficiaries shall provide their own accommodation’ (Art.95.1), while the Directorate General may establish reception centres (Art.95.2). Health centres (...) may be established (Art.27.1.a TPR). Further, individuals staying outside of the temporary accommodation centres may benefit from the aforementioned services (Art.38.2 TPR). Further, in case the individual does not comply with certain obligations such as residing in predetermined places (Art.33.2.a TPR) or

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137 Strik (n.119).
139 Commission, 2nd Report (n.95) 5.
141 M.B. and others v. Turkey App no 36009/08 (ECHR, 15 June 2010).
fulfilling their reporting duty (b), access to education, emergency health services, and other rights can be denied (Art.35.2). Secondly, the implementation of these services in practice is highly questionable. Turkey’s refugee camps are overcrowded, leading to Syrians being legally able to reside outside of camps with limited outreach to the government.\textsuperscript{143} Rising rental prices and overcrowded houses put non-camp Syrians in an even more vulnerable position.\textsuperscript{144} They face social problems such as homelessness and unemployment.\textsuperscript{145} Turkey adopted a new regulation in January 2016, according to which Syrian temporary protection beneficiaries are eligible for work permits.\textsuperscript{146} However, according to HRW, the permit is limited to certain residency criteria and to the sponsoring by an employer.\textsuperscript{147} Thus, contrary to UNHCR’s definition ‘adequate standards of living and work rights’ are not ensured in Turkey. The EU is well-aware of these conditions. As part of the negotiations, Turkey has agreed to allow the EU to monitor refugee camps and centres.\textsuperscript{148}

**Detention Conditions**

L6458 provides a legal framework for administrative detention. To give an example, it sets time limits for detention: six months for individuals subject to a removal decision (Art.57.3), and 30 days for applicants of international protection (Art.68.5). Turkish detention conditions continue to be criticized. According to AI, protection-seekers have been physically ill-treated by officials and were not granted visits by lawyers or family s.\textsuperscript{149} In Turkey, the violation of lawful detention (Art.5 ECHR) has been subject to various judgements of the ECtHR. For example, in Abdolkhani v. Turkey, the Court condemned ‘the absence of clear legal provisions establishing the procedure for ordering and extending detention with a view to deportation and setting time-limits for such detention’.\textsuperscript{150} Similar detention conditions were reaffirmed in 2015 in S.A. v. Turkey.\textsuperscript{151}

\textsuperscript{143} Bidinger (n.133) 225.

\textsuperscript{144} Annette Groth, ‘A Stronger European Response to the Syrian Refugee Crisis’ (Council of Europe, 4 April 2016) 10 \url{http://semantic-pace.net/tools/pdf.aspx?doc=aHR0cDovL2Fzc2VtYmx5LmNvZS5pbnQvbncveG1sL1hSZWYvWDIILURXLWV4dHluYXNwP2ZhVpdOZ0MiU2OCZsYW5nPUVQ&xsl=aHR0cDovL3NlbWFudGljcGFjZS5uZXQvWHNsGzQZGVyWFJlZi1XRC1BVC1YTUwyUERGLnhzbA==&xslt params=ZmlsZWlkPTIyNTY4} <accessed 30 August 2016>.


\textsuperscript{147} HRW (n.138).

\textsuperscript{148} Commission, 2\textsuperscript{nd} Report (n.95) 5.


\textsuperscript{150} Abdolkhani and Karimnia v. Turkey App no 30471/08 (ECHR, 22 September 2009) para 135.

\textsuperscript{151} S.A. v. Turkey App no 74535/10 (ECHR, 15 November 2015) para 28.
Interim Conclusion

The Statement portrays the EU’s practice to outsource responsibility to third countries. The Statement currently pauses the influx of migrants arriving from Turkey into the EU at the expense of protection-seekers’ rights. Furthermore, the asylum procedure in Greece lacks a case-by-case consideration of protection needs, while Turkey cannot offer sufficient protection as defined by UNHCR. Thus, all stakeholders fail to provide access to the asylum procedure.

The Future

There are three possible responses to the current situation. Firstly, the non-European scenario, in which no agreement at European level is found. Secondly, the status quo approach, through which the Dublin system will continue to be amended with marginal improvements to the existing system. In this capacity, the recently proposed Dublin IV Regulation (DIV) will be used as an example to portray the possible legal and institutional future of the system and its risks for the protection of applicants. Thirdly, the European response, in which EU institutions and States agree on a comprehensive revision of the Dublin system. In this desirable approach, the fundamental principles will be reformed radically in order to ensure the protection of applicants as well as the efficiency of the Dublin system.

Non-European Response

In the non-European response, the Dublin system is fully suspended and States resume their practices prior to the Dublin Convention. Without EU Directives, the asylum system of countries will be a set of national legislation in obligation to international frameworks such as the 1951 Convention. At that time complicated ad-hoc negotiations between states were used to determine responsibility for applicants. As proven in the past, countries can deny responsibility more easily, with protection-seekers left in orbit. Access to asylum procedures and minimum standards can no longer be ensured for protection-seekers. The non-European response is not unlikely. Events over the course of this summer have shown that the future of the EU and, consequently, the CEAS are at stake; the UK has voted to leave the EU on the 23rd of June 2016, triggering calls of Marine Le Penn and other right-wing politicians for France, Italy, Austria and others to follow its example.

Dublin IV

This chapter aims to portray the status quo approach. Instead of ensuring fundamental principles, obligations for States and applicants are intensified to generate strict implementation of the Dublin system. The Commission published a proposal for a recast of DIII in May 2016, thus, highlighting its intention to continue with the Dublin system in

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152 Commission, DIV (n.21).
153 Commission, DIII (n.6) 2.
general (3.1). DIV aims to enhance the efficiency of the Dublin system, in particular to improve the efficiency, to reduce secondary movement, and to ensure a high degree of solidarity and fair sharing of responsibility between States (5.1).

I. Allocation of Responsibility

DIV promises to emphasise the ‘lack of choice’ for applicants to choose the State of application, thereby diminishing secondary movement (Rec.22;29). For this, the Proposal emphasizes that the criteria to determine responsibility can only be applied once (Art.9.1). The State, which the applicant first entered (irregularly or legally), continues to be responsible for the processing of the application (Art.4.1;9.1;15.1). Moreover, the State remains responsible even when the applicant leaves the territory (Art.5.2;21.4). Hence, the Commission does not propose new criteria for allocation based on shared responsibility.

The family and minor allocation criteria will be amended as follows. Welcoming is the proposal to broaden the term ‘family’ to include siblings, as well as families that were formed in transit countries (Rec.19;2.g). In accordance with Tarakhel, the State that transfers the minor is obliged to ensure that the receiving State implements appropriate measures concerning the asylum procedure and reception conditions (Art.8.4). However, the allocation of responsibility for unaccompanied minors has not been amended in the best interest of the child. Firstly, the State where the minor first lodged the application will, in principle, be responsible (Rec.20;Art.10.5). Thus, contrary to the proposal by the Commission in 2014 and the ECJ ruling MA, BT, DA, the responsibility will not be assigned to the State where the minor is present.155 Secondly, the term ‘(unmarried) sibling’ has been separated from the term ‘family member’, thus, diminishing the scope of family unification for minors (Art.10;13).

The new discretionary clause will be limited to (wider) family relations (Art.19.1-2). Thus, a regulation that codifies whether another State might still be able to declare responsibility after the first State decided the application to be inadmissible is missing.156 According to Hruschka, this limitation will contribute to the phenomena of protection-seekers in orbit.157 Peers highlights that the proposed limitation will eliminate open-door policies as conducted in Germany in 2015, when the Dublin system was suspended for Syrian nationals.158

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155 Case C-648/11 MA, BT, DA v. Secretary of State for the Home Department [2013] para 60; Proposal for a Regulation (EU) No 604/2013 as regards determining the Member State responsible for examining the application for international protection of unaccompanied minors with no family member, sibling or relative legally present in a Member State [2013] COM (2014)382 final.

156 Maiani, Reform of DIII (n.65) 31.


II. Rights of Applicants

According to the EP, DIV is the first Proposal ‘to cut back on individual rights’. To be fair, the Proposal aims to specify procedural rights of applicants, e.g., to define what specific information the applicant must receive (Art.6), and to codify that the personal interview must be scheduled before the take charge request (Art.7.2). Further, DIV proposes amendments to the appeal procedure, i.e. a suspensive effect (Art.28.3). However, the request to challenge a transfer decision must be lodged by applicants within seven days after receiving the notification of transfer (Art.28.2). In comparison, in Diouf v. Ministre, the ECJ affirmed a 15-day period to be appropriate. In addition, the scope of the appeal has been limited to grounds of inhumane and degrading treatment (Art.28.4) and family separation (Art.28.5). Thus, contrary to Peers, the Abdullahi ruling remains relevant, and the extension of the right to a legal remedy to violations of all procedural rights remains unconfirmed by the Commission. Published in June 2016, the ruling Ghezelbash clearly contradicts the proposed Art.28, and is anticipated to have a significant impact on future negotiations. In its current form, Art.28 gives room to the possible infringement of the right to legal remedy enshrined in Art.13 ECHR and Art.47 EU-Charter.

Detention continues to take place as stipulated under DIII, but time limits have been shortened from two months to two weeks for take back requests/notifications, which the responsible State then must reply to within one week (Art.29.3). The transferral of the detainee shall take place within four weeks rather than six weeks, and the detainee must be released if the responsible State fails to respond to the request within four weeks (Art.29.3). The shorter time limits for the appeal processing and detention are welcoming. However, it is questionable whether States which receive a large amount of applications, will be able to process them in a timely manner. As discussed above, certain States already cannot meet the current (longer) deadlines, which leads to the conclusion that the deadlines in general are not the problem but merely a symptom.

III. Gatekeeper Responsibilities

The State, where the first application is lodged, has certain obligations (Art.3.3-5;Art.20-26;Art.40). States are obliged to investigate whether the application is inadmissible (Art.3.3-5) and whether family criteria prevail (Art.20.3). If so, the State remains responsible to return the applicant to that country after conducting a security check of the applicant (Rec.17;Art.3.b.ii;3.5;40.1). The State stays responsible beyond the examination of the application (Rec.25; Art.20.2-7), including the examination of international protection and possible take back requests (Rec.12; Art.20). DIV aims to tackle the lack of physical transfers under the Dublin system. For this, States are offered tools to enforce transfer requests more easily. Take back requests have been transformed into ‘simple take back notifications’, which ‘do not require a reply, but instead an immediate confirmation of receipt’ (Rec.26;Art.26.3). Time limits for requests have been shortened further, namely,

159 Maiani, Reform of DIII (n.65) 39.
161 Maiani, Reform of DIII (n.65) 39.
one month for take charge requests (Art.24;30.1) and take back requests (Art.25). In addition, past deadlines for submitting take back requests or for effective transfers will not shift responsibility to a different State anymore (Art.26;30).

This procedure matches with the current practice of the Statement. The cancellation of the Statement would leave Greece fully responsible for protection-seekers who entered its territory from Turkey. However, the extended obligations will be difficult to implement in practice, since States ‘are generally reluctant to assume responsibility outside the order of the criteria’. Further, these ‘gatekeeper responsibilities’ are likely to backfire, and may operate as incentives not to register applicants within their territory. Hence, the defensive behaviour of States will continue and lead to a lacking in minimum standards of protection and delayed access to the asylum procedures. In any case, secondary movement is unlikely to be solved through assigning stricter obligations to States.

IV. Applicants’ Penalties

DIV proposes another solution to secondary movement, being to stipulate procedural and material consequences for the applicant in case certain legal obligations are not fulfilled. Procedural consequences are proposed as follows. If the applicant does not comply with the first-entry criterion (Art.4.1), the State will not transfer him/her back but examine the application in the accelerated procedure stipulated in Art.31.8 of the APD (Rec.22;Art.4.2-3;5.1;20.1.b;20.3). Even though basic guarantees are followed in the accelerated procedure, the applicant will be treated similarly to a falsifier (Art.31.8.a, c, d, e), as arriving from a safe third country (b), or as a threat to national security (j). Under certain conditions, further penalties include an application to be treated as a ‘subsequent application’ (Art.20.4), where new evidence is necessary, or even to be prohibited to lodge an appeal within the Dublin territory (Art.20.5). Further, the applicant is obligated to comply with the transfer decision and to be available to the authorities (Art.4.3). Moreover, information submitted too late (no later than during the interview) will not be accepted (Art.5.4). The unaccompanied minors’ right to a representative only exists in the State, where he is obliged to be present (Art.8.2). Material consequences are proposed as follows. The entitlement to the reception conditions enshrined in Art.14-19 of the Reception Standards Directive is suspended once the applicant violates Art.4.1 (Art.5.3). Violations include the denial of schooling and education of minors (Art.14), of access to labour market (Art.15), of vocational training (Art.16), of material reception conditions (Art.17;18), and of health care (Art.19) with the exception of emergency health care.

The Commission aims to force protection-seekers to comply with the prohibition of secondary movement out of fear. Contrary to the 1951 Convention (Art.31), the Commission aims to penalise irregular entry. As shown above, unaccompanied minors are not excluded from the penalties. The fast tracking of procedures and the elimination of the right to lodge an appeal will enhance the risk of refoulement and the right to a legal

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163 ibid.
164 Hruschka, ‘Dublin is dead!’ (n.157).
165 Maiani, Reform of DIII (n.65) 38.
166 Maiani, Reform of DIII (n.65) 35.
remedy.\textsuperscript{167} Equally, the material penalties are likely to result in the violation of Art.3 ECHR and Art.1 EU-Charter. As established above, the ECtHR extended the protection from degrading and inhumane treatment to housing and living conditions. Equally, the ECJ highlighted the right to human dignity enshrined in Art.1 EU-Charter in Cimade and GISTI.\textsuperscript{168} Moreover, the limited access to social rights is a violation of the 1951 Convention (Art.20;21), the EU-Charter (Art.34;35), and (possibly) national constitutions.\textsuperscript{169} Considering the severe consequences, the provisions fail to include a detailed explanation of the scope, time frame, and nature of the penalties. For example, reasons why information or documents were not submitted on time are not codified in DIV. This may lead to individual interpretations by States, potentially resulting in legal uncertainty and further lack of protection for applicants. To summarize in Peers words, ‘asylum-seekers (...) will be left to starve in the streets – even children, torture victims and other vulnerable people’.\textsuperscript{170}

V. Shared responsibility

‘Sharing people’

The Commission proposes a practical approach to implement shared responsibility by monitoring and calculating all applications received by each State (Rec.10;Art.22;23). Chapter IV proposes an approach similar to the (failed) Art.31 of the Commission’s proposal in 2008, which proposed the possible suspension of transfers to States in distress. The mechanism replaces the early warning and preparedness mechanism stipulated in Art.33 DIII (Rec.3). The ‘corrective mechanism’ aims to alert the stakeholders once a State receives a particularly disproportionate number of applications (Art.34). For this, an automated system will monitor all applications (Art.41;42). The disproportionate number of applications is determined by a reference key that calculates equal 50% weighting of the size of the population and the total GDP of a State (Rec.9;32;33;34). Thus, the Commission addresses the critic of not having considered the economic capability of each State. The mechanism is automatically triggered once a State receives a number of applicants that exceeds 150% of its capacity (Art.36;41). As a result, responsibility is allocated to other States (39.c-h). The State then is compensated with EUR 500 for each conducted transfer (Art.42). The assigned responsibility can be refused due to national and public security (Art.40). Therefore, in order to protect families, family members are allocated to the same State (Art.41).

The result of the automated system will hardly be surprising since DIV fails to fundamentally change the responsibility criteria. Most likely, the alert will be triggered fast concerning the number of arrivals in Greece and Italy. The reference key of 150% is set too high, as the State’s asylum system would have already received 50% over its capabilities. After the alert, the allocation procedure will take time to be implemented, during which applicants cannot sufficiently be ensured access to their asylum procedure and reception conditions. The reference key should be triggered by 90% instead in order

\textsuperscript{167} ibid 43.

\textsuperscript{168} Case C-179/11 Cimade and GISTI v. Ministre [2012] paras 42,56.

\textsuperscript{169} Hruschka, ‘Dublin is dead!’ (n.157).

\textsuperscript{170} Peers, ‘Orbanisation’ (n.158).
to gain enough time to react accordingly. In addition, EUR 500 is unlikely to compensate the costs of transfer. More importantly, it is questionable why States should agree on this corrective mechanism considering that Art.31 of the 2008 Proposal was rejected.

‘Sharing money’

A State can decide to (temporarily) suspend the corrective mechanism for a twelve-month period (Rec.35;Art.37). As a result, applicants are allocated to other States. However, this State must make a contribution of EUR 250,000 per applicant to the State that subsequently becomes responsible. The Proposal does not limit the number of times a State can suspend the corrective mechanism.171 Peers describes this part ‘as a fantasy on top of a fantasy’, since the idea of financial contribution has already been rejected by States before.172 He suspects this provision is merely intended as a negotiating position, to address Greece’s debts, or as a divisionary tactic for other amendments described above.173

The European Response

Goodwin-Gill calls for ‘a truly European response’ to the current situation, meaning a scenario in which ‘Europe’s refugees enjoy European asylum, European protection and the rights and benefits accorded by European law’.174 This section proposes radical structural changes to the Dublin system. Needless to say, a radical reform will face high obstacles. States are not particularly eager to receive more protection-seekers or to surrender further power in immigration matters to the EU.175 State sovereignty, including territorial supremacy and self-preservation, has a substantial impact on asylum policies.176 Strong national interests, specifically economy, efficiency, and security, rather than human rights and fairness remain the leading factors in the EU’s asylum debate.177

Among political campaigns it is popular to use immigration as scare tactics for endangering national security, employment rates and the welfare system. The recent Brexit campaign can be used as an example. One of the arguments of the ‘Leave Vote’ campaign was Turkey’s possible EU membership, whose citizens were alleged to pose a threat to national security and - due to their high number of offspring – to public

171 Maiani, Reform of DIII (n.65) 34.
173 ibid.
176 Velluti (n.5) 69.
177 ibid 5.
services.\(^{178}\) However, as long as asylum systems are regulated on a national level, Dublin, or a similar tool will remain of necessity within the EU.\(^{179}\) In order to gain a well-functioning Dublin system both - the efficiency of the system and the protection of applicants - need to be enhanced. To this end, a radical reform of the Dublin system is necessary.

I. Failing Principles of the Dublin System

The cause of secondary movement, rather, not its symptoms, needs to be addressed. For this purpose, shared responsibility must to be ensured, and certain principles must be abolished.

Ensure Shared Responsibility

The Dublin system will only prevail if States are willing to establish a more forceful relocation scheme.\(^{180}\) Especially States which currently receive lesser applicants than others must enhance their support by ‘sharing people’.\(^{181}\) For this theoretical and operational changes are necessary. Firstly, the term solidarity in Art.80 TFEU must be defined in a precise and transparent manner. The lack of a definition for solidarity, a fundamental principle in EU primary law, brings legal uncertainty. Secondly, a ‘central collection of applications’ at EU level must be established.\(^{182}\) The EP has recently recommended such a system through the establishment of hotspots where the distribution could take place.\(^{183}\) The EP envisions protection-seekers to be seen as seeking protection in the EU ‘as a whole and not in an individual Member State’. Evidently, the hotspots would have to be coherent with the protective legislation for applicants, rather than become hastily screening procedures as is feared by experts considering the examples of Greece and Italy.\(^{184}\) Thirdly, once the applicants are registered at EU level, States will have to come to an agreement on a fair and binding distribution key. The Eurasyylum proposal introduced four models based on the GDP per capita, and the size and density of the population, while the German Institute for International and Security


\(^{179}\) Fratzke (n.60) 1.

\(^{180}\) Peers, ‘Refugee Crisis’ (n.175).


\(^{182}\) ibid 59.

\(^{183}\) EP Resolution 2015/2095 (n.48) para 38.

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Affairs proposed to add the criterions of geographic area and unemployment rate. A similar approach to the proposed distribution key in DIV can be fruitful. In addition to the already listed criteria, the unemployment rate and – in the beginning - the number of resettled refugees and of applications in the past five years should be included. In addition, the preferences of applicants should be considered as well (see below). One step further, outside of the responsibility allocation concept of the Dublin system, the idea of centralized criteria for refugee status determination may further reduce circumvention of the Dublin system.

The approach will face obstacles in practice; the Dublin system will cease to be an intergovernmental approach. Further, certain States will have to agree on accepting a bigger responsibility for applicants. As such, new obligations may need to be implemented in a (possibly) more forceful manner. However, shared responsibility will reward States with an overall enhanced protection within the EU, further ‘collective stability’, and trigger good relations among States.

Abolish the Criterion of Irregular Entry

Once the applications are processed at EU level, the criterion of irregular entry to assign responsibility is no longer needed. On the contrary, irregular entry should cease to be a criterion for the allocation of responsibility. As described above, the principle triggers severe imbalances among States, and secondary movements among applicants.

Abolish the ‘No Right to Choose’ Principle

Another disadvantage of the secondary movement is that an applicant’s preferences are neglected. Crépeau, the Special Rapporteur on the human rights of migrants, proposed the ‘free choice’ approach in 2015. According to him, ‘asylum seekers should be able to register their asylum claim in the country of their choice.’ Indeed, the preferences of applicants should be given more consideration in order to diminish secondary movement, especially social and cultural connections and labour opportunities. While the

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187 Heijer and others (n.1) 611.

188 Wagner and Kraler (n.185) 33.

189 Vanheule and others (n.54) 44.

190 Maiani, Reform of DILL (n.65) 26; Guild and others (n.181) 13.

Dublin system includes family criteria, in practice, family reunion is scarce, forcing protection-seekers to enter the State irregularly to join their relatives. According to Rapoport and Moraga, a ‘matching system’ should take both interests – of States and applicants – into account. States name their preferences concerning skill level, nationality, and other characteristics of protection-seekers, followed by applicants accepting States based on their own ranking of preferences. In theory, the ‘matching system’ appears to be worth a try. However, the opportunity of States to choose their applicants freely may trigger discrimination to certain marginalized groups, such as unskilled labourers. While preference based on ethnicity and religion are unsupported by international human rights law, heritage and last names may reveal the religion of an applicant. Taking the current rise of racism into consideration, States may find loopholes to discriminate against the Muslim believers. However, another practical approach is noteworthy. Williams recommends a system, where protection-seekers are registered in the State of first entry, and are given travel documents and financial assistance from a collective budget before continuing their travels to their desired destination. According to him, the free-choice approach would merely require an amendment of DIII.

The ‘free choice’ approach is feared by ‘desirable’ States to work contrary to the principle of shared responsibility and to trigger the so called ‘snow-ball effect’ as more and more individuals join their relatives. Consequently, States might diminish their reception and procedural standards. If so, monetary solidarity schemes, resources for emergency measures, and special EU funds must ensure financial compensation for this scenario.

Abolish the Criterion of Secondary Movement

As proven by the Statement, the EU aims to reduce secondary movement by cooperating with economically and politically less stable countries. The phenomenon of secondary movement is globally used to reject asylum applications as fraudulent or manifestly unfounded. Accordingly, protection-seekers, who have not arrived directly from their countries of origin, cannot claim protection. However, the 1951 Convention does not condition the refugee status to the first safe country available.

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192 Guild and others (n.181) 6.
195 ibid 22.
196 ibid 26.
199 Gilbert (n.71) 532.
In Ratna Omidvar’s opinion, Senate of Canada, the approach is considered to be outdated as individuals cannot be expected to wait for help to arrive.\textsuperscript{200} At the least, the bar of the criteria for first country of asylum and safe third country must be raised. As an example, Legomsky names the ‘complicity principle’ according to which ‘no country may send anyone to another country, knowing that the latter will violate rights which the sending country itself is obligated to respect’.\textsuperscript{201}

II. Establish New EU Bodies

Minimum standards for protection-seekers need to be equally ensured in all States. For this, the proper implementation of common provisions must be supervised more carefully. The establishment of new EU bodies – the Asylum Agency and the Asylum Court - is essential to monitor the proper implementation of the Dublin system.

