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When we launched the OxHRH Blog in June 2012, we had a clear aspiration: to offer an intellectual space that could be resourced, coloured and shaped by contributors from all over the world, who could share their knowledge of cutting edge new human rights developments with others in the global human rights community. This vision rapidly materialised. Since our launch in 2012 we have had posts relating to more than 65 different jurisdictions, written by contributors based in more than 40 different countries. Each blog is carefully written to a very high standard by an expert in its subject matter. But what is so striking is that the result is more than just a colourful patchwork. Themes and patterns have emerged spontaneously. It is for this reason that we decided to create an annual anthology so that our global community can see the whole picture that emerges from the fragments. Our first anthology appeared 18 months ago and was warmly received. In this second edition of Global Perspectives on Human Rights, we have taken a step further. We have invited academics from Oxford and elsewhere to write introductions to each chapter highlighting the thematic connections and evaluating the developments which emerge. The result is a multi-authored work of extraordinary colour and texture, created by all its many contributors and shaped by our commentators.

As ever, our blogs are characterised by their consistently high quality. Our skilful editors carefully select, review and edit each contribution to ensure the highest scholarly standards of analysis of human rights law. The strict word limit means that authors must focus on refining their arguments and making their points quickly and incisively. It also means that our readers can be kept up to date on a daily basis while at the same time being assured of high quality analysis. Particularly important to us has been the accessibility of the OxHRH Blog for audiences arriving in this space from their own local, national and international perspectives, equipped with varying interests and expertise. It has also been a very democratic space. Our contributors range from the most senior in the field – professors, senior counsel and judges, UN special rapporteurs – to those at the beginning of their careers, including graduate students. We have also particularly welcomed the unique perspectives of civil society organisations, NGOs and public interest litigators.

As you scroll through the pages and read posts of interest, I hope the new layout and arrangements of posts into chapters will encourage you to bounce freely between topics and ideas from across the globe, recognizing the themes and connections which lie within and between chapters. The 16 themes we have identified for this anthology differ in interesting ways from those selected for the first anthology, reflecting the constantly evolving nature of human rights developments. The chapters in this collection range from important constitutional issues such as access to justice, jurisdiction and institutional frameworks, through to civil and political rights such as those associated with criminal justice, security, democracy, freedom of speech, and religion, to equality rights, socio-economic and labour rights. We have seen a particularly vivid focus on children’s rights as well as migration, asylum and trafficking. This year’s anthology also reflects the growing human rights focus on business and finance, transitional justice, and development. We hope that the comparative dialogue created and shared in these chapters will help us all develop our own approaches to these issues, and that the collection as a whole will provide a useful resource to practitioners and policy makers working in the area, as well as a reference point and teaching resource for academics.

The 2015 edition of Global Perspectives on Human Rights could not have happened without the effort of the OxHRH team. At the forefront has been Laura Hilly, Managing Editor of the OxHRH Blog and Deputy Director of OxHRH, whose extraordinary imagination, energy, inspiration and hard work have made the blog the exciting and challenging space it is. With her in the editorial team and helping to drive forward the anthology has been Richard Martin, our very talented and energetic editor who has put so much effort and thought into helping Laura steer the anthology to publication. Thanks are also due to Kira Allmann and Heather McRobie for all their hard work as sub-editors of the collection. My great appreciation and admiration goes too to the editorial team led by Laura Hilly (2012 – 2015); Karl Laird (2014); and Claire Overman (2014); and comprised of staff editors Claire Overman (2013 – 2014) Rachel Wechsler (2013 – 2014) Chintan Chandrachud (2013 - 2014) Heather McRobie (2015) Richard Martin (2015). Many thanks for the time, commitment and energy you have invested in the OxHRH Blog to ensure its ongoing success.

We owe an enormous amount to Gullan & Gullan, the South African brand-based communication agency, and in particular Kath McConnachie and Carli Schoeman whose creativity, vision and patience have