The Asylum Agency

According to Goodwin-Gill, the implementation of the CEAS through twenty-eight national systems was always destined to fail.\textsuperscript{202} Peers agrees, and calls for a new forum to coordinate national policies on a regional level.\textsuperscript{203} Moreover, the Commission has recently proposed to strengthen the role of EASO.\textsuperscript{204} Some experts welcome the approach as a fast solution\textsuperscript{205} while others describe it as insufficient.\textsuperscript{206} Instead, a new ‘EU Migration, Asylum and Protection Agency’ should be established to further implement policy goals of the EU.\textsuperscript{207} The legal basis of the Agency is Art.78.2.e TFEU, according to which the EP and the Council are empowered to establish measures for determining the responsibility of States.\textsuperscript{208} One of the main tasks of the Agency will be to process applications at EU level, followed by fairly distributing the applicants among States.\textsuperscript{209} In addition, the Agency will be empowered to monitor proper implementation of the CEAS framework in compliance with EU and international standards linked to the Dublin system, e.g., the Qualification Directive, the Return Directive and the Reception Directive.\textsuperscript{210} Funding will


\textsuperscript{202} Goodwin-Gill (n.174) 2.

\textsuperscript{203} Peers, ‘Refugee Crisis’ (n. 175).


\textsuperscript{205} Pollet (n.64) 84.

\textsuperscript{206} Guild and others (n.181) 57.

\textsuperscript{207} Goodwin-Gill (n.174) 3.

\textsuperscript{208} Heijer and others (n.1) 632.


\textsuperscript{210} Commission, \textit{DIII} (n.6) 15; Guild and others (n.181) 6.
be offered via the EU budget or through contributions from States in proportion to their respective GDPs.\footnote{211} Both approaches, the Agency or the empowerment of EASO, will have to be determined in a precise manner and – most importantly – in accordance with the EU’s mandate and national constitutions.\footnote{212} Otherwise, a clash between the mandate of the Agency and the power of States to execute parts of the asylum procedure are bound to happen.\footnote{213}

\textit{The Asylum Court}

The interpretation of EU provisions must be uniform in all States.\footnote{214} Proven by many examples, the case law of both European Courts has become irreplaceable to enhance the protection of the rights of applicants due to the failure of the Dublin system. However, both European courts and national courts are overburdened with disputes. Hence, it can take years for final judgements to be ruled. As shown above, DIII and DIV contain imprecise and unjust provisions in need of interpretation by an independent body. Applicants’ rights to human dignity, non-refoulement, lawful detention, and legal representation are at stake. Accordingly, Velluti calls for a EU ad hoc Asylum Court based on Art.257 TFEU to ensure faster protection and compliance with the CEAS.\footnote{215} In accordance with Art.257 TFEU, the EP and the Council have the mandate to establish ‘specialised courts’. The Court will ensure common legal standards and understanding for protection-seekers and enhance the cooperation between States.\footnote{216} Similar to Velluti, Hailbronner demands specialised ad hoc courts as well, though he envisages the courts to fully replace the recourse to national courts.\footnote{217} The claims will be processed within three months (including the appeal), while claims concerning applicants originating from safe third countries will be processed within only one month. During these fast-track procedures applicants will not receive welfare. Admittedly, Hailbronner’s approach offers a solution to overburdened courts and lengthy procedures. However, by eliminating one level of jurisdiction the approach certainly does not enhance the protection of applicants. In contrast, Velluti aims to create a third jurisdiction below the ECJ. The Court would decide on appeals against final decisions of domestic courts, which then could be appealed on points of law before the ECJ.\footnote{218} However, this desirable approach equally constitutes a ‘clash with reality’ as States are unlikely to be interested in another supranational court. As an incentive, Velluti offers overburdened national courts the decrease of asylum cases.\footnote{219}

\footnote{211} Carrera and others (n.209) 3.  
\footnote{212} Heijer and others (n.1) 633.  
\footnote{213} Guild and others (n.181) 59.  
\footnote{214} Peers, ‘Refugee Crisis’ (n.175).  
\footnote{215} Velluti (n.5) 108; Pollet (n.64) 85.  
\footnote{216} Velluti (n.5) 108.  
\footnote{218} Velluti (n.5) 109.  
\footnote{219} ibid.
Interim Conclusion

Out of the three possibilities, the European response is the most favourable one. Under DIV, States at the external borders of the EU and ‘desirable’ States will continue to be the main stakeholders in processing applications. In addition, the proposed penalties for applicants raise a serious concern regarding future rights violations. In comparison, the radical European reform promises shared responsibility among States and enhanced protection for applicants. To achieve this outcome, fundamental principles need to be reviewed and new, creative principles must be formed.

Conclusion

The current crisis is ‘not a migration or refugee crisis (…) but a crisis of solidarity and politics’. Indeed, the current Dublin system functions inefficiently. While DIII enhances the protection of protection-seekers in theory, many new provisions lack precise wording and lead to the continued necessity for the European Courts to interpret the provisions. More importantly, the root causes for the failure of DII have not been erased in its Recast. Contrary to Art.80 TFEU, DIII is not governed by the principle of solidarity. The responsibility criteria lead to an unequal distribution of protection-seekers among States. This results in grave consequences for economically weaker States, as seen in the context of the asylum framework in Greece. In order to protect themselves, States with a higher influx of applicants diminish their protection standards in a joint race to the bottom leaving protection-seekers without safeguard. Lacking a joint approach, the EU attempts to decrease the influx of migrants through cooperation with third countries. This cooperation with economically and politically less stable countries succeeds at the expense of protection-seekers. For example, the Statement nominates Greece and Turkey as the key stakeholders in tackling ‘Europe’s Refugee Crisis’, and to decrease secondary movement. Both asylum procedures fail to respect protection-seekers’ rights as enshrined in international and EU law. Deficiencies in the asylum procedure in Greece risk collective expulsion, and Turkey cannot guarantee a functioning asylum procedure; non-refoulement, lawful detention, or adequate housing and living conditions.

What will the future bring? The Commission’s vision for the future of the Dublin system is equally discouraging. The outcome of the corrective mechanism of DIV will hardly be surprising since the fundamental principles (and problems) of DIII will not be addressed. The first-entry criterion for responsibility prevails. States at the external borders of the EU, and ‘desirable’ States, will continue to be the main stakeholders in processing applications. In conclusion, the Dublin system is in need of a radical reform to tackle its ‘policy crisis’. The use of the term ‘radical’ implies that fundamental rethinking must take place in order to achieve a variation of the Dublin system that enhances the efficiency of the system and safeguards the protection of applicants. However, DIII, the Statement, and the proposed DIV signal the lack of political will for such radical reform. Nevertheless, without a reform of the Dublin system a well-functioning allocation procedure cannot be

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created. The concepts of solidarity and shared responsibility need to be ensured in order to gain the full support of all twenty-eight States. To achieve full participation, EU law must offer a definition of solidarity and, thereby offer a shaped and mandatory guiding principle. Further, fundamental principles must be re-shaped. The criterion of secondary movement is outdated and the threshold of the concepts of first country of asylum and safe third country must be improved to respect the rights of protection seekers. A fair distribution key, which takes States economic capabilities and applicants’ preferences into consideration, is necessary. Furthermore, newly established EU institutions must supervise the coherent implementation of EU Directives, especially concerning protection seekers’ rights. A failure of Europe’s policy crisis brings grave consequences for all stakeholders – not ‘only’ for protection-seekers and concerned States, but for the future existence of the EU itself.
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Minor Marriages in Islam and Bangladesh: Harmonising God’s Law with State Law in the Quest for Reform

Taqbir Huda

In today’s modern world, controversy has become a corollary to Islamic law with the issue of minor marriage being but one example of that. The relative dearth of material explicitly addressing the legality of minor marriages within the primary sources (Quran and Hadith) never thwarted minor marriages taking place in the Muslim world. Over time, the culmination of unjust results in Muslim-majority states stemming from minor marriages turned it into an increasingly objectionable one. Consequently, the widespread contention and the heated global pressure paved the way for legislation abolishing or at least restricting minor marriages in these states by setting a minimum age of marriage. This then gave rise to the related controversy of whether such reforms had any justifiable Islamic legal basis or were merely adherent to ‘western’ norms. This article seeks to elucidate the sharia’s position on minor marriages in the classical period by closely examining the interrelated Islamic legal concepts that delimit the practice of minor marriages. It then examines existing state laws on minor marriage in Muslim majority countries, with a particular focus on Bangladesh and its Child Marriage Restraint Acts 1929 and 2017. It concludes that minor marriages, as it is currently practiced, stands in stark contrast to the type of marriage which gained permissibility in the classical period and infringes what the esteemed jurist Al-Ghazali’s considered to be the five cardinal values of Islam vis-à-vis the maqassid al sharia (objectives of the sharia) on all five counts.

Introduction

In the modern world, controversy has become a corollary to Islamic law. The issue of minor marriages is but one illustration of this contemporary phenomenon. The relative dearth of material explicitly addressing the legality of minor marriages within the primary sources (Qur’an and Hadith) never thwarted the practice from taking place in the Muslim world. The widespread contention and heated global pressure have since paved the way for legislation abolishing, or at least restricting, minor marriages in these states by setting a minimum age of marriage. This has then given rise to the related controversy of whether such reforms were in fact legally justifiable in Islam, or were merely adherent to ‘western’ norms. This essay will begin by elucidating the Sharia’s position on minor marriages in the classical period by closely examining the primary sources of law and the interrelated Islamic legal concepts that delimit the practice of minor marriages. The paper will go on to examine existing state laws on minor marriage in Muslim majority states, with a particular focus on Bangladesh, specifically the Child Marriage Restraint Acts 1929 and 2017. It will be shown that minor marriages, as they are currently practiced, stand in stark contrast to the type which gained permissibility in the classical period, and infringe on what the esteemed jurist, Al-Ghazali, considered to be the five cardinal values of Islam vis-à-vis the maqassid al Sharia (objectives of the Sharia) on all five counts. As such, it will be argued that fiqh (Islamic jurisprudence) is embedded with an array of legal tools, such as maslahah (consideration of public interest), which can be used to justify outlawing minor marriages; not doing so is certainly contrary to Sharia.
Minor Marriages in Classical Fiqh

I. Defining the Age of Minority

A minor in classical law ranges from the new born child to anyone who has not yet attained bulugh (puberty).\(^1\) The primary determinant of puberty in classical law lay in the physical and biological signs of development, noting semen emission for males and the onset of menstruation for females.\(^2\) This can be contrasted with the modern notion of minors under legislation in Muslim states, whereby anyone below a specified age is held to be a minor. For instance, the age of minority for both males and females is set below 18 in Morocco, Jordan and Egypt, whereas Bangladesh has set the age at 18 for females and 21 for males.\(^3\) This contemporary shift in the determination of a minor from biological markers to a standardised legal age is not wholly irreconcilable with classical jurisprudence, as age was still a secondary means by which early jurists determined puberty, and hence minority.\(^4\)

All madhhabs (schools of jurisprudence) agreed that the minimum age below which there is a irrefutable legal presumption against puberty is 9 for females and 12 for males.\(^5\) In the absence of physical signs of development, a maximum age was set, following which an irrefutable legal presumption of puberty was placed. As with many areas of law, the four major schools not only differed with one another in setting this age, but there were disagreements within the schools themselves. The majority of the Hanafi school presumes puberty upon reaching the age of 17 for 18 and eighteen for males.\(^6\) The majority of Shafi‘i and Hanbali schools set the maximum age of puberty at 15 years for both sexes, whereas the majority of Maliki school puts it at 17.\(^7\) The Ja‘fari school of the Shi’ites place it at 9 for girls (the lowest) and 15 for boys.\(^8\)

In examining the legal presumptions for and against puberty operating within specified age brackets in classical law, the minimum age of marriage found in modern Muslim family codes and legislation can hardly be seen as an innovation. However, we should not go so far as Buchler and Schlatter in equating the maximum age of puberty found in classical law with that of ‘marriageable age’, which is, with respect, an exaggeration as there was no minimum age of marriage in classical law.\(^9\) Rather, it should be viewed as

\(^1\) Mashood A. Baderin, ‘Age of Marriage, Option of Puberty and Marriage Equality’ (Lecture at SOAS, University of London, February 2015).
\(^3\) Child Marriage Restraint Act 1929, s 2(a).
\(^4\) Baderin (n 1).
\(^6\) ibid
\(^7\) ibid.
\(^8\) ibid.
\(^9\) Buchler (n 2).
the adoption of an idea that was present within classical fiqh itself, and hence concede that it is most certainly not a departure from it.

II. Minor Marriages in the Holy Sources

Qur’an

In classical law, many, if not all, of the major schools have sought to derive the permissibility of minor marriages from the primary sources. The Qur’an does not explicitly address the notion of a marriageable age, save for one verse which commands: ‘And test the orphans [in their abilities] until they reach marriageable age. Then if you perceive in them sound judgment, release their property to them’\(^\text{10}\). This verse seems to clearly indicate that there is proximity between the age at which an individual becomes marriageable and the age at which he or she is able to exercise rational judgment.\(^\text{11}\) However, this is somewhat at odds with the Qur’anic verse 65:4, which most jurists use to justify the lawfulness of minor marriages. The verse mentions that ‘for those who have no menstruation’ when prescribing the requisite iddah (waiting period for a divorced or widowed woman before she can remarry) to women in differing circumstances. Thus, the verse is held to imply that it is lawful for a female minor to marry since there would be no need to prescribe her an iddah period if she was not in a valid marriage in the first place.\(^\text{12}\)

Hadith

Due to the Qur’an’s relative silence on the matter, most jurists have found the Hadith to be more authoritative on the issue of minor marriages. The Sahih Bukhari collection, which is considered to be the most authentic of the six canonical Hadith compilations, evinces the contracting of marriage between the Prophet Muhammad and Aisha when she was a minor.\(^\text{13}\) This, along with the minor marriages subsequently undertaken by the sahabah (companions of the Prophet), are largely used to justify its permissibility. Therefore, the legal status of minor marriages in Sharia is merely mubah (permissible) since it was not derived from or forbidden by a strict shari'i ruling.

III. Islamic Legal Concepts and Principles Delimiting Minor Marriages

The desirability of minor marriages in the classical period and its corresponding permissibility in Islam may be best understood in light of the desire to draw families together and facilitate social integration.\(^\text{14}\) Given the low racial plurality in Islam in its early days, it becomes understandable why it may have viewed such alliances as

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\(^{10}\) Qur’an Chapter 4, Verse 6.

\(^{11}\) Jeremiah J. Bowden, ‘Marriageable Age In Islam: A Study On Marriageable Age Laws And Reforms In Islamic Law’ (2013) 2 LUX.

\(^{12}\) Buchler (n 2).

\(^{13}\) ibid.

\(^{14}\) Ati (n 4) 76.
The use of minor marriages to secure a wider socio-familial benefit is certainly not peculiar against the backdrop of the classical Islamic period. Certain aristocracies in other cultures, such that in the European feudal era, used them as a means to cement political and/or financial ties.

Unfortunately, much of the contemporary discussion on minor marriages in classical Islam is entirely devoid of context and is instead had in deliberately sensationalist and inflammatory terms. It must be made clear that minor marriages in the classical period would usually entail a betrothal or a type of formal agreement, which would defer final consummation to a later date. This is because Islam prescribes that, irrespective of the age at which betrothal may take place, ‘final consummation must be postponed until both parties are ready for marital relations’. This condition was usually determined by puberty, which in turn marked the transition from minority to majority. Cohabitation would also usually begin at that later date, and the minor (or minors, if both parties were prepubescent) would remain in their guardians’ home in the interim period. As such, it seems minor marriages in classical fiqh was allowed as a contract to secure a future, rather than an immediate interest or performance, lest an opportunity to do so ‘may be lost’.

It will be shown that the law requires that all marriage arrangements be made in good faith and in the best interest of the minor who is a party to it. It is simply unlawful for guardians to act purely out of self-interest or put the minors in a disadvantageous situation.

Nikah, Ahliyah and Wilayah

Most jurists concur that nikah (marriage) in Islam is essentially a contract, usually understood as a means to legitimise sexual intercourse and procreation. Thus, all the requirements of forming a valid contract must be met, such as legal capacity and consent. The literal meaning of ahliyah (legal capacity) is ‘competence’ and it has been defined as ‘the eligibility of a person to acquire rights and enter into obligations’ by Islamic jurists.

These jurists have adopted an expansive understanding of ahliyah, stating that it can be of two types: receptive and active, which in turn can either be complete or incomplete. The transition from receptive to active ahliyah, and the corresponding transition from incomplete to complete ahliyah, occur gradually over time as the individual ages. For instance, a foetus, which is considered a legal person in Sharia, has incomplete passive capacity, as it can only receive rights (for example, inheritance) but cannot owe any obligations. Every individual acquires complete receptive capacity upon birth, enabling

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15 ibid.
17 ibid.
19 ‘Ati (n 5) 77.
20 Baderin (n 1).
22 ibid.
them to receive obligations (such as maintenance and liability for loss) in addition to rights, albeit through their wali, or guardian.\textsuperscript{23} This wali, who need only be a sane adult Muslim, can conduct affairs on the minor’s behalf.\textsuperscript{24} Upon reaching the age of seven, the person is said to have an incomplete active capacity, as they have a partial sense of intellect which is higher than that of an insane person or a child below seven years of age. However, their intellect is still lower than a sane adult and as such their active capacity is yet to become complete. They are now fully able to conclude certain transactions on their own and even without their guardians, such as transactions which are wholly to their benefit, like the receipt of gifts or charity. It is only after gaining puberty and rushd (maturity of mind) that the minor is said to have acquired complete active capacity, and becomes an adult in the eyes of the law.

Based on these detailed rules of ahliyah, the jurists held that a wali can enter into a marriage contract on behalf of the minor (i.e. anyone who has complete receptive or incomplete active capacity), provided it is in good faith and in the best interests of the minor. Due to the minor having insufficient legal capacity, they are incapable of determining what is in their own best interest.\textsuperscript{25} As such the guardians could contract them into marriage without their knowledge, rendering their consent to be unnecessary.\textsuperscript{26} This concept of guardianship is by no means exclusive to Islamic law, and can even be said to have origins in archaic or Roman jurisprudence.\textsuperscript{27} One type of guardianship under Roman law known as Patria potestas, was defined in the following terms:

\begin{quote}
The people within our authority are our children, the offspring of a Roman law marriage […] Our authority over our children is a right which only Roman citizens have. Nobody has such extreme control over children. Any child born to your wife is in your authority. The same is true of one born to your son and his wife, as in when your grandchildren are equally within your authority.\textsuperscript{28}
\end{quote}

Similarly, minor marriage is by no stretch of the imagination, a practice that is exclusive to Islam as it was prevalent across different faiths and regions during the early days. For instance, in 6\textsuperscript{th} century Abyssinia a law was passed necessitating forcible intermarriage between Christians and baptized Jews.\textsuperscript{29} Consequently, no male or female over 13 years of age was to remain unmarried, because these early marriages ‘would lead to speedy amalgamation of the communities’.\textsuperscript{30} Minor marriages were also common among the

\begin{thebibliography}{99}
  \bibitem{23} ibid.
  \bibitem{25} Mona Siddiqui, ‘The Concept of Wilaya in Hanafi Law: Authority versus Consent in al-Fatawa al-’Alamgiti’ (1998) 5 Yearbook of Islamic and Middle Eastern Law Online, 171, 177..\textsuperscript{26}
  \bibitem{26} ibid.
  \bibitem{27} ibid.
  \bibitem{28} ibid.
  \bibitem{29} ‘Ati (n 5).
  \bibitem{30} ibid.
\end{thebibliography}
Jews, whereby ‘the ‘bridegroom’ was frequently not more than 10 years old and the bride was younger still’. Some authors have even argued that child marriages were so common; ‘it was virtually the norm’. Even today, the practice of minor marriages, although concentrated in South Asian and Sub-Saharan African regions, is not exclusive to Muslim countries. Christian majority countries such as the Central African Republic, Ethiopia, and Mozambique, along with Hindu majority countries such as India and Nepal are all on the list of countries most affected by child marriage.

**Wilayatul Ijar and Khiyar al Bulugh**

The right of natural guardians with respect to contracting their minor ward into marriage goes even deeper than that of non-natural guardians as most jurists held that they are able to do so not only without the minor’s consent but by force. This would argue that in a string legal sense, the child as a minor has no (legal) consent to give in the first place. This authority is known as *wilayatul ijar* (coercive guardianship), and interestingly, is not derived from the primary sources (*Qur’an* or *Hadith*). Rather, it is a right that was derived through *qiyaṣ* (deductive analogy), and from the *wali’s* right of guardianship over the minor’s property. This right was given to different ‘natural’ guardians in different *madhhab*. On the one hand, the Shafi’īs and Shi’ītes only give the right to the father and paternal grandfather, whereas the Hanafis give it to all male agnates. The Malikis and Hanbalis give it to the father and his *wasi* (executor), who usually remains within the domain of male agnates. Again, this is similar to *Patrias Protestas* which also channeled through the male line as an inherent right. The significant right of the guardians to contract minors into marriage is supposedly limited by a corresponding right given to the minors known as the *khiyar al bulugh* (option of puberty), a primarily Hanafi doctrine which was later adopted by non-Hanafi majority countries through the doctrine of *takhayyur* (eclectic choice). The option allows the minor ward to annul a marriage that had been contracted by a non-natural guardian whilst they were a minor upon reaching puberty. This power is only really relevant to minor girls because a minor boy, upon reaching puberty, will earn the right to *talaq* (divorce or repudiation by the husband) which can unilaterally be pronounced to opt out of marriage.

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34 Ibid.
35 Ibid.
36 Kamali (n 21) 183.
37 Siddiqui (n 19) 172.
It is unsurprising that the practice of minor marriages has been labelled as being discriminatory against minor girls. The minor (girl) has to exercise her right immediately after her first menstruation, through a court. This must be preceded by public declarations of the onset of menstruation as a means to garner surrounding persons as witnesses on her behalf. This procedure is indeed quite burdensome on a young girl, who only just underwent the rather traumatic and painful experience of her first period. The option of puberty may appear to be very significant, but upon closer inspection it becomes severely restricted as it is only exercisable against non-natural guardians. The jurists unambiguously ruled that this right has no application against a natural guardian who had contracted the minor marriage. This is based on the assumption that natural guardians, such as the father and grandfather, would normally do what is best for his ward. As such, some have argued it is possibly not so much an assertion of the natural guardian’s authority over the minor as a securement of the latter’s welfare, even if it effectively nullifies the khiyar al buugh. The minor would then have to prove to the satisfaction of the court that the guardian had acted in bad faith and against her best interest. This usually proves to be an exceptionally onerous task in a de facto patriarchal society, not only due to the strong presumption that a natural guardian would normally do what is best for his child but also because of the tenacious legal culture that is ever-present in these courtrooms.

The Case for Reform

I. Current Law

While minor marriages remained permissible in classical law, the opposite applies today in numerous Muslim states where minor marriages are generally impermissible. However, these countries have been rather hesitant to categorically outlaw minor marriages due to its prevalence in Islamic history. At the furthest extreme, marriage to girls under 12 is considered a rape crime under the Egyptian Penal Code. It even sets a maximum age gap of 25 years between parties contracting to marriage. Reforms in Morocco have been less stern. Despite the minimum age being set at 18, marriages below that age can be allowed through judicial permission and makes the consent of the minor essential, should such a marriage take place. Article 400 of the Moroccan Family Code refers back any novel legal issue to classical Maliki jurisprudence thereby allows plenty of judicial discretion which in turn increases the scope of minor marriages especially when conducted by the father. Jordan too, allows marriages to be contracted three years below the minimum age of 18 through judicial agreement with the Chief Justice in ‘special circumstances’. As such, while the setting of a minimum age has made minor marriages

39 ibid.
40 ibid.
41 ibid.
42 ibid.
43 Egypt Child Act 2008, s 126.
45 Moroccan Family Code 2004, s400
46 Jordanian Personal Status Law 2010, s10.
prima facie impermissible, it is evident they can still take place through certain procedures and under certain circumstances.

Law Regulating Minor Marriages in Bangladesh

The situation in Bangladesh is slightly different. The Child Marriage (Restraint) Act 1929 is often wrongly understood as outlawing child marriages in Bangladesh. However, this is simply untrue. As the act only sets the aforementioned minimum ages of marriage for both sexes, and itself states it is ‘an Act to restrain the solemnization of child marriages’. It does so by prescribing punishments for all categories of persons who may be involved in the child marriage process. This includes the male or female adult person who marries a minor, any person who ‘performs, conducts or directs any child marriage’, and any parent or guardian (lawful or unlawful) who acts in any way to either promote or permit the child marriage to occur or ‘negligently fails to prevent it’ from taking place. These provisions are indeed quite far-reaching, especially for the guardians, and essentially curb the right of wilayatul ijab afforded to them in classical fiqh. However, the punishments are not as severe, and can either be simple imprisonment extending to one month or a fine extending to one thousand taka (roughly $13). The Act also gives power to the Court to issue injunctions prohibiting marriages in contravention of this Act from taking place. Wilful disobedience of any such injunction has the same punishment as above, but the imprisonment may now extend to three months. Crucially, the Act remains silent on the legal status of child marriages, solemnised in contravention of the Act. Thus, whilst persons involved in solemnising the marriage are acting illegally, the Act does not nullify or void the nikah contract; hence; the marriage itself remains legal.

One may wonder why the Act chose to severely restrain the solemnisation of child marriages instead of categorically invalidating the marriages that involve children, or why it was not followed by a subsequent Act of Parliament to that effect. Certain legal thinkers have suggested that the government’s reluctance must be understood in light of its desire to not risk tampering with the divine Sharia law and creating a conflict of laws scenario. The supremacy of Sharia law in family law matters is evinced by The Muslim Personal Law (Shariat) Application Act 1937, which states:

Notwithstanding any custom or usage to the contrary, in all questions […] regarding […] marriage […] the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat).

Whether it is an anomaly in the law or a deliberate omission, empirical evidence clearly exposes the futility of the 1929 Act in restraining child marriages. As per UNICEF, Bangladesh has the highest rate of marriage comprising girls below the age of 15 and the

48 ibid.
50 Muslim Personal Law (Shariat) Application Act 1937, s 2.
second-highest rate of child marriage in the world, behind only Niger.\textsuperscript{51} This translates to one in every three girls being married off before 15, and two in three girls being married off before they reach 18, the ostensibly legal age of marriage. Far from tackling this epidemic, on 15 September 2014 the Cabinet of Bangladesh had accepted the language in the draft Child Marriage Restraint Act 2014 which sought to lower the minimum age of marriage from 18 to 16 years for females. The State Minister explained that the change was to accommodate ‘special circumstances’ such as ‘when a [minor] girl elopes with a man and refuses to return or becomes pregnant before marriage’.\textsuperscript{52} Notwithstanding the minister’s reasoning, the proposal was met with huge outcries and protests by activists, human rights organisations, and the international community, and the matter was (momentarily) set aside as a result.

At the time of writing, the Cabinet of Bangladesh has just accepted the draft bill of Child Marriage Restraint Act 2017. Welcomed changes in the Act include a necessary increase in the prison sentences and fines found in the 1929 Act for those facilitating or solemnising child marriages. The Act even introduces punitive punishments for minors willingly engaging in marriage, which include detention and fines. While the age of marriage remains unchanged, crucially the Act allows girls under 18 to be married under ‘special circumstances’ with parental and judicial consent.\textsuperscript{53} The Cabinet Secretary explained that the minimum age would be relaxed in special cases ‘for the sake of honour – in case of a girl getting accidentally or illegally pregnant’\textsuperscript{54} This reasoning is clearly echoing the logic previously used by the State Minister in support of the failed 2014 Act. Bangladesh enacting such a law marks a historic step backwards in the fight to eradicate child marriage – something its government has repeatedly pledged to do. Explicit non-recognition of child marriages in conjunction with the existing provisions in the 1929 Act would arguably have been the strongest and most effective restraint. Despite staunch opposition from most, this new law has been well received by ‘Islamist’ organisations and figures, such as the increasingly influential leader Hefazat-e-Islam, who went as far as to say ‘in the eyes of Islam, this is the correct decision’.\textsuperscript{55} Thus, it will be argued in the following paragraphs that legislation finally outlawing minor marriages will certainly not be an affront to Islamic law, rather, justifications for reform can be found well within the rubric of Sharia.


\textsuperscript{54} ibid.

II. Reform based on Maqasid Al Sharia and Maslahah

Again, it must be stressed that minor marriages are merely mubah, which is religiously value neutral. Hence, this crucially renders the scope for reform to be substantially higher in comparison to issues which are fardh (e.g. prescribed shares of inheritance), mandub (e.g. charity), makrooh (e.g. divorce), or haram (e.g. murder). While the maqassid al sharia is the philosophy on which the justifications for reform can be based, ijtihad (exertion of juristic effort) is the methodology encompassing the different legal tools that can be used to implement these reforms, and hence, fulfill the maqassid. The law has to prohibit that which promotes harm and protect that which procures benefit for Muslims in this world and the hereafter. Plainly speaking, these are the maqassid al sharia.\(^{56}\) Maslahah literally means public benefit or interest.\(^{57}\) It qualifies as maslahah mursalah (considerations of public interest) when it is not regulated or restricted by the Qur’an, Hadith, or ijma (universal consensus).\(^{58}\) That maslahah changes over time and the enactment of the same rule may be beneficial at one point in time but harmful at another is perhaps best understood with the issue of minor marriages. At least since the 11th century, Islamic jurists consider maslahah to be the embodiment of the maqassid.\(^{59}\) To Al-Ghazali, the maqassid comprise of protecting the five cardinal values: religion, life, intellect, lineage, and property. Hence, any action which secures these values falls within the scope of maslahah, and any measure which infringes them is mafsadah (evil). Islam abolished certain types of marriages that went against the maqassid such as marriage by purchase, marriage by exchange, marriage by inheritance, and wife-lending, all of which were derogatory to the status of women.\(^{60}\) Minor marriages remained permissible as they posed no such threat towards the maqassid, instead producing the aforementioned social benefits.

Today, this otherwise permissible form of marriage produced serious harm for the females, the kind of harm Islam strove to eradicate upon its advent. Serious health issues as direct results of child-marriages include, but are certainly not limited to, ‘gynecological problems due to early childbirth, a higher risk of cervical cancer, and a higher risk of suicide and other mental problems such as depression and anxiety’ (life).\(^{61}\) Underage pregnancy consistently ranks among the main causes of death for girls in the developing world, where child marriage is especially prevalent.\(^{62}\) Furthermore, these young girls are usually met with the burdensome duties of an adult wife and homemaker imposed upon them, which often results in their being deprived of a proper education.\(^{63}\) This in turn ‘reduces girls’ employment options to cooking, cleaning, and having babies’ (intellect).\(^{64}\) Underage motherhood can go on to jeopardise the lives of the minors’ own offspring.

\(^{57}\) ibid.
\(^{58}\) ibid.
\(^{59}\) Felicitas Opwis, ‘Maslaha In Contemporary Islamic Legal Theory’ (2005) 12 Islamic Law and Society.
\(^{60}\) ‘Ati (n 5).
\(^{61}\) Bowden (n 11).
\(^{62}\) UNICEF(n 33).
\(^{63}\) ibid.
\(^{64}\) ibid 5.
(lineage), for how can a child suffering from demonstrable harm be expected to look after another child as a mother?\textsuperscript{65} Child brides, by virtue of their underdeveloped pelvises being more prone to obstructed labour, tend to contract obstetric fistula. This is a health complication which causes the reproductive organs, rectum, and bladder to split, jeopardising the life of both mother and child.\textsuperscript{66} The injustice does not end there. Yazbak highlights instances where minor girls are given into marriage so the father can use her dower to pay off a debt, to arrange a son’s marriage or simply ‘pocket the money himself’ can and have happened.\textsuperscript{67} Such practices are plainly misusing the dower of the bride (property), a portion of wealth that should rightfully have been for her own exclusive use. Additionally, Bowden identifies the much larger problem of repressive regimes like Taliban universalising and misconstruing a particular action (marriage to Aisha) of the Prophet for the purposes of ‘islamising’ their unjust policies, such as, inter alia, the commodification of child brides.\textsuperscript{68} As the author ingeniously goes on to suggest, the Prophet’s marriage to Aisha (with consummation being delayed until she turned nine and reached puberty) should be used to promote the underlying rationale behind it: that of setting a minimum age for licit sexual intercourse.\textsuperscript{69} Taken together, the unjustified suffering by these minor girls and potential for corruption on part of the guardians and repressive regimes, severely endangers the inherent spirit of justice that is embedded within Islamic law (religion).

The continued practice of minor marriages without any restriction arguably passes on all five counts laid by Al-Ghazali as to constituting a mafsadah, and these reforms are an essential step towards maslahah by ensuring these threats are averted and these archetypal Islamic values secured. This is why one of the greatest Caliphs of all time, Umar like Al Ghazali, was such a staunch advocate of focusing on the spirit of the law rather than the letter itself. His suspension of the theft penalty during a period of famine based on darurah (necessity) and modification of the punishment for conspiracy of murder based on maslahah are too well known in the realm of Islamic scholarship to need further elaboration. They were fully cognisant of the fact that while the maqasid are timeless, the rules and practices that facilitate their attainment are not. If we trick ourselves into obsessing over the letter of the law rather than its spirit, not only do we risk reducing the inherently evolutionary nature of Islamic law to monolithic rigidity, but we also allow it to obscure our notion of the very purpose of the Sharia itself.

III. Other Tools for Reform

Even if minor marriages produced any benefit to society today, the general principle of Sharia is such that the prevention of harm takes precedence over the procurement of benefit.\textsuperscript{70} Thus, plausibly, not only are these reforms well within the scope of being

\textsuperscript{65} ibid 6.
\textsuperscript{66} UNICEF(n 33) 39.
\textsuperscript{67} Mahmoud Yazbak, 'Minor Marriages and Khiyar Al Bulugh In Ottoman Palestine: A Note Of Womens’ Strategies In A Patriarchal Society’ (2002) 9 Islamic Law and Society.
\textsuperscript{68} Bowden (n 11) 4-7.
\textsuperscript{69} ibid.
\textsuperscript{70} Kamali (n 21).
justifiably abolished under Islamic law, but to not abolish them and allow for the resulting harm to persist would be tantamount to being contrary to Islamic law. The legislators adopting these reforms themselves proudly claim to be doing so in the name of Islam, and rightly so. For example, the Moudawanna very aptly asserts that it ‘eliminates discrimination against women, protects the rights of children and preserves men’s dignity’. Moreover, ‘Abd al-Wahhab Khallaf considered the stipulation of a minimum age of marriage to be an example of a ruling based on maslahah mursalah, as no textual authority can be found on a minimum age of marriage.\textsuperscript{71}

*Sadd al-dhara‘i* is a tool of interpretation that is harmonious with maslahah and can also be used to endorse our justification. This tool entails the prevention of an expected illegal result (for example, harms resulting from minor marriages) which can possibly arise if the legal means (minor marriages) towards it is not also not prevented. Moreover, it must be stated that there is no *ijma* on the permissibility of minor marriages even within classical *fiqh* as a significant minority considered it to be impermissible.\textsuperscript{72} This can then be arguably seen as an issue of *ikhtilaf* (disagreement). Johansen argues that, as long as the deductions of the scholars differ, their *ikhtilaf* warrants the derivation of legal norms (and hence, legislation) on the basis of each scholar’s respective *ijtihad*.\textsuperscript{73}

Notwithstanding all the arguments in favour of abolishing minor marriages using Islamic law principles, the doctrine of *siyasah shar‘iyyah* (administrative and policy regulations) allows us to go even further. This is because the doctrine itself admits the need for, and the validity of, extra-*shari‘a* rules which cannot themselves be subsequently regarded as a departure from any established paradigm.\textsuperscript{74} Interestingly, *siyasah shar‘iyyah* is seen as being largely contemporaneous with the dictates of *maslahah*, as it widens the discretion of judges and lawmakers. As Ibn Qayyim stated “*siyasah shar‘iyyah* comprises all measures that bring people close to beneficence and move them further away from corruption even if no authority is found for them in Divine revelation”.\textsuperscript{75}

**Conclusion**

Over the course of this essay, several things have become clear. Minor marriages have generally been permissible under classical Islamic law. However, minor marriages as they are currently practiced in Muslim countries stands in stark contrast to the type which gained permissibility from classical *Sharia* and transgresses the *maqassid al Sharia*. While the *maqassid* remain the same across time, laws that facilitate their fulfilment are susceptible to change. Through utilising the pluralistic richness of *fiqih*, minor marriages must be categorically abolished in Bangladesh to truly adhere to the everlasting spirit of the *Sharia*, or that ‘God does not wish to impose any hardship’ upon people.

\textsuperscript{71} Opwis (n 58).
\textsuperscript{72} Baderin (n 1).
\textsuperscript{73} Baber Johansen, *Contingency in a Sacred Law: Legal and Ethical Norms in the Muslim Fiqh* (Brill 1999).
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The Shortcomings of Family Mediation and Restorative Justice Proceedings

Serene Reza

This paper aims to examine the range and validity of critiques in family mediation and restorative justice proceedings. Written as part of an undergraduate module on Alternative Dispute Resolution (ADR), it addresses several criticisms that ADR has faced alongside its growing prominence in recent years. Using family mediation and restorative justice as the means by which to contextualise these criticisms, the article explores three major critiques: a lack of impartiality, power imbalances, and finally, informality that leads to injustice and uncertainty. Each analysis is explored discreetly, as well as in the two chosen mediatory contexts, and subsequently evaluated and compared with the adversarial system. The article arrives at the conclusion that each critique is intrinsically linked to the next, and, moreover, many of the advantages of family mediation and restorative justice also contribute to the perceived disadvantages. The paper strives to demonstrate that choosing to undertake a specific form of ADR is dependent on the individual’s sense of personal justice and how they are looking to attain it.

Introduction

Modern Alternative Dispute Resolution (‘ADR’) processes largely comprise of arbitration, collaboration, negotiation, conciliation, and mediation. These subspecies of the larger ADR genus have obtained global recognition in recent decades, with growing prominence in both legal practice and academia.

The reasons behind the growth of ADR are several. Factors such as the increased delay and expense in the adversarial system following legal reform, as well as worldwide Access to Justice movements have significantly contributed. In some cases, a resistance towards courts and their perceived generalist solutions has also developed. This increasing prevalence of ADR has been met with tremendous support in some instances, though it has also engendered a plethora of criticisms. This article addresses criticisms of mediation in particular, which is defined by Folberg and Taylor as:

1 Simon Roberts and Michael Palmer, Dispute Processes, ADR and the Primary Forms of Decision-Making (2nd edn, CUP 2005).
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A process by which the participants, together with the assistance of a neutral third person or persons, systematically isolate dispute issues, in order to develop options, consider alternatives and reach consensual settlements that will accommodate their needs. Mediation is a process which emphasises the participants' own responsibilities for making decisions that affect their lives.

Family mediation and restorative justice are subsequently explored as the examples through which to evaluate the validity of certain critiques - namely, a lack of impartiality, imbalances of power, and uncertainty due to the informality of the process.

Family Mediation

Mediation in family law contrasts greatly with the proceedings found within a court of law, but operates within similar constraints, including but not limited to the 'paramountcy principle' of child welfare. The ideal of disputing parties attempting to 'solve things for themselves if they can' has resulted in a move towards facilitating out-of-court settlement procedures in recent years.

Mandatory mediation has largely been effectuated through the Legal Aid, Sentencing and Punishment of Offenders Act ('LASPO') 2012 and the restrictions on acquiring legal aid prescribed therein. The Children and Families Act 2014 further supplements LASPO by requiring applicants in family cases to attend a Mediation Information & Assessment Meeting ('MIAM'), aimed at helping disputants understand the nature of their conflict, thereby determining whether mediation is the appropriate course of action.

Restorative Justice

The term 'restorative justice' is utilised predominantly within the area of criminal law. There is no consensus as to its exact definition. For the purpose of this article, the following definition will be assumed:

[Restorative justice] encourages those who have caused harm to acknowledge the impact of what they have done and gives them an opportunity to make

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3 Children Act 1989, s 1.
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reparation. It offers those who have suffered harm the opportunity to have their harm or loss acknowledged and amends made.\(^5\)

It becomes evident from this explanation, and other variations,\(^6\) that the focal points of restorative justice are twofold: the first being the achievement of some form of reparation for the victim; and the second, the encouragement of the offender to take responsibility for their actions so as to invoke a change in attitude that will prevent the individual from re-offending. Moreover, the rise of restorative justice, and the concept of reparation rather than retribution, is indicative of a shift in conventional understandings of fairness.\(^7\)

Restorative justice can encompass a broad range of ADR procedures. These can be broadly split into direct and indirect victim-offender mediations, as well as community conferences,\(^8\) all of which fall under Folberg and Taylor’s definition of mediation.

A Lack of Impartiality

The concept of impartiality is multifaceted. A mediator is expected to operate without prejudice, which is defined in psychological terms as ‘an aversive or hostile attitude toward a person who belongs to a group, simply because he belongs to that group’.\(^9\) It becomes the mediator’s duty to ensure their preconceived notions about the disputant parties, or indeed their case, do not have any bearing on the proceedings or outcome of the mediation. A failure in this capacity is frequently used to denounce mediation.

An argument in favour of the adversarial system arises here. Within a court of law, there exist constraints and regulations that bind the judge, limiting subjective input and thereby facilitating impartiality. Delgado et al. note:

Many judges are appointed for lengthy terms, in some cases for life, and are to that extent freed from having to be politically responsive in their decisions. Moreover, when a judge is appointed he or she agrees to apply an existing system of rules. The simple act of applying rules reduces bias.\(^10\)

Similarly, the appointment of jurors is restrained. In the United States, for example, the doctrine of *voir dire* allows for the parties, their counsel, and the judge to remove jurors on

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the basis of prejudice, an infinite number of times. The confidentiality necessary in mediation makes a similar process for vetting a mediator extremely difficult. Social psychologists suggest that once a prejudiced person realises that their views differ from the surrounding norms, they are likely to change their behaviour to conform. The adversarial system can therefore be said to encourage the formation of a ‘public conscience and a standard for expected behaviour that check overt signs of prejudice.’ By contrast, the significantly more private setting of mediation does not provide an avenue for these checks to be undertaken.

There are ways that a mediator may seek to mitigate biases that arise. Bush puts forth a compelling argument in favour of what he coins ‘active impartiality’, stating mediators should direct actions and interactions toward both parties equally, and express to parties the importance of consistent behaviour. This makes it easier to attain and retain the trust of the disputants, and by consequence, explore a wider range of mediatory techniques. This is especially true if being fully impartial is not compatible with the context in which mediation is utilised.

The following two sections evaluate the validity of a lack of impartiality as a critique within the areas of family mediation and restorative justice.

I. In Family Mediation

Impartiality has been recognised by Marion Stevenson, a leading mediator, as one of three key guiding principles that a family mediator must consider. However, it can be said that ‘pure’ impartiality is a virtually impossible feat to achieve within the context of family law. For a mediator in this area to gain an accurate representation of events, an element of connection with the disputants is required and this cannot be achieved without some exposure to each party’s narrative. As such, Bush’s aforementioned solution of active impartiality could effectively reduce biases without sacrificing the personal interaction that is characteristically necessary in family mediation.

Even if the mediator does not impose his or her views directly, indirect suggestions may bear some influence. Furthermore, summaries of disputants’ dialogue are written from the

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11 Ibid.
12 Ibid.
13 Allport (n 10), 470-471.
15 Ibid.
subjective perspective of the mediator. Through language selection, or in the case of omissions, a lack thereof, such documents become reflections of what the mediator assumes to be relevant, and may not accurately portray the nuances of communication between the parties.18

In cases concerning children in particular, the subjective nature of mediation in the context of family law may mitigate what appears to be a legislative bias in favour of mothers. This is especially true in cases concerning parental responsibility and the associated court orders, as only mothers and their husbands are given automatic legal parental responsibility.19 Further steps must be taken should an unmarried father of a child, for example, wish to acquire parental responsibility. Mediation before litigation may thus allow these fathers to reach a private agreement - a ‘parental responsibility agreement’20 - which confers rights to the father without court involvement, thereby reducing the need for costly court proceedings. This also makes legislation including the Children & Families Act 2014, which codified a presumption of parental involvement in a child’s life, more enforceable by way of private ordering. Moreover, as aforementioned, family mediation must also operate bearing in mind the welfare of any children involved in the matter. Thus, inter-party bias aside, a mediator will commence proceedings with a heightened interest in the child’s needs, and disputing parents may therefore be placed in a relatively unfavourable position. Hence, although partiality within family mediation is to an extent, inevitable, it cannot be said that courts and the law act without their own preconceptions.

II. In Restorative Justice

The impartiality critique progresses further within the context of restorative justice. Firstly, there arises the issue of differing definitions of impartiality, and discrepancies across restorative justice, exempli gratia within Youth Offending Teams. Rosenblatt states the following:

The impartiality set out in international legislation on restorative justice and adhered to by restoravists is not the impartiality of community representatives, but the impartiality of mediators … or facilitators.21

This highlights another key issue: who should take on the role of mediator in restorative justice proceedings? Standards of restorative practice such as the guidelines provided by

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19 Children Act 1989, s 4.
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the Youth Justice Board in England and Wales stress the requirement of impartiality. Whilst critics of family mediation suggest that a mediator cannot be fully impartial, a strong argument regarding restorative justice goes against aforementioned standards, proposing that a mediator should not be. Essentially, the idea behind this is that if the goal is rehabilitating the offender, and restoring order to the community, an understanding of the associated societal norms is vital. By this logic, a community representative, rather than a trained objective mediator would be the obvious choice.

Developments in South Africa are a prime example of evidence in favour of this view. The Truth & Reconciliation Commission was established in 1995 to restore a nation quite literally divided by the Apartheid regime. This article does not delve into the intricacies of the Commission, but rather notes that a key critique it faced was related to the objective approach it employed. Impartiality was paramount when selecting commissioners, and thus, deciding offenders' punishments was seen as a top-down approach by some academics, rather than that of a community seeking to restore justice. This concern has been accommodated in subsequent South African restorative justice proceedings, including the Zwelethemba model, a hybrid of restorative and transformative procedure with a focus on the future rather than the past. Pali and Pelikan note:

... the model resists the idea of a solution being crafted by an impartial outsider. The authority for sorting things out in this model is not an outside authority, who impartially decides what is right and what should be done. Rather, the model insists that resolution comes from inside the community and that it arises as a consequence of deliberation. This is very different from other models in general, where impartiality and neutrality are heavily emphasised.

The success of the Zwelethemba model, in spite of rejecting outsider contributions, suggests that impartiality is not a prerequisite for the success of mediation, particularly within restorative justice. This, in turn, decreases the validity of impartiality as a critique of ADR.

Power Imbalances

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23 The Promotion of National Unity and Reconciliation Act 1995 (SA).
24 Ibid s 7(2)(b).
27 Ibid 152.
Outcomes of all party-versus-party exchanges ‘will reflect to some extent the bargaining endowments of different parties.’\(^\text{28}\) In his seminal article ‘Against Settlement’, Owen Fiss criticises ADR for enhancing these power inequalities.\(^\text{29}\)

Fiss proposes a situation in which the structure and relatively informal nature of mediation can indirectly coerce a poorer party to accept a lesser settlement than they could otherwise obtain. Where there is an obvious disparity in power, an indigent party can be disadvantaged in terms of acquiring a range of necessary resources. They may be able to afford less, or no, legal advice. This could prevent them from amassing and evaluating relevant legal information. In this instance, the impoverished party will find themselves disadvantaged during the bargaining stages of mediation.\(^\text{30}\) Fear of no longer being able to fund the mediation may cause poorer disputants to agree hastily, potentially accepting unfavourable terms. Additionally, an urgent need for the money from settlement may drive them to prematurely reach an agreement to collect damages faster. Even in the absence of an economic disparity, power imbalances may arise due to the relative ability of each party to effectively communicate their needs.\(^\text{31}\)

Mediators may attempt to offset power imbalances or reduce the effect they have on mediation proceedings. There is little accord as to how this should be done,\(^\text{32}\) particularly bearing in mind the principle of neutrality in mediation. Fiss believes taking institutionally-initiated mitigation steps is futile.\(^\text{33}\) At face value, it appears this view has some merit. This is especially true when considering the presence of a judge, who may be able to supplement presentations put forth by parties and their counsel. Thus, in many courtroom cases, a lawyer-client relationship can minimise power discrepancies as the solicitor or barrister act and speak for the party they represent.

However, Fiss fails to account for the inequality of power that may arise through other means. Firstly, power dynamics may be in flux between a client and their counsel as a result of the lawyer’s ability to relay information in a manner that is comprehensible to the client.\(^\text{34}\) Additionally, whilst the direct disputant-versus-disputant imbalance may be reduced in courts, it has the potential to be replaced by an imbalance of power between the parties’ representatives based on their respective levels of experience, their knowledge of the judge and other factors.\(^\text{35}\) It can therefore be argued that adjudication does not remove power imbalances, but merely transfers them.

\(^{28}\) Roberts and Palmer (n 2) 200.  
\(^{29}\) Owen M Fiss, ‘Against Settlement’ [1984] 93 YLJ 1073.  
\(^{30}\) Ibid.  
\(^{31}\) Myers and Wasoff, ‘Meeting in the Middle’ [2000] 33 SLT 259.  
\(^{32}\) Roberts and Palmer (n 2) 200.  
\(^{33}\) Fiss (n 30).  
\(^{34}\) Myers and Wasoff (n 32).  
\(^{35}\) Ibid.
The upcoming sections examine the extents to which this is true within family law and restorative justice, as well as addressing any other context-specific discrepancies in bargaining force.

I. In Family Mediation

Power imbalances are prevalent throughout family conflicts, fuelled by ‘differences in income, social background and personal stamina that tend to be covered up rather than overcome.’

Furthermore, within family disputes, parties are generally well-known to one another. Thus, one party opting to capitalise on what or who they know can disadvantage the opposing party during negotiations.

Herring notes the example of a divorce mediation where ‘one party is a trained accountant and the other party has an aversion to figures’. If these parties were to then discuss the division of household finances, the parties’ prior experiences could contribute to a power imbalance. As previously mentioned, negotiation capabilities serve useful in meeting one’s needs. If one party is aware of the other’s reservations in this area, this can be used to their advantage.

It has been suggested that, in spite of the different forms in which power inequalities manifest themselves, the trend is that women are the disadvantaged party. A key example is households where domestic violence has been present, where women are often the abused party. The abuse itself may not bar mediation, however, several factors surrounding it may be taken into account when determining whether mediation is the appropriate course of action. In spite of organisational steps taken to offset a power imbalance of this nature, many parties do not disclose abuse they have endured, nor do they feel they were adequately protected throughout mediations. This undermines the efficacy and reliability of mediation as a means of reaching a mutually desired result.

Some argue that women have been societally conditioned to feel less comfortable with conflict than men, and therefore reach agreement sooner so as to avoid further conflict. Additional psychological arguments include the higher susceptibility of women to depression following the breakdown of a relationship, which arguably, may reduce their

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37 Herring (n 21) 56.
38 Myers and Wasoff (n 32).
39 Ibid.
41 Myers and Wasoff (n 32).
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ability or willingness to negotiate, thus resulting in a power disparity. These arguments, however, are likely prone to both geographical and temporal variation, and cannot be accepted as fact. Further surveys have suggested that women prioritise the needs of others, including their former partner’s and children’s, over their own during family mediations and are more easily influenced by normative values. This, to an extent, is in accordance with the feminist critique proposed by Grillo, who is of the view that ADR systems do not fix damage done in the past but merely ignore them and move onwards, incorrectly assuming an even power distribution along the way and ultimately worsening the divide. She states that:

...forcing unwilling women to take part in a process which involves much personal exposure sends a powerful social message: it is permissible to discount the real experience of women in the service of someone else’s idea of what will be good for them, good for their children, or good for the system.

However, English and Welsh law makes MIAMs mandatory, but does not impose an obligation on parties to solve their disputes via mediation. This critique is likely invalid with regards to voluntary mediations, although levels of coercion are not easily quantified. Indeed, research does not suggest that women felt particularly disadvantaged by family mediation proceedings, and as such, it is debatable whether a male-female power imbalance exists in this area.

Family mediation creates an environment in which certain imbalances of power can be exacerbated by the intimate relationship parties may have or used to have, supporting the idea that power imbalances undermine the efficacy of mediation as a means of dispute resolution. Moreover, the idea that this gives rise to further criticism such as that proposed by Grillo is more unlikely, as the elective nature of mediation cannot be said to force parties - female or male - to participate.

II. In Restorative Justice

Perhaps the largest concern with regard to power imbalances in restorative justice is the perpetuation of the victim-offender dynamic. Exposing the affected person to the wrongdoer could prove traumatic for the former, and amplify a pre-existing discrepancy in personal power.

43 Susan Tilley, ‘Recognising Gender Differences in all Issues Mediation’ [2007] 37 Fam Law 352.
45 Joan B Kelly and Mary A Duryee, ‘Women’s and Men’s Views of Mediation in Voluntary and Mandatory Mediation Settings’ [1995] 30 Fam Concil Courts Rev 34.
In cases of violent crime, a mediator lacks the ability to alter past events and subsequently, the fact that one party has more power than the other as a result of the trauma inflicted, becomes unchangeable.\textsuperscript{46} Mitigatory and assessment measures\textsuperscript{47} may prove effective when forging ahead with restorative justice mediations, but in practice, they fail to minimise existing power imbalances created through the harm inflicted by the offender.

This risk of reminding victims of previous harm makes Grillo’s feminist critique\textsuperscript{48} particularly relevant, that restorative justice proceedings arguably force normative values of restoration and acceptance on the female victims of violent or sexual crime. This is especially true when considering mandatory restorative justice proceedings; however, as with family law, it is unlikely to still be the case when the victim herself has opted to participate in restorative justice. More generally, using the Truth & Reconciliation Commission of South Africa as an example, restorative justice proceedings can potentially exploit a victim’s suffering in order to turn a case into a public example.\textsuperscript{49} This exploitation in both large and individual-scale restorative procedures could in fact increase power imbalances before seeking to improve them, and ‘a victim may come out of the restorative process feeling more harmed.’\textsuperscript{50}

\textbf{Informality Leading to Uncertainty and Injustice}

The confidential nature of mediation denies disputants knowledge of how issues similar to theirs have been resolved previously. This contrasts starkly with the doctrine of \textit{stare decisis} and the importance given to precedent in common law countries. Silver argues that mediation results in no lasting social impact as too much focus is given to the individual rather than the community at large.\textsuperscript{51} Furthermore, the relative informality of mediation proceedings often leads to accusations that it lacks the systematised checks and balances associated with adversarial system.\textsuperscript{52}

It is, however, frequently argued that the defining principle of mediation is to ensure that parties find a solution to their \textit{personal} issue, rendering the outcomes of previous similar

\textsuperscript{46}Tilley (n 44).
\textsuperscript{47}Myers and Wasoff (n 32).
\textsuperscript{48}Grillo (n 45).
\textsuperscript{52}Gay Clarke and Iyla Davies, ‘ADR — Argument for and Against Use of the Mediation Process Particularly in Family and Neighbourhood Disputes’ [1991] 7 QUT Law Review 81-95.
disputes irrelevant.\textsuperscript{53} Moreover, mediators often employ an element of ‘reality testing’, which often has rooting in social norms. The symbiotic relationship of the law and societal conventions becomes relevant here, as the reality-testing utilised in mediations is likely influenced by the law to a certain degree and cannot be said to be completely devoid of it.\textsuperscript{54} As De Sousa Santos points out, applying ‘the law’ may not even be necessary; in cultures where ADR is more prevalent than an adversarial system, local authorities rely solely on normative values to maintain order.\textsuperscript{55}

Nader posits that ‘disputing without the force of the law is a lost battle.’\textsuperscript{56} Whether this is applicable within the contexts of family mediation and restorative justice is addressed in subsequent sections.

I. In Family Mediation

Mediation’s focus on individual, subjective justice can be viewed positively in family law. This \textit{ad hoc} approach is more conducive to achieving the disputants’ goals whilst also upholding legal standards, as mediation is more accommodating of the unique situation of families than the characteristically top-down nature of a court of law. The House of Lords has stated that many family cases will have several appropriate solutions and there is no strictly correct or incorrect answer.\textsuperscript{57} Mediation thus facilitates exploration of these options. Indeed, if there is no right or wrong decision to be made, then the layman is just as qualified to reach it as a court, meaning that informality is of no consequence to the outcome of the case.\textsuperscript{58} The appropriateness of state involvement in a private family dispute should also be considered. A court decision may strive to protect the interests of the state or a third party, and prioritise these interests over those of the disputants.

Criticisms arise over the paramountcy principle of child welfare, particularly with regard to divorce mediations. Although there is no distinct authority to ensure children are protected in mediation, judicial interpretation of legislation may also vary. Thus, it must be shown that a judge will understand a child’s needs better than the child’s parents in order to validate the idea that courts safeguard children more adequately than ADR.\textsuperscript{59} The appropriateness of adjudication can also be questioned in cases concerning domestic violence. Here, solicitors may often use traumatic, personal accounts as a ‘trigger to

\begin{thebibliography}{9}
\bibitem{53} Ibid.
\bibitem{54} Ibid.
\bibitem{56} Laura Nader, ‘Disputing Without the Force of the Law’ [1979] 88 YLJ 998.
\bibitem{57} Piglowska v Piglowski [1999] 2 FLR 763.
\bibitem{58} Herring (n 21) 52.
\bibitem{59} Ibid.
\end{thebibliography}
action’ in an effort to antagonise the opposition or further the court’s agenda. Mediation provides a more intimate environment with minimal external intervention and the promise of confidentiality, thereby limiting privacy violations.

Another major issue is the varying understanding of ‘justice’ between mediators and solicitors. Wasoff and Myers studied solicitors’ and mediators’ divorce practices, and note that family courts and lawyers are more results-driven than process-driven, stating that ‘for solicitors, the law and the interpretation of the law by the courts was their lingua franca of negotiations.’ Contrastingly, mediators extended notions of fairness to include the parties’ treatment of one another, as well as the cultivation of a respectful environment, rather than simply the arrival at a positive outcome. To state that the informality of mediation acted to the detriment of disputants would therefore be an unfair assessment as the processes are entirely different. Such an evaluation would depend on the individual preferences and respective endgames of the parties. Satisfaction with post-mediation outcomes is considered by some scholars to be just enough, whilst others denounce mediation’s lack of legislative grounding in considering its ability to uphold justice and the rule of law.

Although there exists a ‘tension for mediators between a […] non-legalistic philosophy and the need to work within the law,’ family mediations often utilise law and legal norms as benchmarks around which to structure informal proceedings. Similarly, law works as a normative and moral authority for solicitors as well. Thus, ADR processes may invoke the courts. Strategic invocation can be used as a persuasive tool, although frequently, court proceedings can signify a mediator’s loss of control over the parties and create avertable conflict. This contradicts the idea of a subjective fairness for the disputants rather than an objective overarching fairness, leading to less situational certainty for the disputants. Mnookin supports this viewpoint by stating that family mediation, specifically divorce, operates ‘in the shadow of the law’. This is because elements of the adversarial system found within divorce mediation, as well as the looming possibility of invoking court proceedings in the event of a failure of ‘private ordering’.

Furthermore, Nader’s view can, within the context of family law, be refuted. The concepts of uncertainty and fairness are very much dependent on what disputants are seeking to achieve through their chosen course of action. The view that ADR’s relative informality contributes to uncertainty can be viewed as over-simplistic. Whilst mediation lacks the rigidity provided by stare decisis, this, to some disputants, is the appeal of an adaptable and confidential form of dispute resolution. The option to choose between the two systems

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60 Myers and Wasoff (n 32).
61 Ibid.
62 Clarke and Davies (n 53).
63 Myers and Wasoff (n 32).
signifies an element of flexibility that can work in the favour of parties achieving their goals, whilst using the law as a benchmark in mediation allows for a rooting in socio-legal familial norms.

II. In Restorative Justice

The flexibility of restorative justice has undoubtedly contributed to its use in a variety of settings ranging from educational discipline to criminal law. Within the latter, an informal atmosphere allows both victim and offender to communicate freely in a safe space. However, this move away from the public nature of occidental criminal courts in favour of private proceedings detracts from principles of even-handedness, especially with regard to offenders. Without the doctrine of precedent, there is no means by which to ensure all offenders receive similar treatment for committing similar crimes.65 Having said this, as mentioned, restorative justice focuses on recognition and reparation for the victim and the accountability of the offender. This idea of the offender taking responsibility for his or her wrongdoing, and making amends, is generally accepted as ‘an essential element of complete justice,’66 and thus, it can be argued that restorative justice allows for the public perception of justice to be complied with even if it does not necessarily coincide with legislative agendas.

Tied to the concepts of fairness and justice is the notion of punishment. Restorative justice is more rehabilitative than retributive. Thus, a common criticism is that offenders are treated ‘softly’.67 Giving a voice to offenders as part of preventative steps against reoffending can often give rise to the misconception that restorative systems are extremely lenient relative to adversarial ones. In spite of this, the adversarial system is not any more effective at preventing re-offence than restorative justice, and in many ways, the latter is a more difficult procedure for offenders to undertake.68 Offenders are expected to take an active role in making reparations to the victim and acknowledging the harm or loss they have suffered.69 Indeed,

Punishment works most effectively when carefully measured and accepted by all parties […] as appropriate. Restorative programmes allow for a more flexible approach to sanctions in order to maximise their relevance for all […] Their more prevalent adoption may reduce overall punitiveness in favour of more effective reduction in the harm done and reoffending.70

66 Ibid.
67 Ibid.
68 Ibid.
69 Liebmann (n 9).
70 Marshall (n 66).
A disconnect from legislative norms renders restorative justice very flexible. However, when contrasted with the adversarial system it cannot be deemed unjust simply because the process itself does not fulfil particular formalities. If true justice encompasses reducing an offender’s likelihood of recommitting a crime, then restorative justice is arguably more successful, due to its informality, as compared to its evidently formal adversarial counterpart.

Evaluation and Conclusion

It has been said that ‘often the advantages of mediation also contribute to the disadvantages.’ As an example, the confidentiality and informality of mediation that many disputants actively pursue also invites criticism for promoting a lack of certainty and a disconnect from public law and scrutiny. There are intrinsic links between several of the criticisms of mediation as well. For instance, a mediator’s lack of impartiality could enhance existing power imbalances if they are seen to lean in favour of the more powerful party. Further, mediation’s lack of checks and balances could reinforce existing power dynamics during the mediation process. The inability to fully separate some of these criticisms from one another likely contributes to why ADR receives a disproportionate amount of disparagement relative to formal legal procedure.

An alternate view is that in trying to decrease the scope for certain faults, mediators will invite others, which is especially relevant to impartiality. Whilst having a bias could exacerbate power imbalances, assuming disputing parties can and should be treated equally could have the same effect. Thus, this author’s view is that a proportional approach should be taken, and mediators should tailor interactions based on existing power dynamics to ‘even the playing field’. For this reason, impartiality is, in this author’s opinion, the least valid criticism explored in this article.

In spite of the critiques put forth here, and others, mediation has on several occasions served as a valuable tool for dispute resolution. Family disputes that lack an unequivocally correct answer, and the ad hoc approach to achieving justice for victims and offenders alike in restorative justice proceedings, are well attuned to facilitated self-determination. This is much easier to accomplish when parties have an element of control over how negotiations proceed. As such, although the criticisms mediation has engendered are indeed remarkable, they are often oppositely applicable to court proceedings with equal credibility.

71 Clarke and Davies (n 53).
72 [1999] 2 FLR 763.
The coexistence of the adversarial system and ADR is vital to the achievement of personal justice. Those seeking to resolve disputes must conduct a balancing exercise in terms of what values they most wish to uphold, what they hope to gain from conflict resolution, and the shortcomings of the system they choose, as neither is truly without.
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Questioning the Constitutionality of the 99-year Lease Agreement Between Judicial Officers and the Government of Zimbabwe

Justice Alfred Mavedzenge

The 2013 Constitution of Zimbabwe guarantees the independence of judicial officers. To maintain the independence of the judiciary, the Constitution requires judicial officers to abide by certain standards of moral and professional conduct, listed in section 165.1 These include that judicial officers must be above reproach, and must not engage in conduct or any relationship that causes the appearance of impropriety in the eyes of a reasonable observer. A substantial number of judicial officers have been given land by the Government under the Fast Track Land Reform Programme. These judicial officers presently lease the land from the President under lease agreements which do not provide them with security of tenure because the President – in his capacity as the lessor – has the authority to repossess the land even after the lessee has made substantial investments in the land. This Article examines the impact of such lease agreements on the independence of the judicial officers who are the lessees. It also discusses the constitutionality of these lease agreements and suggests possible redress which Zimbabwean citizens may seek.

Introduction

Since 1999, the Government of Zimbabwe has embarked on a land redistribution exercise also known as the Fast Track Land Reform Programme. This exercise saw the Government compulsorily acquiring land, mainly land used for commercial farming by white farmers, and redistributing that land to black Zimbabweans. The land reform process created two farming models: the A1 and A2 models. The A1 model is for small-scale, subsistence farms, while under A2 farms are large commercial enterprises. The majority of judges that benefit from the land redistribution programme run commercial farms, and therefore lease the land under the A 2 model. Individuals who have acquired land under the A2 model lease said land from the President and Government on the basis of what is known as the ‘99-Year Lease Agreement’.

The Government has justified this programme of land redistribution as necessary for the purpose of correcting historical imbalances regarding access to and ownership of productive agricultural land in Zimbabwe.2 Whilst the statistics on the ratio of land ownership between black and whites remains a contested subject, there is no doubt that most of the commercially

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1 The Constitution of Zimbabwe, s 165.
2 Preamble to the 99-Year Lease Agreement.
productive land was in the hands of white farmers.\(^3\) This paper seeks to explore certain aspects of the land reform programme which have not been otherwise studied; the debate on the land reform has largely focused on whether the land reform was necessary or not. Sufficient attention has not been given to the implications of the programme on judicial independence - an important principle under the envisaged constitutional democracy that comprises the Zimbabwean state.

The Government and those in support of the land reform process argue that given this imbalance and the unwillingness of the white commercial farmers to share access to land equitably, it was necessary to embark on a more radical land redistribution process.\(^4\) Some of the critics of this process counter-argue that whilst land reform was necessary to achieve equitable access to the vital natural resource, the process could have been better conducted.\(^5\) They argue that the process was unnecessarily violent and chaotic; that it should have been planned better to realise the maximum socio-economic benefits of the land. They also argue that the process became less focused on economically empowering black Zimbabweans, and instead became focused on entrenching the ZANU-PF’s hold on political power.\(^6\)

This Article does not seek to examine the credibility or soundness of either of these two views. That debate has already been explored thoroughly by more competent scholars. We instead seek to analyse the impact of the 99-Year Lease Agreement on the ability of judges and magistrates (who benefited from the land reform process under the A2 model) to be independent when adjudicating matters which involve the President and Government. It also seeks to examine the impact that the 99-Year Lease Agreement has on the public’s confidence in the ability of the judges and magistrates to be impartial when adjudicating matters involving their landlord: the President and/or the Government. To achieve this purpose, the Article discusses the concept of judicial independence and how it has been entrenched in the 2013 Constitution of Zimbabwe. We then discuss the 99-Year Lease Agreement, pointing out the weaknesses of the agreement which have a negative impact on the capacity of judges and magistrates to be impartial and to be viewed as impartial by the public when they adjudicate in matters which involve the President and the Government. Finally, we consider the constitutionality of the 99-Year Lease Agreement, and examine opportunities for legal reform to enhance the independence of judges and magistrates who are leasing farms from the President and Government.


\(^4\) Moyo (n 3).


\(^6\) ibid.
This discussion is conducted in a legal context where the Constitution categorically requires judges and magistrates to always act independent of undue influence when exercising their judicial functions. In addition, it also specifically requires judges and magistrates to refrain from conduct and/or entering into any relationship which causes the public to view them as incapable of being impartial when adjudicating over matters.

**Duty to Act Independently and to Maintain a Public Image of Impartiality**

The principle of judicial independence is derived from Montesquieu’s separation of powers doctrine, which demands that power not be concentrated in a single organ of State but instead shared between the legislature, the judiciary, and the executive; with each of these three branches checking against abuse of power by the others. One of the roles of the judiciary in the separation of powers model is to ensure that the other two branches of the state comply with the law. The judiciary performs this function by adjudicating over the disputes that are brought before it by citizens or other organs of the state. In order to perform this function effectively, the judiciary must be an independent institution with independent judicial officers.

The concept of judicial independence has been explained in the Bangalore Principles of Judicial Conduct (2002) as a principle which requires a judicial officer to:

- exercise the judicial function independently on the basis of the judge’s assessment of the facts and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

Thus judicial independence requires a judicial officer to execute his or her judicial functions free from interferences and influences other than the law which he or she is supposed to apply.

Senior judicial practitioners such as Ismael Mohamed (the former Chief Justice of South Africa and Namibia) have summarised the essence of judicial independence as follows:

What judicial independence means in principle is simply the right and duty of judges to perform the function of judicial adjudication, through an application of

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9 ibid.
their own integrity and the law, without any actual or perceived, direct or indirect interference from or dependence on any other person or institution.\(^\text{10}\)

Thus, Mohamed views judicial independence as a principle which includes judicial integrity and impartiality. This view is also supported by Brazier\(^\text{11}\) who argues that judicial independence requires that, ‘in general the public must feel confident in the integrity and impartiality of the judiciary: judges must therefore be secure from undue influence and be autonomous in their own field’. Similarly, Lord Bingham\(^\text{12}\) makes the point that judicial independence includes judicial impartiality when he argued that:

Any mention of judicial independence must eventually prompt the question: independent of what? The most obvious answer is, of course, independent of government. I find it impossible to think of any way in which judges, in their decision-making role, should not be independent of government.\(\text{[But]}\) They must also, plainly, ensure that their impartiality is not undermined by any other association, whether professional, commercial, personal or whatever.

The Constitutional Court of South Africa, in the Certification case, affirmed the view that judicial impartiality is an element of judicial independence when it held that what is vital to judicial independence is that, ‘the Judiciary should enforce the law impartially.’\(^\text{13}\) The views of the Constitutional Court of South Africa – as a superior foreign court – have persuasive value in the Zimbabwean legal system.\(^\text{14}\) Therefore, the Court’s view that judicial independence encompasses judicial impartiality has persuasive value in a discussion on judicial independence in Zimbabwe. Therefore, there is a strong view expressed both in law and literature that judicial independence includes the values of judicial impartiality, integrity and propriety.

The principles of judicial integrity and propriety require judicial officers to ensure that their conduct is above reproach in the view of a reasonable observer,\(^\text{15}\) while impartiality is the idea that judicial officers must execute their judicial functions without favour, bias, or prejudice.\(^\text{16}\)

Mohamed, Brazier, and the Constitutional Court of South Africa are all correct to argue that the principle of judicial independence includes judicial propriety and impartiality as the concept of judicial independence rests on the ability of individual judicial officers to apply the law without fear, favour, or any bias when adjudicating a matter. Furthermore, it is necessary


\(^{11}\) Rodney Brazier, Constitutional Reform (3rd edn, OUP 1991) 172.


\(^{13}\) Certification of the Constitution of the Republic of South Africa [1996] ZACC 26, 1996 (4) SA 744 (CC) [123].

\(^{14}\) The Constitution of Zimbabwe, s 46(1)(e).

\(^{15}\) Bangalore Principles (n 8), art 3(1).

\(^{16}\) ibid, art 2(2).
for judicial officers to safeguard their integrity and to conduct themselves with propriety in order to safeguard their independence from sources which could take advantage of impropriety to influence the judicial officer’s decisions. Failure to safeguard judicial integrity and propriety undermines the confidence of the public in the independence of the judicial officer. Thus there is justification in viewing judicial independence as inseparable from the ideas of impartiality, propriety, and integrity because these are the values judicial officers must adhere to in order to safeguard their independence.\footnote{ibid, art 1.}

It is also important to note that judicial independence should be understood as twofold in nature. Firstly, it is explained as the ability of the individual judicial officer to be independent in fact; and secondly, it is the requirement to ensure that the public has confidence in the ability of a judicial officer to be impartial. This is clear in both Mohamed and Brazier’s explanations of judicial independence as the principle that the judicial officer must, ‘perform the function of judicial adjudication, through an application of their own integrity and the law, without any actual or perceived, direct or indirect interference...’\footnote{Mohamed (n 11).} and that the, ‘general public must feel confident in the integrity and impartiality of the judiciary’.\footnote{Brazier (n 12).} The Bangalore principles also underscore this view by requiring judges to be independent, impartial and conduct themselves with integrity both in fact and in appearance.\footnote{Bangalore Principles (n 8), arts 2(2), 3(1), 3(2), 4(1).} Thus at the international level and in literature, judicial independence is interpreted as the requirement to apply the law free of any influences, to act impartially with integrity and propriety both in fact and in appearance. The 2013 Constitution of Zimbabwe entrenches judicial independence in the same manner, as will be subsequently shown.

**The Constitution of Zimbabwe and the Independence of the Judiciary**

The Constitution of Zimbabwe guarantees the independence of the judiciary. The judiciary consists of the Chief Justice, Deputy Chief Justice, and all judges and magistrates who preside in all the courts established by the Constitution or any Act of Parliament.\footnote{The Constitution of Zimbabwe, s 163.} The Constitution defines judicial independence as the principle that, ‘the courts are independent and are subject only to [the] Constitution and the law which they must apply impartially, expeditiously and without fear, favour or prejudice’.\footnote{ibid, s 164(1).} Thus, in line with the Bangalore Principles, the Constitution entrenches impartiality as one of the values which must underpin the independence of the judiciary in Zimbabwe. Therefore, when exercising their judicial functions, all judges and magistrates in Zimbabwe are required to make their decisions impartially, without being influenced by anyone or anything but the law.
In order to protect the independence of the judiciary, the Constitution establishes certain principles and standards in section 165, which outlines the manner in which judges and magistrates execute their judicial mandate and conduct themselves outside of the courts.23 These include the principle that, ‘members of the judiciary must not solicit or accept any gift, bequest, loan or favour that may influence their judicial conduct or give the appearance of judicial impropriety.’24 In addition, the Constitution prescribes that, ‘Members of the judiciary, individually and collectively, must respect and honour their judicial office as a public trust and must strive to enhance their independence in order to maintain public confidence in the judicial system.’ These two principles require that judges must not only be independent and impartial when exercising their judicial functions but they must also appear to be independent and impartial. It therefore may be argued that the Constitution of Zimbabwe has domesticated both the Bangalore principles and the views of eminent scholars (Mohamed, Brazier) that judicial independence requires judges and magistrates to act independently in fact and to maintain a public image of independence. Therefore, it is not adequate for judicial officers in Zimbabwe to be impartial in fact but they must also cultivate the appearance of impartiality, which necessarily requires ensuring that their conduct in and out of court maintains and enhances the confidence of the public in the impartiality of the judge and of the judiciary as an institution. Furthermore, it is not enough for them to hold themselves with propriety in fact. Their obligation on judicial propriety stretches beyond that as they are required not only to avoid impropriety, but to also avoid any appearance of impropriety in the eyes of a reasonable observer.

There is a very important reason why the Constitution has required judicial officers to be independent both in fact and in appearance: judicial officers must inspire public confidence in their ability to act impartially when executing their judicial mandate, which includes adjudicating over legal disputes. Various reasons have been suggested both in case law and literature as to why it is necessary that the public must have confidence in the impartiality of judicial officers. In *Baker v Carr*25, Frankfurter J explains the rationale as follows:

> The Court’s authority ... possessed of neither the purse nor the sword ... ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.

Thus, it is suggested by Frankfurter J that for the judiciary to sustain its authority, its officers must hold themselves with high propriety and integrity to ensure that the public continues to render its confidence in their ability to protect the citizen’s rights, freedoms and other entitlements. Otherwise, when judicial officers become entangled in impropriety or the

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23 ibid, s 165.
24 ibid, s 165(5).
appearance thereof, the judiciary will lose its legitimacy in the eyes of the public. Frankfurter J’s view holds true in Zimbabwe, and has found expression in various provisions of the Constitution.

The Constitution prescribes that the supremacy of the Constitution and the rule of law should be the foundation of Zimbabwean governance. The preamble to the Constitution clearly affirms this commitment and section 165(1)(c) prescribes that one of the roles of the judges and magistrates is to safeguard and enforce the rule of law. In section 164(2), the Constitution acknowledges that, ‘the independence, impartiality and effectiveness of the courts are central to the rule of law and democratic governance’.

There is a nexus between the duty to uphold the rule of law and the need for judges to act independently and maintain a public image of independence at all times. It is necessary for judges and magistrates to maintain a public image of independence so that the public they serve will have confidence that the judiciary will always act fairly and on the basis of the law, without fear or favour. In section 69(3), the Constitution guarantees members of the public the right of access to the courts for the resolution of any legal dispute. If the judges and magistrates appear in any way partial, the public is likely to hesitate to come to the courts for the resolution of disputes because they lack confidence that their disputes will be resolved fairly, on the basis of the law, and without bias. When the public lacks confidence in the capacity of the judiciary to act impartially and fairly, there will be a break down in the rule of law. Any break down in the rule of law gives the public no option other than to engage in catastrophic self-help, wherein they take the law into their hands. Inevitably, this will lead to violations of fundamental rights, which in turn is likely to culminate in a civil crisis with catastrophic political, social, and economic consequences. This is what the Constitution seeks to avoid by stating that in order to maintain the rule of law, judges and magistrates have the duty to inspire and maintain public confidence in the ability of the courts to apply the law independent of any other influences. Therefore, when judges and magistrate fail to maintain a public image of independence they are in violation of the Constitution, particularly section 165(2) read together with sections 165(3), 3(1)(c) and 69(3) of the Constitution. This is a serious violation which undermines the very foundation of Zimbabwe’s constitutional state - the rule of law.

The Constitution does not only require the judges and magistrates to act independently and maintain a public image of independence, but it also requires the state and all institutions of government to support the judiciary in cultivating independence and maintain the required public image of impartiality. The Constitution seeks to achieve this by entrenching a number of obligations which the state must fulfil. These include that, ‘the State, through legislative and

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26 The Constitution of Zimbabwe, s 3(1)(a) and 3(1)(b).
27 ibid, s 165(1)(c).
28 ibid, s 164(2).
29 ibid, s 69(3).
30 ibid, s 165(1)(c).
other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness and to ensure that they comply with the principles set out in section 165,31 which includes the duty to maintain public confidence in the judicial system.31 In this regard, the state has two kinds of duties. First is the negative duty to refrain from acting in any way which interferes with the judicial functions of judges and magistrates.32 This includes the duty to refrain from acting in any way which appears to compromise the independence of the judges and magistrates. Second is the positive duty to implement measures to enhance the independence of the judiciary and the public confidence in the judges and magistrates.33

Such measures include awarding competitive salaries and other benefits to judicial officers. In terms of section 188(1), judges and magistrates are entitled to receive salaries, allowances and other benefits fixed from time to time by the Judicial Services Commission (JSC) with the approval of the President, given after consulting the Ministers for Justice and Finance. The nature of the salaries and benefits, as well as the manner in which they are awarded, must be consistent with the principle that judges and magistrates must be financially secure from external interference. Therefore, one of the positive measures to be undertaken by the State is to ensure that the judges and magistrates are awarded competitive salaries and benefits at all times and that these salaries and benefits must be awarded in a manner which does not compromise – or appear to compromise – judicial independence. Thus, the manner in which salaries and benefits are awarded to the judges and magistrates must inspire rather than undermine public confidence in the independence of the judges and magistrates. One of the benefits which a substantial number of judges and magistrates in Zimbabwe have received from the State, is commercial farming land. Although the land was not allocated to them as part of their package of benefits as judicial officers, they received this land as beneficiaries of the land reform program and therefore it is a benefit which they have accrued from Government. This has implications on their independence in fact and in appearance, examined below.

The 99-Year Lease Agreement and the Independence of Judges and Magistrates

Since 1999, the Government has been appropriating land from mainly white commercial farmers and redistributing it to black citizens. Various justifications have been provided in defence of this exercise, with equally numerous criticisms levelled against it.34 The focus of this Article – as mentioned earlier – is not to explore these, as so much has already been written on this subject. This Article attempts to examine the impact of the land tenure system (introduced

31 ibid, s 165.
32 ibid, s 164(2)(a).
33 ibid, s 164(2)(b).
34 Ian Scoones, Zimbabwe’s Land Reform: Myths and Realities (Weaver Press 2010).
after the redistribution of land) on the independence of judges and magistrates. It also attempts to examine the constitutionality of this system.

As part of the land redistribution exercise, the Government created two landholding systems: the A1 and A2 models. Those who were given land and resettled under the A1 farm model are essentially smallholder farmers living in a villagised or self-contained manner. The A2 model is composed of individual plots of land that are classified as small, medium, and large-scale commercial schemes. These farms require a high amount of investment to prove productive: an A2 farmer may be legally required to pay annual rentals as high as $152,830, develop and implement a five-year development plan, and establish home and accommodation for employees within three months of occupying the farm. By 2009, about 2295 farms had been acquired for resettlement under this model, and 16,386 beneficiaries had accessed approximately 2,681,642.00 hectares of land under this model. These figures have obviously since increased given that land redistribution is ongoing. The true beneficiaries of this model of land redistribution are contested; some critics allege that the beneficiaries are largely political elites who are connected to the Harare regime in one way or another, while other scholars have claimed that the ‘politically connected’ constitute between 5 to 26% of the beneficiaries. The real figures will probably not be known at this point given that the beneficiaries are in most cases unwilling to identify themselves or reveal their political allegiance. However, what has been ascertained is that there are a substantial number of senior judges and magistrates who are beneficiaries under the A2 farm model.

The hallmark of the A2 farm model is that the beneficiary leases the land from the Government under a 99-Year Lease Agreement which is concluded between the Government and the land holder. The beneficiary farmer is not an owner of the land but is a lessee while the owner of the land is the Government, represented by the President as the lessor. Therefore, it can reasonably be argued that the judges and magistrates who are beneficiaries of the land reform exercise under the A2 model are leasing the land from the Government. Though *prima facie* appearing to be an ordinary business arrangement similar to a judge renting property from

36 ibid.
37 99-Year Lease Agreement, cls 4 and 5.
38 Matondi and Dekker (n 37) 6-7.
39 Scoones (n 36).
40 Matondi and Dekker (n 37) 7.
42 99-Year Lease Agreement, cl 1.1.
any other person, this view is conclusively rejected with a closer look at the nature of the parties to this lease arrangement, as examined against Constitutional demands of professional and moral judicial conduct.

On the lease agreement, the Government is represented by the acquiring authority, who per the Land Acquisition Act⁴³ is the President. Therefore, all the judges and magistrates who have been allocated land under this model are, in effect, leasing the land from the President.

The President is the Head of the Executive⁴⁴, whose decisions and policies are from time to time brought for review in the courts, and these same judges and magistrates are required to pronounce on the legality of those decisions and policies. Therefore, when a citizen approaches the court to review the President’s decision or policy, in reality, the citizen is asking for a judge (who is a lessee of the President) to review the decision made by the President (who is the lessor to the judge). As mentioned earlier, the lessees are required to make huge investments in the form of capital and human resources on these farms. For instance, they may have to pay up to $152,830⁴⁵ in non-reimbursable annual rental. In addition, the lessee must develop and implement a five-year development plan which involves a substantial capital investment.⁴⁶

Having made such investments, there can never be any doubt that judges and magistrates have a substantial interest in maintaining the lease to realise the profits of their investment. This substantial interest surely has a bearing on their mind when adjudicating disputes, especially sensitive matters involving the President and/or the Government. Thus the lessee/lessor relationship between the judge or magistrate and the President is an untenable one which undermines the ability of the judge or magistrate to be independent of undue influence from the President and/or his Government when adjudicating disputes involving the President and/or his Government.

It may be counter-argued that the lessee/lessor relationship between the judges and the President or Government does not automatically imply that the judges and magistrates cannot be independent when adjudicating over cases which involve Government. However, as discussed earlier, the Constitution does not demand of judges and magistrates to be independent in fact only but also to refrain from entering into relationships which undermine public confidence in their ability to be independent when executing their judicial functions. The fact that the judges and magistrates are lessees to the President and that they have substantial interests in maintaining the leaseholds casts suspicions on their ability to act impartially in cases which involve the President and/or his Government, especially politically and economically sensitive ones.

It may also be counter-argued that the lessor/lessee relationship between the President and the judges and magistrates who benefited under the A2 landholding model does not compromise

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⁴³ Land Acquisition Act 1992, s 3.
⁴⁴ The Constitution of Zimbabwe, s 88(2).
⁴⁵ 99-Year Lease Agreement, cl 4.
⁴⁶ ibid, cl 9.
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– or should not appear to compromise – the independence of the judges and magistrates involved. The lease agreement provides adequate security of tenure, which guarantees the land holder to remain on the farm even if they make an adverse judgement in a matter which involves their lessor. This argument is unfounded because the reality is that the 99-Year Lease Agreement (which is the agreement between the landholder and the President) read together with the Land Acquisition Act (the principal legislation) does not guarantee security of tenure for the lessee. Clause 20 of the 99-Year Lease Agreement prescribes that:

The Lessor may, at any time and in such manner and under such conditions as it may deem fit, repossess the Leasehold or any portion thereof if the repossession is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public.47

This is a broad provision which gives the President and or his Minister (as an acquiring authority) the leeway and rights to repossess the entire farm or part of it from the judge and or magistrate concerned at any time. All the President needs to do is to provide the judge and or magistrate with a notice of 90 days48 and any reasons which fit within the aforementioned broad categories of promoting or safeguarding the interests of defence, public safety, public order, public morality, public health, town and country planning. For instance, the President may decide to give the judge or magistrate 90 days notice to vacate the farm because Government has designated the farm for the establishment of a military base or for the expansion of a town. The judge or magistrate may be relocated to another less lucrative farm.

However, what makes the lessee’s tenure even less secure is that the 99-Year Lease Agreement must always be interpreted together with the Land Acquisition Act because the lease agreement is an instrument which seeks to give effect to the policy and legislative objectives enshrined in the Act.49 Therefore, the above cited clause 20 of the 99-Year Lease Agreement must be read together with section 3 of the Land Acquisition Act which states that:

(1) Subject to this Act, the President, or any Minister duly authorised by the President for that purpose, may compulsorily acquire—
(a) any land, where the acquisition is reasonably necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the utilization of that or any other property for a purpose beneficial to the public generally or to any section of the public;
(b) any rural land, where the acquisition is reasonably necessary for the utilization of that or any other land—
(i) for settlement for agricultural or other purposes; or

47 ibid, cl 20 (emphasis added).
48 ibid, cl 22.
(ii) for purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or
(iii) for the relocation of persons dispossessed in consequence of the utilization of land for a purpose referred to in subparagraph (i) or (ii). 50

When clause 20 of the 99-Year Lease Agreement is interpreted in the context of section 3 of the Land Acquisition Act, the implication is that the President may at any time repossess the land from the lessee on account that the land has been designated for any other use including resettling other people. Therefore, it is possible that a judge or magistrate, after issuing an adverse decision or remarks in a matter which involves the President and/or Government, may be removed from their farm and either be left with no land, or be relocated to less lucrative land. Thus it is not true that the 99-Year Lease Agreement provides security of tenure to the judges and magistrates who are leasing the land from the President. The reality is that the lease agreement and the Land Acquisition Act places the tenure of the judge or magistrate on the land at the mercy of the President and Government. This exerts undue influence on the judge or magistrate when adjudicating over a matter which involves the President and/or the Government. Furthermore, it puts the judge or magistrate in a relationship which diminishes public confidence in their ability to act fairly and impartially in a matter which involves the President and/or Government.

Implications on the constitutional validity of the 99-Year Lease Agreement

The 99-Year Lease Agreement may therefore be unconstitutional where the judges and magistrates are the lessees and the President and Government are the lessors. As discussed earlier, the 99-Year Lease Agreement does not provide security of tenure for the lessees as it allows the lessor to repossess the land at any time. The 99-year lease is therefore unconstitutional because it compromises the independence of the judiciary by putting the leaseholder judge or magistrate in a conflicting and vulnerable position, where they hold land at the mercy of the President and Government and yet are required to adjudicate fairly and impartially on matters which involve the President and the Government. In order to secure their tenure on the farms leased to them by the President and Government, judges and magistrates are likely to be biased in favour of the President and Government when they adjudicate over sensitive matters involving their landlord.

In addition, the lease agreement is unconstitutional insofar as it places lessee judges and magistrates in a contractual relationship with the President and Government, arguably diminishing public confidence in the independence of the judiciary. As demonstrated above, the Constitution requires that the members of the judiciary, ‘must strive to enhance their independence in order to maintain public confidence in the judicial system’. 51 In addition, the Constitution instructs that, ‘members of the judiciary must not solicit any gift, bequest, loan or

50 Land Acquisition Act 1992, s 3.
51 The Constitution of Zimbabwe, s 165 (2).
favour that may influence their judicial conduct or give the appearance of judicial impropriety.\textsuperscript{52} The appearance of judicial impropriety includes conduct or entering into relationships which causes a reasonable observer to view the judge as incapable of being impartial.\textsuperscript{53} By accepting to be a lessee on a lease agreement, which involves a substantial economic interest with no security of tenure, judges and magistrates place themselves in a relationship which results in the public having diminished confidence in their ability to enforce the law without bias, especially in matters that involve the judge’s landlord. Judges who are lessees on the 99-Year Lease Agreement are therefore in violation of sections 165(2) and 165(5) of the Constitution. They have failed to live up to the constitutionally required standard of judicial propriety and integrity, entrenched in section 165(5) of the Constitution. As discussed earlier, judicial propriety and integrity means that a judicial officer must ensure that their conduct is above reproach in the view of a reasonable observer.\textsuperscript{54} Therefore, a judicial officer must not involve themselves in relationships with any party – including the Government – which causes the reasonable observer to view them with reproach, as that undermines public confidence in the impartiality of the judicial officer as an individual and the judiciary as an institution.

It has often been argued that judges and magistrates are citizens of Zimbabwe and therefore have a legitimate right and expectation to benefit from a lawful government programme such as the land redistribution programme.\textsuperscript{55} This argument is problematic as it assumes that judicial officers are ordinary citizens, when they are not. The Bangalore Principles say the following about the status of judicial officers in Article 4.2:

As a subject of constant public scrutiny, a judge must accept personal restrictions that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly. In particular, a judge shall conduct himself or herself in a way that is consistent with the dignity of the judicial office.\textsuperscript{56}

Thus, there is international recognition that under international law, judges are not ordinary citizens by virtue of the role they play in society as adjudicators of the law. This view is affirmed in the Constitution of Zimbabwe, where it prescribes specific standards according to which judicial officers must live by.\textsuperscript{57} As discussed earlier, one of those standards is that they must be careful about how they relate with fellow citizens and their own government and must refrain from giving any appearance of impropriety or reproach.\textsuperscript{58} The past Chief Justice of the Constitutional Court of Zimbabwe, Godfrey Chidyausiku, said it aptly when he remarked

\textsuperscript{52} ibid, s 165(5).
\textsuperscript{53} See Bangalore Principles (n 8) art 4.
\textsuperscript{54} Definition derived from Bangalore Principles (n 8) art 3(1).
\textsuperscript{55} See Nleya (n 44).
\textsuperscript{56} Bangalore Principles (n 8) art 4(2).
\textsuperscript{57} The Constitution of Zimbabwe, s 165.
\textsuperscript{58} ibid, s 165 (5).
that, ‘Like Caesar’s wife, a judge has to be beyond reproach’. Therefore, judicial officers are held to a higher standard of moral and professional behaviour by the Constitution and therefore, a thing that was appropriate for any citizen to do may be improper for a judicial officer to do. Whilst it might be constitutional for ordinary citizens to benefit from the land reform programme as a lessee on the current 99-Year Lease Agreement, the same is not true for judicial officers by virtue of their role in society. They have been entrusted by the Constitution to enforce the rule of law and to apply the law impartially in fact and in appearance, and therefore cannot be lessees on an agreement which does not guarantee them security of tenure from undue interference (by the President and Government) with their judicial functions. In addition, they may not be lessees on an agreement which does not give them security of tenure and thereby undermine public confidence in their ability to adjudicate impartially.

It may as well be argued that what this Article suggests is tantamount to discriminating against judicial officers by advocating restrictions on judicial officers which do not apply to other citizens. Whilst it should be acknowledged that what this Article is suggesting is discriminatory in nature, one would argue that it is discrimination which is sanctioned by the Constitution and is therefore lawful. The Constitution does not prohibit all forms of discrimination, instead outlawing unfair discrimination. Discrimination is unfair if it is based on any of the grounds listed in section 56(3) of the Constitution, a list which includes socio-economic status. However, the fact that discrimination is based on any of these prohibited grounds does not automatically mean that such unfair discrimination is unconstitutional. If the discrimination is based on any of the grounds listed in section 56(3) but it is sanctioned by the Constitution itself, then such discrimination may be unfair but nevertheless constitutional. Therefore, although what this Article suggests may amount to unfair discrimination on the basis of the social standing of the judicial officer, such discrimination is sanctioned by the Constitution through section 165 which imposes a higher standard of moral and professional behaviour for judicial officers, which is not necessarily applicable to the rest of the citizens. In that regard, it should be acknowledged that it is the Constitution, through section 165, which restricts judicial officers from leasing government land on the basis of an agreement which does not accord them security of tenure. Therefore, if such discrimination is sanctioned by the Constitution, it cannot be deemed to be unconstitutional.

Furthermore, unfair discrimination is constitutionally permissible if it is reasonable and necessary to achieve a purpose that is considered legitimate in a democratic constitutional

60 The Constitution of Zimbabwe, s 56(3).
61 The Constitution of Zimbabwe, s 56(5). See also Harksen v Lane [1997] ZACC 12 [50]-[53] where the test for establishing unconstitutional discrimination is laid out. This is foreign case law which has persuasive force in this discussion because of the similarity of the provisions on discrimination under the Interim Constitution of South Africa (1993) and that of Zimbabwe, 2013.
62 The Constitution of Zimbabwe, s 165.
Judicial officers may be held to a higher standard of moral and professional behaviour on the basis of their social standing because they are responsible for enforcing the rule of law – a mandate which, as discussed earlier, they are only able to discharge if they are impartial both in fact and in appearance. It is a legitimate purpose entrenched in the Constitution, and is therefore the kind of differential treatment acceptable within the confines of the Constitution.

Opportunities and Main Thrusts for Litigation

Given that the independence of the judiciary has been weakened or appears to have been compromised by making certain judges and magistrates lessees on insecure lease agreements, the right of access to justice enshrined in section 69 of the Constitution is threatened. Where a right has been threatened, any holder of that right can approach the court to litigate in defence of the right. Therefore, any citizen may challenge the constitutional validity of the 99-Year Lease Agreement on the basis that it is a threat to the right of access to justice and the rule of law in so far as the lease is a threat to the independence of the judiciary and it undermines public confidence in the judiciary. The matter may be heard by a judge who is not a lessee on the 99-Year Lease Agreement. The litigating citizen may be inclined to seek as relief a declaration of the constitutional invalidity of the 99-Year Lease Agreement in so far as it makes a judge or magistrate a lessee with no security of tenure. In addition, the citizen may also apply for an order of the court which directs the President and Government to strike down clause 20 of the 99-Year Lease Agreement and replace it with a provision which provides the lease holders with security of tenure.

Conclusion

In Zimbabwe, judicial officers are required by the Constitution to maintain public confidence in their ability to perform their roles impartially and to adjudicate over matters without fear or favour. In order to maintain public confidence, judicial officers are required to adhere to certain standards of behaviour and conduct per section 165 of the Constitution, including refraining from impropriety or engaging in any conduct or relationship which causes a reasonable observer to suspect impropriety. Certain judges and magistrates are beneficiaries of the Zimbabwe land reform programme. Whilst judicial officers (like every other citizen of Zimbabwe) are entitled to have a fair share in the distribution and ownership of natural resources; the Constitution demands that the manner in which they should seek to benefit from government programmes should be above reproach. Many judicial officers who have benefitted from the land redistribution programme are lessees on 99-Year Lease Agreements, with the President as the lessor. The lessee/lessor relationship between the judges and the

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63 ibid, s 56 (5).
64 ibid, s 164 (2) read together with s 165(1)(c).
65 ibid, s 69.
66 This is in terms of The Constitution of Zimbabwe, s 85(1).
67 This is allowed by The Constitution of Zimbabwe, s 167(3).
President undermines the ability of judges to adjudicate impartially in matters which involve the President or the Government. Further, an analysis of this lease agreement reveals that it does not offer security of tenure for judicial officers as the President has the power to repossess the land at any time. This scenario causes a reasonable observer to suspect that the judge will not be impartial when adjudicating over a matter which involves the President and/or the government. Therefore, by agreeing or seeking to be lessees on this agreement, judicial officers have violated the Constitution in the sense that they have engaged themselves in a commercial relationship which undermines their independence from the Executive and causes the public to have diminished confidence in the integrity and impartiality of those judicial officers. Further, the lease agreement is unconstitutional insofar as it seeks to make a judicial officer a lessee without offering the lessee security of tenure. Citizens may therefore challenge the constitutionality of the 99-Year Lease Agreement on such basis and may seek as redress a declaration of invalidity be pronounced and an order be given to the effect that the lease agreements should confer security of tenure to lease-holding judicial officers.
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Winibaldus Stefanus Mere

Eighteen years ago, hundreds of ethnic Chinese women were raped during three days of mob violence in May 1998 in Jakarta and other areas of Indonesia prior to the downfall of the Soeharto regime. No legal action has been taken to hold the perpetrators to account and to provide justice to the victims. What has happened so far is that despite the evidence of the tragedy having been documented and publicized by reliable sources, the government, military and police, as well as some religious groups that were accused of being responsible for the atrocities have strongly denied the occurrence of the mass rape. (They instead took advantage of victim’s reluctance of publicly coming forward with their claims as evidence that the mass rape tragedy was mere a rumour without proof. Furthermore, the stories provided by some victims to humanitarian and human rights activists were labelled as lies that were nothing more than political propaganda to discredit Indonesia as a nation.) Members of the Indonesian parliament and Supreme Court have even suggested that the tragedy, including mass rape of ethnic Chinese, should be considered as ordinary crimes. In contrast to this suggestion, this paper argues that the Jakarta mass rape tragedy was not only a crime against humanity, but also a crime of genocide, as a particular group of Chinese descent women were intentionally targeted with intent to destroy them because of their ethnicity, race and religion.

Introduction

Nineteen years have passed since the tragic mass rapes of hundreds of ethnic Chinese women in three days of mob violence in May 1998 in Jakarta – and other areas of Indonesia – prior to the downfall of the Soeharto regime. However, the manner in which the government and the courts have previously and continue to handle the atrocities remains mysterious and opaque. This is because despite evidence of the tragedy having been documented and publicised by reliable sources;¹ the Government, military, police, along with certain religious groups allegedly responsible for the atrocities have strongly refuted the occurrence

Editors Note: All names and identities have been modified for security purposes.
² Ibid.
of mass rapes. Instead, these groups took advantage of victims’ reluctance to come forward, and the reluctance of witnesses to the tragedy to come forward due to security concerns, as counter-evidence to instead counter-claim that the mass rapes were mere rumour without proof, and further labelled the stories provided by some victims to humanitarian and human rights activists as lies that were nothing more than political propaganda to discredit Indonesia as a nation.

As a result, it is not the victims or fact-finding agencies that have determined the truth of the rapes, but powerful criminal actors who – by doing so – are actually trying to obscure the fact, meaning, and magnitude of the criminal acts of rape; not only to eliminate the record thereof but also to avoid any legal accountability. As the title of an article in the Jakarta Post correctly points out, “Power dictates whether evidence of rapes exists”. Despite clear evidence pointing to instances of rape, as this power dictated that the evidence did not exist, members of the Indonesian Parliament and Supreme Court have even suggested that the May tragedy, including the mass rapes of ethnic Chinese, should be considered ordinary crimes.

In contrast to this suggestion, some have considered these rapes crimes against humanity. While there is some truth in this contention, this article goes even further and argues that the Jakarta mass rapes were crimes of genocide, where a particular group of women of Chinese descent were intentionally targeted with the intent to destroy them because of their ethnicity, race, and religion. This intent is the core aspect that distinguishes genocide from crimes against humanity, and will constitute the main concern of this paper. The paper begins with an overview of the general understanding of genocide, compared with crimes against humanity. This is followed by an exploration of the notion of rape as a crime against humanity in comparison with rape as genocide in the light of the relevant conventions, statutes, and jurisprudence. The paper then points out and examines the genocidal aspects of

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the Jakarta mass rape tragedy, focusing on the *actus reus* and *mens rea* requirements of genocide.

**Understanding Genocide and Crimes against Humanity**

The notion of genocide as an international crime first emerged following reactions of shock toward the evil of the Holocaust, itself aimed to exterminate a particular ethnic minority during the Second World War. Even though the practice of the extermination of national or ethnic minorities was not new, it was only in 1944 that the term ‘genocide’ was first introduced by Raphael Lamkin to describe the attempted extermination of the Jewish people by the Nazis as specific type of atrocity inadequately covered by then-current notions of crimes against humanity.\(^9\)\(^10\)\(^11\) Article 6(c) of the Charter of the International Military Tribunal contains the following definition of crimes against humanity:

> ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.’\(^12\)

In the absence of a legal definition of genocide,\(^13\) the Nuremberg Tribunal did not recognise genocide as such in its judgments, and what would now constitute genocide was instead prosecuted within this understanding of crimes against humanity.\(^14\)\(^15\) This understanding of crimes against humanity has been incorporated into a number of international documents, such as the Statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY),\(^16\) the International Criminal Tribunal for Rwanda (ICTR),\(^17\) and the Statute of the

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\(^12\) Charter of the International Military Tribunal, August 1945, Art. 6(c).

\(^13\) (n 10).


International Criminal Court (ICC),\(^{18}\) though there are slight differences concerning the definition and legal elements of this crime. The ICTY and the ICTR Statutes have included the crimes of rape and torture, while the ICC Statute includes a set of specific acts besides rape and torture such as enforced disappearance, apartheid, and other inhumane acts of similar character. What the notions of crimes against humanity in these different Statutes have in common is that they refer to ‘widespread and systematic’ individual crimes both in times of peace and war.

Since the adoption of the 1948 Genocide Convention\(^{19}\), a standard definition of genocide has been introduced in the international legal system. This conception of genocide was subsequently adopted verbatim in the Statutes of the \textit{ad hoc} Tribunals\(^{20}\) and the International Criminal Court (ICC),\(^{21}\) as:

‘any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) imposing measures intended to prevent births within the group; (e) forcibly transferring children of the group to another group.’\(^{22}\)

These acts of genocide are crimes under international law which States are obligated to prevent and punish. Obligations and prohibitions that arise from this substantive provision of genocide have not been only considered customary international law with \textit{erga omnes} status,\(^{23}\) but also as non-derogable norm of \textit{ius cogens}.\(^{24}\)

These characteristics put genocide ‘at the apex of the pyramid’\(^{25}\) of international crimes, which was declared by the ICTR to be the ‘crime of crimes.’\(^{26}\) Since what would be now

\(^{21}\) Article 6 of Rome Statute of the International Criminal Court (adopted 17 July 1998; entered into force 1 July 2002)
\(^{22}\) Convention on the Prevention and Punishment of the Crime of Genocide (n 19).
\(^{25}\) William A. Schabas, \textit{Genocide in International Law} (1st edn CUP 2000).
considered as genocide was in the past prosecuted as crimes against humanity, there are similarities between the two. Influenced by the notion of genocide, the most recent definition of crimes against humanity under the ICC Statute has been expanded to include “persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious [or] gender [grounds].” Thus, all manner of atrocities that may not meet the strict definition of genocide may instead fit within this broader notion of crimes against humanity. It has now been widely accepted that genocide inheres within the broader scope of crimes against humanity, which is considered as the second tier in the pyramid of international crimes.27

What distinguishes genocide from more general crimes against humanity is its special intent ‘to destroy in whole or in part’ an identifiable group, which is not a necessary aspect of crimes against humanity which only requires knowledge of systematic and widespread atrocities against civilians. Genocide requires that ‘the intent to destroy the group must accompany the intent to commit the underlying offense.’28 In other words, when the atrocity ‘escalates to the extreme form of wilful and deliberate acts designed to destroy a group or part of the group,’ it amounts to genocide.29 The destruction specified here however has to be physical or biological harm against the victims, not the socio-cultural destruction of the targeted groups.30 Although there were attempts to include such socio-cultural destruction, the ICTY Trial Chamber in Kristic case asserted that ‘customary international law limits the definition of genocide to those acts seeking the physical or biological destruction of all or part of the group. An enterprise attacking [to annihilate] only the cultural or sociological characteristic of a human group […] would not fall under the definition of genocide.’31

Hence, the scope of the notion of genocide and the protection it offers under the Genocide Convention is narrower than the concept of, and legal protection from, crimes against humanity. Although similar to genocide, while crimes against humanity have expanded to include identifiable groups, genocide focuses primarily on the matter of survival from elimination of identifiable groups.32 This has been confirmed in Kupreski which notes that ‘in essence, genocide differs from persecution in that in the case of genocide, the perpetrator chooses his victims because they belong to a specific group and seeks to destroy in whole or in part this very group.’33 Conversely, crimes against humanity – as confirmed in Tadic34 and Akayesu35 – do not require the discriminatory intent to destroy as a requirement.

27 Cryer and others (n 10).
29 ibid.
30 Cryer and others (n 10).
32 Cryer and others (n 10).
34 Prosecutor v. Tadic, Case No. IT-94-1-T, Opinion and Judgment (7 May 1997) [652].
35 Prosecutor v Akayesu (Judgment) ICTR-96-4-T, T Ch I (2 September 1998)
Another difference is that crime against humanity, at least as the Nuremberg Charter seems to suggest, can only be committed in time of war (although an increasing number of arguments, described below, abandon the nexus with armed conflict), or have to be a ‘widespread or systematic attack against civilians’, while the Genocide Convention indicates that genocide may be committed in peacetime as in time of war. Genocide can be planned or committed on a large scale or by individual undertakings, and it does not always have to be a ‘widespread or systematic attack against civilians’. Genocide must be committed against members of specific protected groups, whereas crimes against humanity may be a widespread or systematic attack against civilian populations, not necessarily with the intention to destroy or to eliminate them.

In sum, while the gravity and scale of crimes against humanity require ‘objective circumstantial elements,’ genocide necessitates also ‘the subjective mens rea’, the intent to destroy all or part of a national, ethnical, racial, or religious group and the ‘underlying offense must have at least a remote chance of contributing to complete or partial destruction of the victims’ group.’ This intent requirement, as will be explored further below, characterises the genocidal aspect of the Jakarta mass rape of ethnic Chinese women because the ill-treatment and deliberate rapes and killings that followed were committed with the intent to destroy the ethnic Chinese as an identifiable minority group in Indonesia. Before exploring this in detail, it is necessary to highlight the legal concept of rape as genocide in comparison to rape as a crime against humanity.

**Rape as Crimes against Humanity and Genocide**

Rape as crime against humanity was first expressly recognised under Control Council Law No. 10. It was then included within the list of crimes against humanity under Article 7 of the ICC Statute. Under this provision, rape is defined as an invasion in ‘the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.’ In order for an instance of rape to be categorised as a crime against humanity – as opposed to an ordinary crime – the violence of

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36 Mettraux (n 28).
37 Genocide Convention, Art. 1.
38 Mettraux (n 28).
39 Cryer and others (n 10).
42 Rome Statute of the International Criminal Court (n 21) Art. 7.
rape is ‘no longer directed at the physical welfare of the victim alone but at humanity as a whole.’\textsuperscript{44} Additionally, it must have been committed with knowledge that the rape was ‘part of or intended to be part of a widespread or systematic attack’ directed against a significant number of civilian populations.\textsuperscript{45}

The ‘widespread and systematic’ nature and knowledge element of rape as a crime against humanity, as well as the scope of an attack that may be categorised as a crime against humanity have been further elaborated in the \textit{ad hoc} tribunal decisions. The ‘widespread characteristic refers to the scale of the acts perpetrated and the number of victims.’\textsuperscript{46} The ICTR Chamber in \textit{Akayesu} case defined the concept of ‘widespread’ as ‘massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims.’\textsuperscript{47} Thus, a criminal offense with the magnitude of a crime against humanity may involve the ‘cumulative effect of a series of inhuman acts or the singular effect of an inhuman act of extraordinary magnitude.’\textsuperscript{48} The ‘systematic’ characteristic refers to the organised pattern of the crime\textsuperscript{49}, the existence of political objectives that motivated the perpetration of the crime and policy or plan to execute it, as well as the involvement of political and military authorities.\textsuperscript{50}

As regards the scope of the attack, it does not have to be an armed conflict. It primarily refers to ‘a course of conduct involving the commission of acts of violence ... [that] can precede, outlast, or continue during the armed conflict, but need not be part of the conflict under customary international law.’\textsuperscript{51} Thus, the attack may involve any form of mistreatment of a civilian population and is not limited only to armed attack.\textsuperscript{52} The primary object of the attack is the civilian population\textsuperscript{53} and it does not need to be the entire population of a geographic entity, nor should it directed only against ‘a limited and randomly selected number of individuals.’\textsuperscript{54} Where the perpetrators have some knowledge that the rape is part of a widespread and systematic attack against a civilian population, it may amount to a crime against humanity. Otherwise, the rape is simply an ordinary crime that can only be criminalised under the municipal legal system. However, where the rape is ‘systematic and widespread’ – where it touches the concern and interest of the international community and

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\textsuperscript{44} Prosecutor v. Drazen Erdemovic (Judgment) ICTY IT-96-22-T, (29 November 1996).
\textsuperscript{45} See Assembly of State Parties to Rome Statute of the International Criminal Court (n 43).
\textsuperscript{46} Prosecutor v. Blaskic (Judgment) ICTY Case. IT-95-14-T, (26 September 2005).
\textsuperscript{47} Prosecutor v Akayesu (n 35).
\textsuperscript{49} Prosecutor v. Kunarac et al., (Judgment) ICTY Case No. IT-96-23/1-A, Judgment, (12 June 2002).
\textsuperscript{50} Prosecutor v. Blaskic (n 46).
\textsuperscript{51} Prosecutor v. Naletilic et al., (Judgment) ICTY Case No. IT-98-34, (31 March 2003).
\textsuperscript{52} Prosecutor v. Kunarac et al. (n 49).
\textsuperscript{54} Prosecutor v. Naletilic et al. (n 51).
\textsuperscript{55} Prosecutor v. Kunarac et al. (n 49).
\end{flushright}
is carried out with an extensive and methodical manner – it falls within the jurisdiction of international law.\textsuperscript{56}

Distinct from crimes against humanity, which includes rape and sexual violence as material elements in its definition, there is no explicit reference to rape and sexual violence as a constituent element in the definition of genocide. This is firstly because international legal jurisprudence historically considered the crime of sexual violence as falling under ‘moral crime and outrages on honour’ requiring a response to restore dignity; rather than as a legal crime against humanity in the category of an ‘act of violence and inhumanity constituting crimes against the world community as a whole.’\textsuperscript{57} Secondly, some have argued that recognising rape as genocide would undermine the gendered nature of the crime of rape, since genocide as a crime focuses more on the group rather than on the individual.\textsuperscript{58} Therefore, when the crime of sexual violence was widespread in Yugoslavia and Rwanda, rape and genocide were commonly considered separated issues: rape or genocide, not rape as genocide.\textsuperscript{59} Thirdly, rape is regretfully conceived of as ‘somehow a ‘lesser’ or ‘incidental’ crime, not worth investigating.’\textsuperscript{60}

These attitudes could also be seen in the absence of discussion about rape and sexual violence as a means to destroy an identifiable group based on gender during the process of drafting the Genocide Convention.\textsuperscript{61} There were attempts based on some versions of the draft to interpret them as referring to gender-based sexual violence through constructions such as ‘biological genocide’\textsuperscript{62} or ‘preventing … [the] preservation or development’\textsuperscript{63} that follow the phrase “to destroy in whole or in part”. Even when the draft had been finalised, the phrase “serious bodily or mental harm” (Art. 2 (b)) could have been extended to include rape and other sexual violence, but there was a failure to do so. This lack of attention to gender-based identifiable group and sexual violence as a material element in the definition

\textsuperscript{59} (n 40).
\textsuperscript{62} See First Draft of the Geneva Convention, prepared by the UN Secretariat, UN Doc. E/447, May 1947, Art. 2 (2): “[Biological genocide] Restricting births by: (a) sterilization and/or compulsory abortion: or (b) segregation of the sexes: or (c) obstacles to marriage”, available at: <http://www.preventgenocide.org/law/convention/drafts>.
\textsuperscript{63} Art. 2.
of genocide falsely raises the impression that ‘sexual violence cannot be a means of committing genocide and/or to destroy’ a gender-based group.\textsuperscript{64}

It was only following the ICTY and ICTR that the international community began to take into account the crimes of rape and other sexual violence as genocide due to increasing awareness of the magnitude and severity of the consequences of using rape as a method of destroying certain identifiable groups.\textsuperscript{65} The prosecution of Jean-Paul Akayesu marked the turning point for ruling rape and other forms of sexual violence as genocide in international legal jurisprudence, although the possibility of sexual violence as a means to commit genocide was already acknowledged by the ICTY in \textit{Karadzic and Mladic Rule 61 Hearing}\.\textsuperscript{66} Akayesu, a Hutu, was charged with a crime of genocide not only for knowing, but also facilitating ‘the commission of the sexual violence, beatings and murders by allowing the sexual violence and beating and murders to occur … [against the Tutsis].’\textsuperscript{67} In its judgment the Trial Chamber made an innovative decision by explicitly arguing that rape and other sexual violence ‘constitute genocide in the same way as any other act [listed in Art. 2(2) of the ICTR] as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted group as such.’\textsuperscript{68} The Trial Chamber also recognised that the crime of rape and sexual violence can be interpreted and prosecuted under the acts in point (b) and (d) of the ICTR Article 2 (2).\textsuperscript{69}

In addition, the Trial Chamber provided a progressive definition of rape and sexual violence. Rape is defined as ‘a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.’ Sexual violence – including rape – is considered as ‘any act of a sexual nature, which is committed on a person under circumstances which are coercive.’\textsuperscript{70} While the former is limited to physical invasion of the human body, the latter is not limited to physical invasion and ‘may include acts which do not involve penetration or even physical contact.’\textsuperscript{71} Relying on this notion of rape and sexual violence, the Chamber in Akayesu acknowledged firstly that rape and sexual violence against Tutsi women were an integral part of systematic genocide in Rwanda and solely directed against them as ‘part of propaganda campaign geared to mobilising the Hutu against the Tutsi,’ who were presented as sexual objects.\textsuperscript{72} Secondly, the Chamber recognised genocidal rape is ‘one of the worst way[s] of inflicting harm on the victims as she or he suffers both bodily and mental harm.’\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{64} Anne Marie de Brouwer, \textit{Supranational Criminal Prosecution of Sexual Violence}, (Intersentia, 2005).
\item \textsuperscript{65} MH Short (n 40).
\item \textsuperscript{66} \textit{Prosecutor v. Radovan Karadzic and Ratko Mladic} (Judgment) Case No. IT-95-18-R61, (11 July 1996).
\item \textsuperscript{67} \textit{Prosecutor v Akayesu} (n 35).
\item \textsuperscript{68} ibid.
\item \textsuperscript{69} The ICTR Art. 2 (2)(b); (n 64) 45
\item \textsuperscript{70} \textit{Prosecutor v Akayesu} (n 35).
\item \textsuperscript{71} ibid.
\item \textsuperscript{72} ibid, [732]
\item \textsuperscript{73} ibid, [731].
\end{itemize}
Thirdly, genocidal rape was committed as ‘a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself.’ The various material aspects of the rapes, combined with the intent behind the acts committed by the Hutu against the Tutsi under the leadership of Akayesu, satisfy the requirements for accusing him of the crime of genocide.

The Akayesu case sets up a precedent that can become a guiding light for understanding rape and sexual violence as genocide in legal jurisprudence. In the Kayishema and Ruzindana cases concerning charges of genocide against Clement Kayishema and Obed Ruzinanda for their involvement in the killings and sexual violence against the Tutsis, the ICTR Chamber concurred with the decision in Akayesu case by holding that ‘acts of sexual violence, rape, mutilations and interrogations combined with beatings, and/or threats of death, were all acts that amount to serious bodily harm,’ which could amount to a crime of genocide. Furthermore, the Chamber ruled that rape as genocide can be punished for ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part,’ where the ‘conditions of life’ envisaged included rape. In Rutaganda, a case concerning the charge of genocide against Georges Rutaganda for his involvement in the capture, rape, and torture of Tutsi citizens, the ICTR Chamber considered rape as genocide by interpreting the phrase ‘serious bodily and mental harm’ in Article 2 (2) (b) of the ICTR Statute as ‘act of bodily or mentally torture, inhumane or degrading treatment, rape, sexual violence and persecution,’ and such ‘serious harm need not entail permanent or irremediable harm.’ Likewise, in Musema, a case concerning a charge of genocide and crimes against humanity against Alfred Musema for his involvement in the attack, rape, and murder of Tutsi individuals, the ICTR Chamber used a similar interpretation to consider rape as an act of genocide as stipulated under clause (b) (‘serious bodily and mental harm’) of the ICTR Statute.

These progressive interpretations of genocide indicate that despite the absence of specific references to rape and sexual violence as genocide in the definition of genocide in the ICC Statute (which replicates the definitions of the Genocide Convention and ad hoc tribunal), in the actual practice of legal jurisprudence – in particular in Akayesu, Kahishema and Ruzindana and Musema – the ICTR has established an explicit link between sexual violence and genocide. There is support for this progressive interpretation in the ICC’s Elements of Crimes, in which the footnote to Article 6 (b) regarding ‘serious bodily and mental harm’
explicitly expands the scope of genocide by asserting that ‘this conduct may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment.’

This development in legal jurisprudence illustrates that rape and all forms of sexual violence that are committed as a method to destroy in whole or in part a particular identifiable group as such can be prosecuted as genocide. For how this notion is also applicable to the Jakarta mass rapes of ethnic Chinese women, it is necessary to examine the actus reus and mens rea requirements of genocide. The significance of this examination will not only assist in identifying the existence of material and mental elements of the Jakarta mass rapes that evidence a crime of genocide, but at the same time highlight some of the elements necessary to understand the Jakarta mass rapes as a crime against humanity.

The Genocidal Aspects of Jakarta Gang Rapes of Ethnic Chinese Women

Since Indonesia gained its independence in 1945, Indonesians of Chinese descent have had difficulty defining themselves within the nation. Although since then they have followed a process of assimilation and integration, current generations continue to struggle to find an effective way to identify as both ethnically Chinese and Indonesian, as there is socio-political stigmatisation referring to them as ‘non-pribumi’ (non-indigenous) as opposed to ‘pribumi’ (indigenous). Ethnically, they are a minority group constituting 1.5% of the population when the 1998 mass rapes occurred. Throughout the 1960s, as the country was struggling in a conflict between two ideologies – democratic-capitalism and socialist-communism – many Indonesians of Chinese descent became the targets and victims of mass murders as they were associated with communists by the democratic-capitalist Indonesia New Order Regime.

A decade later, as the economy was booming, Chinese-Indonesians were very successful in business and became a part of the system of crony capitalism with President Soeharto and his family. Many Indonesians were resentful of their property as they controlled most of Indonesia’s private wealth. As their traditional religion, Confucianism, was banned and excluded from the nation’s five official religions, a majority of them opted to join Catholicism, whose adherents in the late 1990s made up 9% of the population in a country with an 88% Muslim population. Thus, they have also become the target of looting and killings when ethno-religious conflicts break out in the country.

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85 Ibid 18; Jaques Bertrand, Nationalism and Ethnic Conflict In Indonesia (CUP 2004).
86 Chiduza (n 7) 464; Purdey (n 84) 22.
The 1997 economic crisis that hit East Asian countries, including Indonesia, was seen by many Indonesians not only as an opportunity to overthrow the Soeharto regime, but also to place blame at the feet of the Chinese-Indonesians. As riots broke out in Jakarta and other cities between the 13th and 15th of May 1998, mob leaders orchestrated the riots with a 'strongly demonstrated anti-Chinese sentiment.'87 Due to well-founded fears, many Chinese Indonesians fled the country.88 In the aftermath of the riots, human rights activist reported numerous rapes, almost all cases of which were committed against ethnic Chinese women by organised Indonesian gangs.89 It was also discovered that other sexual violence had taken place.90

There are no exact accounts of the incidents, as victims are afraid to speak out due to personal security fears, and no medical records were ever explicitly reported.91 However, Tim Relawan Kemanusiaan (Volunteer Team for Humanity) – led by the Catholic Priest Sandyawan Sumardi – identified at least 168 ethnic Chinese females as young as ten years old that were raped or sexually abused, some of them by anywhere from three to seven men. The findings also indicated that most of them were raped or sexually abused in front of their family members or in public places, and that some of them were killed after the rape.92

I. Actus Reus Elements of the Crime of Genocide

The acts (or omissions) that amount to genocide are listed in the Genocide Convention Article 2(a–e). For the purpose of this article, this section will focus mainly on Article (a), (b), and (d) by explaining how these genocidal acts have been interpreted in legal jurisprudence and how they can be applied to the Jakarta mass rapes. Art (c) is implicitly included in (b), and there is lack of evidence with regard to (e).

The first genocidal act is ‘killing members of the group’. In the Akayesu case the Chamber found that ‘in most cases the rapes of Tutsi women in Taba were accompanied with the intent to kill those women. Many rapes were perpetrated near mass graves where the women were taken to be killed.’93 This is seen by the Chamber as the determination of the perpetrators to kill Tutsi women after ‘inflicting acute suffering on [them] in the process.’94 In the Kayishema and Ruzindana case, the Prosecutor broadened the interpretation by suggesting that acts not intended to caused death may still be covered by the notion of ‘killing members of the group’ if in fact they result in death. The Prosecutor held that ‘killing is merely the act of causing the death’ and this ‘would permit, if the need arises, a broadening of the meaning

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87 Kuan (n 6) 465
88 Purdey (n 84) ix
90 Ibid.
91 Ibid
92 The Constitution of Zimbabwe (n 1).
93 Akayesu (n 20) para. 733.
94 ibid.
or interpretation’ beyond mere deliberate homicide.\textsuperscript{95} Thus, the term ‘killing’ is synonymous with ‘causing death,’ such as if the victim is dead\textsuperscript{96} following sexual violence.

The Asian Human Rights Commission has estimated that, in the Jakarta mass rapes, at least 20 women were killed or died after rape.\textsuperscript{97} It can be reasonably estimated that the numbers of women who were killed or died after rape were higher, as the overall number of people who died during the three day riot was around 1,198, a figure that including non-Chinese.\textsuperscript{98} Most of those who died were repeatedly raped and then thrown into burning buildings, as fire was used as one of the weapons to destroy ethnic Chinese houses and shops.\textsuperscript{99} One victim recounted that “her two younger sisters [were] raped by about 10 rioters and pushed from the third floor to the burning ground floor.”\textsuperscript{100} Another victim, known as Vivian (names have been changed for security reasons) said that she was raped by seven men and her younger sister was stabbed to death after being brutally raped.\textsuperscript{101} There were, however, some who committed suicide after rape.\textsuperscript{102} Whether death by suicide after rape can be categorised as genocidal act of killing is not a question easily answered. The notion that killing is synonymous with causing death may help to understand killing through suicide. As Ruckert and Witschel noted, this interpretation may be needed in cases ‘where a perpetrator had not “pulled the trigger” himself, but caused the death of a victim in an indirect way.’\textsuperscript{103}

The second genocidal act is ‘causing serious bodily or mental harm to members of the group.’ The phrase ‘serious bodily or mental harm’ was held by the Chamber in the Akayesu case to mean ‘acts of torture, be they bodily or mental, inhuman or degrading treatment, persecution.’\textsuperscript{104} It is ‘harm’, as interpreted in Kayishema and Ruzindana, that ‘seriously injures the health, causes disfigurement or causes any injury to external, internal organs or senses.’\textsuperscript{105} With regard to serious mental harm, the Chamber in the Gacumbitsi case noted that it can be ‘some type of impairment of mental faculties, or harm that causes serious injury to the mental state of the victim.’\textsuperscript{106} But as how the state of “seriousness” is measured,

\begin{itemize}
\item \textsuperscript{95} (n 21) 50.
\item \textsuperscript{96} ibid.
\item \textsuperscript{97} Asian Human Rights Commission (n 8)
\item \textsuperscript{98} Moyo (n 89).
\item \textsuperscript{99} The Bangalore Principles of Judicial Conduct (n 8).
\item \textsuperscript{100} ibid
\item \textsuperscript{101} The Bangalore Principles of Judicial Conduct (n 8).
\item \textsuperscript{103} Wiebke Ruckert and Georg Witschel, ‘Article 7(1)(k) – Other Inhuman Act,’ in Roy S. Lee, et.al. (eds.), The International Criminal Court: Elements of Crimes and Rules of procedure and Evidence (Transnational Publishers 2001) 67; de Brouwer (n 64) 51.
\item \textsuperscript{104} Prosecutor v. Akayesu (n 35) [504]
\item \textsuperscript{105} Prosecutor v. Clement Kayishema and Obed Ruzindana (n 75) [109]
\item \textsuperscript{106} Prosecutor v. Sylvestre Gacumbitsi (Judgment) ICTR-2001-64-T, (17 June 2004) [291].
\end{itemize}
assessment must be on a case-by-case level.\textsuperscript{107} The judgment in the \textit{Kristic} case has suggested that it must be a state of harm that ‘goes beyond temporary unhappiness, embarrassment or humiliation,’ and ‘results in grave and long-term disadvantage to a person’s ability to lead a normal and constructive life.’\textsuperscript{108}

The fact that ethnic Chinese females as young as 10 were being raped repeatedly by three to seven men was evidence of serious bodily harm, degradation, and persecution during the Jakarta mass rapes. In testimony to the US Congress, Sandyawan raised a case that represented many other similar cases, saying “some [men] forced the victim’s son to rape his younger sisters. They also coerced the male-house-maid to rape the mother of the family. The gang-rapes were then continued by the group and other unknown persons.’\textsuperscript{109} Another report indicated that ‘many of these women also suffered from massive tortures and object penetrations’\textsuperscript{110} In addition, most of the survivors continue to suffer from serious psychological trauma and disorders.\textsuperscript{111}

The third genocidal act is ‘imposing measures intended to prevent births within the group.’ It was held in the \textit{Akayesu} case that this act may include ‘sexual mutilation, the practice of sterilisation, forced birth control, separation of the sexes and prohibition of marriage’\textsuperscript{112} There are no documented accounts of the practices of sterilisation or direct prohibition of marriage during the Jakarta mass rapes. However, a man told the Indonesian Human Rights Commission that a gang had mutilated his wife’s genitals after raping her.\textsuperscript{113} Another report indicated that “harmful objects, such as broken bottles or razor blades were used to damage their reproductive organs.”\textsuperscript{114} Two survivors, Siska and Erna\textsuperscript{115}, testified that their breasts were cut off by the rapists before they were dumped at a nearby village.\textsuperscript{116}

\section*{II. \textit{Mens Rea} Element of the Crime of Genocide}

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As indicated earlier, the applicability of the notion of genocide does not only necessitate material genocidal acts, but it has to meet the mental genocidal requirement, that is the ‘intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.’ Thus, the mental element of genocide comprises: (1) targeted group as such; (2) intent to destroy that group; and (3) in whole or in part.

The first requirement is a targeted-identifiable group. In the Akayesu case, it was held that ‘the act must have been committed against one or several individuals because such individual or individuals were members of a specific group, and specifically because they belonged to this group.’\(^\text{117}\) Hence, ‘the victim is chosen not because of his individual identity, but rather on account of his membership of a national, ethnical, racial and religious group’ and ‘chosen as such, which hence, means that the victim of the crime of genocide is the group itself and not only the individual.’\(^\text{118}\) Whereas the group’s national identity is characterised by a legal bond of ‘common citizenship, coupled with reciprocity of rights and duty,’\(^\text{119}\) a group’s ethnicity is defined by ‘common language or culture,’\(^\text{120}\) While a group’s race is characterised by ‘the hereditary physical traits often identified with a geographical region, irrespective of linguistic, cultural, national or religious factors,’\(^\text{121}\) the group’s religion is differentiated by ‘shar[ing] the same religion, denomination or mode of worship.’\(^\text{122}\)

In the Jakarta mass rapes, Chinese women were targeted mainly because of their ethnicity, race, and religion. This can be seen in the attitude and comments of rapists towards victims. One source quoted a rapist as saying “I have to give you a lesson….You are beautiful and you are a part of the Chinese,” while other rapists said “You must be raped because you are Chinese and non-Muslim.”\(^\text{123}\) Other victims had testified that they were forced to wear Muslim clothes after being raped.\(^\text{124}\) There were also posters put in front of houses and buildings to distinguish ownership based on racial and religious criteria such as “milik orang Islam” (Muslim-owned), “milik pribumi” (indigenous-owned) and “pribumi Islam” (Muslim indigenous).\(^\text{125}\) Houses and buildings without these posters meant non-Muslim and non-indigenous, and as such were identifiable owned by the Chinese.

The second and most important requirement is “intent to destroy” the targeted group. This significantly distinguishes genocide from crimes against humanity because the latter,
although targeting a specific group, does not seek to destroy the group as such.\textsuperscript{126} As intent is hard – even impossible – to determine, it can be inferred from a certain number of ‘presumption facts.’\textsuperscript{127} The Chambers of both the ICTR and ICTY considered that it can be deduced from: (1) ‘the genocidal intent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether this act was committed by the same offender or by others;’\textsuperscript{128} (2) ‘the general nature of the atrocities in a region or a country, where there are deliberate and systematic act of “targeting victims on account of their membership of a particular group, while excluding members of other groups;’\textsuperscript{129} (3) general political doctrine that allows genocidal acts or ‘repetition of destructive and discriminatory acts;’\textsuperscript{130} (4) the pattern of conducts that violate the very foundation of the group; (5) ‘the combined effect of speeches or projects laying the groundwork for and justifying the act’ with a massive scale of destructive effect, which aims at undermining the foundation of the group.\textsuperscript{131}

As indicated in the historical background at the beginning of part IV, there was repetition of destructive and discriminatory acts towards the ethnic minority Chinese community because of their ethnicity, race, and religion, as well as their economic advantage. Many major disputes were ended with the killing of the Chinese and the burning of their property. The Jakarta mass rapes, along with tortures, burning of property, and killings, were a part of a pattern of crimes, not only intended to inflict violence on ethnic Chinese women as individuals, but also to destroy them as a group. Some comments, – “you are raped because you are Chinese and non-Muslim” – described earlier, can be interpreted as a reaffirmation of intent to destroy them as a group.

Intent in the \textit{Akayesu} case was at least partially inferred from his speeches, ‘calling, more or less explicitly, for the commission of genocide.’\textsuperscript{132} Despite ‘no specific orders for rape … innuendo, jokes and propaganda’ associated with a collective inclination to rape Tutsi women were interpreted as intention to destroy the Tutsi ethnic group.\textsuperscript{133} The term \textit{kubohoza}, meaning ‘to liberate’, become an expression associated with rape as an agenda for Hutus to control over Tutsis.\textsuperscript{134} In the Jakarta rape incident, one leader incited his gang by yelling ‘anti-Chinese.’\textsuperscript{135} This was echoed by the rapists themselves who repeatedly screamed ‘Let’s

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\item[\textsuperscript{126}] de Brouwer (n 64) 72.
\item[\textsuperscript{127}] ibid 76.
\item[\textsuperscript{128}] \textit{Prosecutor v. Akayesu} (n 35) [523]
\item[\textsuperscript{129}] ibid.
\item[\textsuperscript{130}] \textit{Prosecutor v. Radovan Karadzic and Ratko Mladic} (n 66).
\item[\textsuperscript{131}] ibid [95].
\item[\textsuperscript{132}] \textit{Prosecutor v. Akayesu} (n 35) [729].
\item[\textsuperscript{135}] The Constitution of Zimbabwe (n 1).
\end{itemize}
\end{footnotesize}
butcher the Chinese!’ Or ‘Let’s eat pigs!’ As this was followed by incidents of rape and murder, such expressions can be seen as indications of intent to destroy the ethnic Chinese community.

The third requirement is that the destruction be ‘in whole or in part.’ The term ‘in whole’ does not necessarily mean ‘the actual extermination of a group in its entirety, but is understood as long as genocidal acts in point (a) to (e) are committed with the special intent to destroy.’ The term ‘in part’ can be understood as a ‘substantial part,’ which means ‘a large majority of the group in question or the most representative members of the targeted community.’ The Jakarta mass rapes occurred in the Chinese-Indonesian-populated area in the capital of Indonesia. Geopolitically and economically, they were and are seen as the faces of ethnic Chinese-Indonesians as a whole. Thus, threats to the security of the Chinese-Indonesians in Jakarta can be interpreted as threats to the security of Chinese Indonesians in the rest of the country. As such, when the mass rapes occurred in Jakarta, many Chinese Indonesians in other parts of Indonesia fled the country.

III. Complicity in Genocide and Crimes against Humanity?

Widespread and serious threats of persecution from unidentified gangs and army generals who were accused of masterminding the rapes have traumatised many victims, prevented them from speaking out, and terrorised investigators and human rights activists from collecting adequate evidence of the mass rapes. Doctors who had been privately asked to provide medical care by hundreds of victims have chosen to keep silent for security reasons. The police who had been assigned to provide protection for the victims not only forced the victims to deny that a rape ever happened, but also became rapists themselves in the process of investigation. Despite national and international mass media and independent human rights organisations continuing to expose evidence of the rape, there were strong counter-narratives from the military, as well anti-Chinese xenophobic religious groups and politicians who professed not to know about the incident and expressed doubts suggesting that the rapes never happened.

In fact, there were and are strong indications that the rapes were systematically planned and coordinated by military personnel, and that talk of rape had circulated amongst particular

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137 Prosecutor v. Akayesu (n 35) [497].
140 Harsono (n 113) 97; The Bangalore Principles of Judicial Conduct (n 8).
141 The Bangalore Principles of Judicial Conduct (n 8).
142 Moyo (n 3).
143 Mydans (n 102)
144 Moyo (n 4).
groups prior to the riot and rapes proper. This suggests that not only military personnel, but some other groups, including some anti-Chinese xenophobic religious groups and politicians were also aware of the incident. The given facts regarding the ‘systematic’ nature of rape and the involvement of political elites and military personnel, coupled with the ‘widespread’ character of rape as indicated in the discussion about the actus reus and mens rea of genocide above, demonstrated that the Jakarta mass rapes were a crime against humanity. The fact that the rape targeted ethnic Chinese women in order to destroy them as an ethnic group further qualifies it as a crime of genocide. In criminal law, perpetrators can be prosecuted for complicity with crimes against humanity and/or genocide. As for complicity in genocide, the ICTR Chamber in the Akayesu case held that ‘if the accused knowingly aided and abetted in the commission of such murder while he knew or had reason to know that the principal was acting with genocidal intent, the accused would be an accomplice to genocide, even though he did not share the murderer’s intent to destroy the group.’

Conclusion

Due to denials about the evidence of rape by government officials as well as by the military, police, and the national court, it is difficult to obtain justice for victims by prosecuting the perpetrators for facilitating and committing rape as genocide. Since there were indisputably in fact mass rapes between the 13th and 14th of May in Jakarta, this denial should not, however, be considered as transforming the rape into a non-existent fact, or a mere ordinary crime. This article has illustrated that the Jakarta mass rapes were a crime of genocide, although they could also be categorised as a crime against humanity. They were genocide primarily because they were committed with the intent to destroy the ethnic Chinese based on their ethnicity, race, and religion as such. To reduce them to mere ordinary crimes or even merely crimes against humanity would mean to ignore the magnitude of the genocidal crime as the ‘crime of crimes.’

For a country like Indonesia, with a long tradition of repeated gross human rights abuses, expressly acknowledging and publicly calling the 1998 Jakarta mass rapes of women of Chinese ethnic decent genocide (as well as a crime against humanity as this article has shown, though the contention should be examined through a proper and open court hearing) is important because of several reasons. Firstly, despite repeated gross human rights violations involving governmental or political elites and large corporations, there has been a long tradition of impunity due to the unwillingness of government to cooperate and/or lack of law enforcement in the country. Secondly, for a crime with the magnitude of genocide or crimes against humanity, it would be unfair and unjust to the victims in particular and universal humanity in general if the Jakarta mass rapes are reduced simply to

145 The Constitution of Zimbabwe (n 1).
146 Prosecutor v. Akayesu (n 35) 540, 541.
147 Liza Yosephine, ‘Tribunal Says Indonesia Responsible for Genocide in 1965’ The Jakarta Post, (Jakarta, 20 July 2016)
the status of ordinary – or even non-existent – crime. Thus, publicly acknowledging the mass rapes as genocide or crimes against humanity can increase global condemnation and pressure to hold the perpetrators liable and bring justice to the victims. Thirdly, as a multicultural country, where there have been always tensions between various groups of people from different ethnic and religious backgrounds, there is a risk that crimes such as rape, or other similar gross crimes against human rights may be repeated in the future, in particular when this tension is exploited to attempt to eliminate other minority groups based on religious or ideological convictions or political agendas. Acknowledging the magnitude of a crime as such and holding the perpetrators and the accomplices in those crimes accountable can form a deterrent to prevent the occurrence of similar crimes in the future. Fourthly, the acknowledgement that the Jakarta mass rapes were genocide and/or crimes against humanity is necessary for a genuine reconciliation process. In dealing with allegations against the mining industry for aiding and abetting South African apartheid regime, the Truth and Reconciliation Commission was of opinion that the Mining Industry must acknowledge its complicit relationship with the regime as ‘first order involvement’ (direct complicity) because such acknowledgement was necessary for reconciliation process. Similarly, attitudes to acknowledge and identify genocide or crimes against humanity as crimes (as they should be) are also relevant in dealing with the Jakarta mass rapes in order to bring about progress for the process of national reconciliation among citizens of different ethnic and religions, and for the protection of ethnic minority human rights in the future.
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In India, the law of adoption is governed by the Hindu Adoptions and Maintenance Act, 1956 (HAMA). This act regulates the adoption of Hindus, Buddhists, Jains, and Sikhs. This article will also discuss the process of adoption, which includes the qualifications and requirements of both adopter and adoptee. The analysis will include how modern-day Indian adoption statutes, in particular, the HAMA, do not reflect the practices and guidelines traditionally held in Hinduism, Buddhism, Jainism, and Sikhism. Furthermore, as evidenced by court cases, these religious and contemporary laws fail to reflect actual desires of the Indian people.

Introduction

The birth and upbringing of Kabir, the beloved 15th century Indian poet and saint, has long remained a mystery. Revered by Hindus, Muslims, and Sikhs, it is rumoured that he was born to an unwed Brahman woman who abandoned him at birth. Found by a lake in Varanasi, he was adopted and raised by Muslim weavers.1

Had Kabir been born and raised in modern-day India, his adoption by Muslim parents would have been illegal. The law of adoptions in India, governed by the Hindu Adoptions and Maintenance Act 1956, hereafter referred to as HAMA, forbids such interreligious adoptions. This act regulates the adoption of Hindus, Buddhists, Jains, and Sikhs. For the purposes of this paper, I refer to adoption specifically in terms of its feasibility, which includes the qualifications and requirements of both adopter and adoptee.

This paper will explore how modern-day Indian adoption law, particularly the HAMA, do not reflect the practices and guidelines traditionally held in Hinduism, Buddhism, Jainism, and Sikhism. As evidenced by court cases, these religious and contemporary laws fail to reflect the realities of the Indian people and their desires. Islamic adoption has been excluded from this research as it is conceptually recognized to be limited guardianship and is not covered under the HAMA.

Hindu Religious Law and Adoptions

Hindu law is significantly unstructured, pulling its authority from a variety of sources with varying degrees of influence contingent upon the region and time period. The lack of formalities in the recognition of Hindu law, even prior to the British attempt to codify it under colonial rule, transformed the law to what we consider to be Hindu law today. Political scientist Fukuyama addresses this transformation well, maintaining that,

*In their application of “Hindu” law, the British misunderstood the role of law in Indian society. They believed that the Dharmasāstra was the equivalent of European ecclesiastical law, that is, religious as opposed to secular law that was codified in written texts and uniformly applicable to all Hindus... At that point, traditional Hindu law was a living tradition collapsed.*

While there is guidance from the ancient texts of the *Vedas* and the *Manu*, priests, and other sources of written and customary law, reconciling the primacy of any one source of another is a difficult task. The principle of lawfulness in Hinduism itself, *dharma*, has evolved continuously over the centuries, even prior to the formal codification of Hindu law. According to Fitzgerald:

*Dharma includes all aspects of proper individual and social behaviour as demanded by one’s role in society and in keeping with one’s social identity according to age, gender, caste, marital status, and order of life. The term dharma may be translated as “Law” if we do not limit ourselves to its narrow modern definition as civil and criminal statutes, but take it to include all the rules of behaviour, including moral and religious behaviour, that a community recognizes as binding on its members.*

In accepting this definition of *dharma*, or Hindu jurisprudence, the emphasis is on the role of caste and community in Hindu law. In many cases, *panchayat*, a traditional community-centric political system popular in the region, determined the customary outcome of social issues within their village councils.

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I. Defining Adoption in Hindu Religious Law

As reflected in the Yajur Veda, through one of the srutis, or commonly attributed as ‘that which was heard’, adoption can be justified through Hindu mythology, when the God Atri bestowed his son to the sonless Aurva:

Atri gave his son to Aurva who longed for a son (was sonless)... Atri performing the Yaga of giving his son to Aurva who was sonless became a precedent and a Vedic authority for Dattaka.6

This act between deities outlined principles for the Dattaka system of adoption; notably, this only outlined adoption guidelines for sons, in which five out of twelve different types could be adopted. Certain types had to be adopted as lower caste and it was strongly preferred that the adopted son be already related by blood, however distantly.

Adoption served a purpose other than continuing lineage and the wellbeing of the family and estate. In the Hindu rituals of a funeral, the son is expected to light the pyre for his father’s cremation and to ‘offer Pinda and Udaka to the father and his ancestors when they had departed for the other world, and by these Sraddha offerings at regular intervals to sustain them in the spirit-world’.7 Furthermore, the strictness in the application of the Dattaka system evolved throughout the centuries. As a case in point, during the Kali period, or the present period (after 700 BC), only the aurasa (natural-born) and dattaka (given) sons are accepted.8 This essentially undermines the twelve different types of adoption and the caste distinctions, overruling smriti or textual sources as guidance. Many historians attribute this change to the rise of Buddhism, which sought to eradicate the caste system and apply equality. This relaxation of rules demonstrates the continuous and evolving interpretation of Hindu law based on the changing desires and values of society.

II. Buddhism, Jainism, and Sikhism

Without delving into the nuances of Buddhist, Jain and Sikh legal jurisprudence, it is certain that all three religions lack recognised personal laws. Much of this relates to the colonisation of India and the British lack of interest in understanding and defining religious laws other than that of Hinduism and Islam. As such, Buddhists, Jains, and Sikhs, were generally subjected to Hindu laws. Sezgin states that: ‘it must also be remembered that during the colonial period, the laws of Sikhs, Jains and Buddhists were usually applied as part of

5 ibid.
7 ibid 244.
8 ibid 99.
custom in accordance with the rulings of Privy Council in London’.  

The argument that Buddhism, Jainism, and Sikhism can be categorised as ‘Hindu’ relies on the assumption that they are simple offshoots of Hinduism, as though they are merely different sects of Hinduism. While the three religions have roots in the subcontinent, they are fundamentally different from Hinduism and one another. The majority of worshippers within these communities would identify themselves as belonging to a religion unique to Hinduism. The British did eventually identify Sikhism as a separate religion from Hinduism, and subsequently made changes to the law through the Privy Council’s creation of the Anand Marriage Act (1909) and the Punjab Laws Act (1972), which identified customary laws for Punjabis, particularly Sikhs.

Each of these religions lacks emphasis on formalities, notably in the absence of a contrasting dharma, legal system, or codification of laws. For example, traditional Sikhism has no concept of personal laws or, more fundamentally, legal jurisprudence. In recent times, particularly amidst Hindu-Sikh tensions, the Sikh community has struggled to unify and agree on personal laws that might potentially be applied to them. According to Sirdar Kapur Singh, a renowned Sikh scholar and philosopher, ‘Sikhism has no corpus of civil law of divine origin’, implying that there is no divine origin in terms of Sikh personal laws. Such a position makes the task of developing contemporary personal laws for the Sikh community even more difficult and more controversial to justify.

Jainism, in contrast to Sikhism, bears some similarity to Hinduism in the sense that it has a variety of sources that ultimately influence its own dharma, or legal principles:

Together, the śrāvakācāras and the nītiśāstras form the Jain equivalent of the Hindu dharmaśāstras. But their focus is more on ethics and ritual than on statecraft and personal law, which are traditionally kept outside the religious law and left to local custom, desācāra.

In the colonial era, the British only recognised the Jains as a separate religion in the mid-19th century, at which time they attempted to codify Jain law in a similar fashion to Hindu law. While Jainism does not have such express legal concepts and notions as those which exist in Hinduism, it is essential to note that there are some concepts around personal laws in which “Jain texts also contain many original conceptions, especially on the rights of widows to

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10 ibid.
inherit and to adopt a son, coloured throughout by the Jain value of non-violence”. In fact, adoption is not viewed through as spiritual a lens in Jainism as it is in Hinduism, particularly when it comes to funeral rites.

Note that while each of these religious communities have been granted Indian national minority status and have been officially recognised as separate religions, they are still subjected to modern laws, loosely based on Hindu *dharma*, including HAMA.

**The Hindu Adoption and Maintenance Act**

While it is helpful to classify adoption laws in India as within Tamanaha’s tenets of a religious normative system, this is also difficult as the majority of the Indian legal context is still structured under the common law system. While aspects of Hindu religious law do exist in the current Indian legal system, much of it is through codification or applied customarily at a local level. This mixed legal system, as Palmer describes, “is one in which two or more legal traditions, or parts thereof, are operating simultaneously within a single system”. Furthermore, Merry states that legal pluralism creates a multitude of highly complex legal problems, including “the need to decide when a subgroup’s law applies to a particular transaction or conflict…particularly family law”. As such, the predominantly common law legal system in India does not reflect societal values, which includes the 78th Act passed by India’s Parliament, the Hindu Adoption and Maintenance Act of 1956.

**I. HAMA Rules and Intentions**

In 1956, eleven years after India’s Independence, HAMA was passed by the Indian parliament, overriding then any “text, rule or interpretation of Hindu law or any custom or usage” as well as “any other law in force” previous to the commencement of this act. The purpose of this act is not merely to rewrite old customs and usages regarding adoptions, but also to instil uniformity of the law among Hindus.

The Act overrides old customs, sources, and practices traditionally utilised within Hinduism. The most obvious of these is that girls may be legally adopted under HAMA, a reality that was not acceptable under the ancient Dattaka system of adoption. The Act also requires the child, or the adoptee, to be considered a ‘Hindu’ by definition, but does not require the child

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13 *ibid* 11.
17 The Hindu Adoption and Maintenance Act 1956.
to be of a similar caste or a blood relative as referred to in ancient systems. However, the idea of *sui juris*, both a Western and Hindu concept, is still preserved within HAMA, which states that the adopter must be of sound mind or mental competence as necessitated within the Yajur Veda and the Dattaka systems.\(^{18}\)

Perhaps the most notable preserved custom under HAMA is that married women cannot directly adopt a child, which can be done only with the consent of her husband. This is similar to the Dattaka system, which does not generally allow a woman to adopt, especially if her husband is deceased. The estate, lineage, and funeral rites would have already been, respectively, redistributed, ended, and conducted by an alternative. However, under HAMA in 1956, an unwed, divorced, or widowed woman may adopt – a very modern, westernised approach that is especially advanced for the India of the 1950s.

II. Non-Hindus as ‘Hindus’

As previously mentioned, the term ‘Hindu’ in this act refers to ‘any person who is a Hindu by religion’, ‘any person who is a Buddhist, Jaina or Sikh by religion’, and ‘to any person who is not a Muslim, Christian, Parsi or Jew by religion’. The act later explains that,

[The term] ‘Hindu’ shall be construed as if it included a person who, though not a Hindu by religion, is nevertheless, a person to whom this Act applies by virtue of the provisions contained in this section’.\(^{19}\)

There are three significant issues with defining Hindu in this manner. Firstly, it implies that Muslims, Christians, Parsis, and Jews already have adoption laws established and therefore are able to make use of and abide by them. Secondly, by establishing that anyone who is not a Muslim, Christian, Parsi, or Jew by religion is bound by this Act would imply that Buddhists, Jains, and Sikhs, who are not Hindus by religion, are already bound by this Act. The inclusion of Buddhist, Jains, and Sikhs in such a catch-all definition of ‘Hindu’ caused significant confusion and communal strife, despite later disclaimers that the term ‘Hindu’ may not include Hindus by religion. Finally, it appears as though the Act acknowledges that there are religious differences, but refuses to treat Buddhists, Jains, and Sikhs as separate legal communities. As discussed, Buddhists, Jains, and Sikhs take their own approach to personal laws; however, having different laws for different communities within one nation creates inequalities and competing tiers of standing citizenship and rights. This is a reflection of Buddhists, Jains, and Sikhs standing as a minority in India, but not necessarily as they wish to see themselves.

\(^{18}\) *ibid.*

\(^{19}\) *ibid.*
III. Court Cases and Trends under HAMA

In a report by the National Judicial Academy, it was found that there was a high degree of flexibility when it came to judicial interpretation of HAMA.\textsuperscript{20} For example, in the case of \textit{Mst Deu v. Laxmi Narayan}, an adult woman who was adopted as a child had to surrender her inheritance and investments she was awarded through her mother’s will,\textsuperscript{21} as the courts rule her adoption had been invalid, despite the correct paperwork and procedures. They found that her separated mother did not gain the consent of her husband prior to the adoption.\textsuperscript{22} As of 2010, the HAMA was amended with respect to such inequality, and now treats men and women equally in the adoption process. A woman no longer needs permission or consent from her husband to adopt a child, as they both have equal rights in the process. That is, both husband and wife must consent to the adoption, and it is no longer the burden of the wife to attain the consent of her husband.\textsuperscript{23}

More recently, the courts have begun to prioritise the interest of the child and the state in their rulings of legal adoptions. For example, in the HAMA 1956, it is stated that an adopter cannot adopt a child of the same sex if they already have a child of that sex within their household. Recent cases have seen the law develop in this regard, as in the case of \textit{Darshana Gupta v None and Ors}, which held that the plaintiff could adopt a second daughter,\textsuperscript{24} supported by judicial reasoning that the HAMA was constructed for a different social scenario and time, in which the Acts were ultimately intended ‘harmoniously to ensure rehabilitation and social reintegration of orphaned, abandoned and surrendered children’.\textsuperscript{25}

While the HAMA and the Indian legal system regarding personal laws seek to reform society’s adoption practices and customs, it ultimately fails. As an example, the high incidence of foeticide, especially of female infants, is still commonplace in India despite the relative legal ease of adoption.\textsuperscript{26} The legal feasibility of being able to give up a daughter for adoption or receive a daughter through adoption, has not reframed Indian society’s views of female infants. As demonstrated by the statistics from the Central Adoption Resource Agency (CARA), legal adoptions of Indian orphans, both in-country and inter-country, have

\textsuperscript{20} National Judicial Academy (Bhopal), Hindu Adoption Laws & Interpretation By Different High Courts, (Deepak Verma, NUJS, 2015) 10.
\textsuperscript{21} \textit{Mst Deu and others v. Laxmi Narayan and others} (1998) 8 SCC 701.
\textsuperscript{23} The Personal Laws (Amendment) Act 2010.
\textsuperscript{24} \textit{Darshana Gupta v None and Others} (2015) AIR 105.
\textsuperscript{25} \textit{ibid}.
\textsuperscript{26} Alka Gupta, ‘Foeticide in India’ (UNICEF India, 2015) <http://unicef.in/PressReleases/227> accessed 17 February 2016.
plummeted by fifty percent in the last five years.\textsuperscript{27} This attests to the fact that legal adoptions are not currently a popular trend or priority in Indian society.

Conclusion

The codification and interference by British colonisers misplaced much of the body of traditional religious law for Hindus, Buddhists, Jains, and Sikhs. This interruption or disillusionment has prevented the vast majority of these worshippers from living by their religious laws. As such, their values are also not aligned with their respective religious laws, nor with such modern ones such as the HAMA. The wide gap created by traditional religious laws, the British interpretation and attempted codification of these laws, the ‘progressive’ nature of modern laws, and the desires of the people have resulted in a further divergence, as demonstrated by the diminishing number of legal adoptions. While HAMA may periodically project the remnants of traditional Hindu religious law, especially the Dattaka system, it is ultimately more aligned with Western principles that also do not reflect contemporary social values in India.

More recently, the introduction of the Juvenile Justice (Care and Protection of Children) Act 2015 may lead to a more secular and smoother approach to adoption for inter-country adoptions.\textsuperscript{28} Section 35 of the Act emphasises the need to ‘declare the child legally free for adoption’ after institutional inquiries and procedures have been followed. Furthermore, the Act incorporates the Hague Convention regarding adoption as well as fundamental principles for the care and protection of children.\textsuperscript{29} It also states in s 56(3) that the Act does not apply to the adoption of children under HAMA. In essence, this may create adopted children of two worlds—one that is bound by outdated colonial and religious rules, and the other that is secular in nature, adhering to international guidelines.

\textsuperscript{27} ‘Adoption Statistics’ (CARA) 
\textsuperscript{28} Juvenile Justice (Care and Protection of Children) Act 2015.  
\textsuperscript{29} Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (1993).
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Playing musical chairs with international justice: evaluating the appointment of judges *ad hoc* in proceedings before the International Court of Justice

Gavin Lamont Arthur Dingley

Under Article 31 of the Statute of the International Court of Justice, an *ad hoc* judge may be appointed by either of the parties before the Court, where they do not have a judge of their nationality on the Bench. This provision has been heavily criticised as it detracts from the notion of impartiality essential for justice in the international arena. This paper builds upon this perception by looking at the voting behaviours of judges in cases where they have been appointed *ad hoc* and the effect this has had on the impartiality of the tribunal itself.

Introduction

The International Court of Justice (‘the Court’) is typically composed of fifteen judges elected to serve nine-year terms. There is an informal understanding that the Court will maintain an equitable distribution of judges by geographical region, with Article 9 of the Statute of the International Court of Justice (‘the Statute’) ensuring that representation on the Bench encompasses the ‘main forms of civilization and of the principal legal systems of the world.’

Such norms in the Court are certainly uncontroversial of their own merit, but are compromised by provisions under Article 31 for the appointment of judges *ad hoc*.

Such appointments are qualified under Article 31, permissible only in cases where neither of the interested State Parties has a judge already sitting at the Court. This mechanism has been both criticised and lauded. On the one hand, it is seen as an instrument which has contributed to expanding the scope of the jurisdiction of the Court; on the other, it is charged with having jeopardised the Court’s impartiality. This essay will explore both sides of this debate, with the aim of making apparent the irrelevance of the *ad hoc* judge in the modern legal landscape.

Composition

The composition of international courts has been a matter of concern since the advent of the permanent international judicial body. Allocating seats on the Bench of the International Court was a compelling reason behind the successive failures in establishing a court at The

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1Statute of the International Court of Justice, April 1946, Article 9.
Hague Peace Conferences in 1899 and 1907. By contrast, in some regional ad hoc tribunals, the constitutive instrument allows each state to have a permanent judge on the Bench of the court. In these circumstances, each state that is a party will nominate a candidate for appointment, either by supplying a list of potential candidates or by way of common agreement.

The balance between power and judicial representation at the Court is regulated by the relevant agreements that exist between the five members of the Security Council who hold permanent seats at the Court. Whilst these agreements are not written into the legal provisions of the Court’s constitution, they lend a platform to the power politics and tacit conventions of the Court. This contrasts with Article 2 of the Statute, which requires that judges should be elected ‘regardless of their nationality’, though this has yet to be seriously challenged.

The Judge ad hoc, the Creator of Equality

Article 10 of the Universal Declaration Human Rights affirms the need for ‘an independent and impartial tribunal’ to guarantee the protection of rights. It is certain that the appointment of impartial and independent judges is effectively crucial to the functioning of the rule of law.

Issues on the composition of the Court and the judicial appointment process become apparent the moment the need for a judge ad hoc arises. In some cases, states attempt to frustrate proceedings by trying to dispel the need for them to sit. The functional credibility of any tribunal that derives its authority from the international community is hinged on the competencies, professionally and against international standards of impartiality. The selection of arbitrators in these proceedings is the critical precursor to such a test, as they undoubtedly influence the perceptions of legitimacy associated with the tribunal, with scrutiny often falling upon the judges who render decisions. The perception of legitimacy is most vital in such an evaluation, and it is precisely in this respect that the use of judges ad hoc to some extent alleviates ‘the instinctive mistrust felt by nations for a court composed of foreign judges’, and any allegations of bias from the Bench.

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3 See for example the European Court of Human Rights and the European Court of Justice.
4 Statute of the International Court of Justice, Article 2.
5 See for example Caron (n 2) 21–2 on debates over the establishment of a permanent international court at the 1899 and 1907 Hague Peace Conferences.
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Typically, the selection procedure before international courts involves the nomination of a candidate by a state. This has rendered the process increasingly political, as states jostle for some sort of political influence in the Court. Borrowing from the earlier argument on perceptions of legitimacy, the presence of a judge ad hoc on the Bench appears more likely to result in state parties accepting the jurisdiction of the Court. This premise is marred by the same imbalanced representation of many international organs, as not all permanent members of the Security Council have yet to accept the Court’s jurisdiction without reservation. Only the United Kingdom has accepted compulsory jurisdiction, while China, Russia, France, and the United States continue to resist doing so.

Judges certainly play an essential role in achieving and maintaining the acceptance of the states that utilise the Court. In relation to the Court, Abi-Saab has observed that what counts is not to eliminate politics from the elections, which is a contradiction in terms, but to improve and widen the range of nominations so that political choice can be exercised from among a sufficient number of highly qualified candidates. While the intergovernmental context means that there is always a political dimension to the judicial appointment process, the choice is between a process in which the politics is open, acknowledged, and possesses some degree of balance, or a system in which political power and influence is masked, unacknowledged, and unilateral.

**Specialised Arbitrators**

The provisions of Article 31 of the Statute suggest that the usage of both ad hoc and elected judges serves as an advantage and should be viewed as a means by which states can ‘protect their interests and enable the Court to understand certain questions which require highly specialised knowledge.’ In this sense, it may be argued that the role of the judge ad hoc is to ensure that a case is fully understood before it is accepted or rejected by the Court, taking into account an assumed specialist knowledge of national sensibilities. The judge sitting ad hoc offers the Court a unique and relativist perspective on the differences between legal systems, which allows for nations to go before the Court with a case that is well received and understood.

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8 Charlesworth (n 6).
9 Statute of the International Court of Justice, Article 9.
10 PH Russell, ‘Conclusion’ in K Malleson and PH Russell (eds), Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World (University of Toronto Press 2006) 420.
12 "Statements by the Congress of the United States and by Congressmen opposed to United States support of the contras", Military and Paramilitary Activities in and Against Nicaragua, ICJ Report 1986, 480-488.
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The *Avena* case\(^\text{13}\) is a classic example where a thorough understanding of the constitutional law of the United States was necessary, as the matters concerned the domestic law of the appointing party.\(^\text{14}\) That being said, ‘the International Court treats municipal law as a fact stated by the relevant domestic courts.’\(^\text{15}\) The supposed influence or benefit of the judge *ad hoc* is then misunderstood, as the interpretation of municipal law in a case is fixed by the previous decision in the municipal court,\(^\text{16}\) thereby underlining the lack of influence a judge *ad hoc* would hold in cases of this nature.

**Adding to the Bench: Creating Impartiality?**

Where the judicial selection process leaves room for manipulation, there is surely a negative effect on the perceived independence of the tribunal.\(^\text{17}\) This is more prominent in the international context as judicial appointments are often not controlled by any one state, so they are ‘institutionally less subject to appointment politics than their domestic counterparts.’\(^\text{18}\) That being said, certain states may exercise their discretion and either veto or act decisively in the appointment process so as to influence the outcome. This highlights the problems underlying politically infused control in the recruitment process, an example of which concerns the Southern African Development Community (SADC) Tribunal, where a member was suspended when SADC member states failed to reappoint or replace judges once the Tribunal handed down a decision against a member state.\(^\text{19}\)

A testament to its inherent significance in society, the notion of judicial independence finds its roots in many provisions in the governing instruments of most international courts and tribunals, as well as in declarations of independence.\(^\text{20}\) Note that this position appears to be threatened by certain provisions which pit the nexus of judicial independence against the Tribunal’s composition, an example of which specifies that for ‘independence… [to be best served, the judicial body] must be balanced with…representativeness of the tribunals’

\(^\text{13}\) *Avena and Other Mexican Nationals (Mexico v United States of America), Judgment, ICJ Reports 2004, 12.*


\(^\text{15}\) Iain Scobie, ‘Une hérésie en matière judiciaire? The role of the judge ad hoc in the international court’ (2005) 4(3) The Law & Practice of International Courts and Tribunals 421, 459.

\(^\text{16}\) Serbian Loans PCIJ, Ser A, No 20/21, 46–47.


composition’.\footnote{G Ulfstein, ‘The International Judiciary’ in J Klabbers, A Peters and G Ulfstein (eds), The Constitutionalization of International Law (Oxford University Press 2009) 126, 130.} Despite this, one crucial fact remains: there are fewer seats on the judicial bench than there are states that have affirmed the Court’s constitutive instrument. In these situations, there is inevitable competition between states and judicial candidates for a seat. To alleviate this pressure, there is often a provision governing allocation within the Court’s rules, though rules requiring equitable geographic representation on the Bench appear at odds with the concept of independent and meritocratic appointments. Scobbie agrees, suggesting that, on the face of it, the very idea that a litigant may appoint a judge of its own choice to the Bench would appear to be in flagrant breach of the \textit{nemo iudex in sua causa} principle and the general notion of judicial independence.\footnote{Scobbie (n 15) 428.}

By contrast, in the overwhelming majority of domestic cases, a judge with such an interest in a case would be expected to recuse him- or herself as this would go against the principle of impartiality. Instead, international law creates a paradox whereby the appointment of a judge \textit{ad hoc} is for the preservation of impartiality in the adjudication of the dispute. In this respect, the tribunal’s impartiality is inseparable from notions of procedural equality.\footnote{Gerhard Wegen, Book Review of ’VS Mani, International Adjudication: Procedural Aspects’ (1982) 6(2) Fordham International Law Journal, Article 6 <http://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1070&context=ilj> accessed 16 April 2016.}

Lauterpacht argued that there should never exist a fear of the unconscious bias of a sitting member of the Bench where the interests of one’s state are concerned, as this would constitute an abuse of judicial power and would violate the judicial oath which turns on the notion of impartiality.\footnote{E Lauterpacht (n 14) 374.} Lauterpacht further argued that a judge \textit{ad hoc} had a negligible effect on the outcome of a case where there were often 15 judges. Rather, he argued, ‘the interest of the parties must be represented and defended by advocates and counsel—not by judges pledged by their oath to the duty of impartiality.’\footnote{45 Annuaire de l’Institut de Droit International (1954) Vol 1, 534.} Yet in many respects, this is a ‘perfectionist’ view and not in tune with the realities of cases before the Court. The use of judges sitting \textit{ad hoc} has invariably been to ensure that the Court fully understands and considers the arguments of the parties in the dispute, although this does not detract from the fact that the majority of \textit{ad hoc} judges vote by aligning with their countries.\footnote{W Samore, ‘National Origins v Impartial Decisions: A Study of World Court Holdings’, (1956) 34(3) Chicago-Kent Law Review 193, 193.}
Voting Behaviour

Ogbodo argues that Article 31 ‘corrupts the integrity of the Court by allowing a party before it to nominate an ad hoc judge if none of the Court judges is a nationality of the party’. However, this practice may be contrastingly viewed as a fairness provision, ensuring that every party before the Court has a judge of the same nationality as the parties in a case, or a ‘favourable’ ad hoc judge. Yet on closer inspection, this practice portrays an abuse of the judicial system at the highest level. This is based on research which has shown that, ultimately, ad hoc judges tend to vote for their country of nationality irrespective of the Court’s majority decision. This casts doubt on the Court’s impartiality. One observation to be made is that without representation on the judicial Bench of the Court a party cannot be guaranteed fair and impartial justice. This also puts question marks over the Court’s ability to dispense States-blind justice. The problem lies in the fact that, as an ad hoc judge is an appointee of one of the state parties with a pending case before the Court, the probability of a future appointment ad hoc will undoubtedly influence whether a judge is likely to be sympathetic towards the proposing state party.

That being said, opinions stemming from cases before the Court have generally sought to dismiss the idea that the judicial role of a judge ad hoc is a mouthpiece of the appointing state or represents a ‘guaranteed’ vote in a set of proceedings. Interestingly, when analysing the appointment of judges ad hoc over the years there has been a correlation between their respective voting behaviours and the states which have appointed them to their roles. This highlights that the character of the Court is altered the moment an ad hoc judge is added to the Bench, particularly as such appointees appear tend to side with their appointing state when analysing past records.

Conclusion: Should the Judge ad hoc Sit?

It is undeniable that the provisions of Article 31 of the Statute allowing a state to nominate a judge ad hoc if none of the current judges of the Court are a national of the party tarnishes the impartiality and rule of law associated with the Court. As an international body, the Court should give parties unqualified confidence in its ability to arbitrate disputes fairly with a
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states-blind approach to justice. To facilitate this move, Article 31 must be removed from the Court’s statute book.

Arguments also point strongly towards ensuring equality of arms at the Court between parties, in the sense that ‘the presence of a judge *ad hoc* may reassure the party which has appointed him that the nuances of its pleadings have been understood by at least one member of the Court.’ However, significant criticism is levelled when both parties appoint judges *ad hoc*. In this situation, each respective advantage is neutralised by the other, thereby becoming redundant. All the same, Rosenne and Ronen have argued that to date there has been no ‘significant political demand for change’ in the system of appointing judges *ad hoc* at the Court. One argument put forward is that states continue to view it as one of the tools to safeguard their rights. This stems from what states perceive as their moral position and political interest, as affected by the decisions of the Court.

Rather, Judge Loder, a former President of the Court, has put forward an argument with significant resonance: judges sitting *ad hoc* represent the idea of arbitration as opposed to justice. Instead, judges *ad hoc*, if necessary, should only take part in the proceedings where they are needed in an advisory capacity. The role of the judge *ad hoc* is near its tether; the institution ‘contradicts[s] essential principles of judicial activity such as the independence of the judiciary, but the International Court of Justice functions in an extremely politicised milieu.’

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35 ibid 131.
38 Scobbie (n 15) 463.
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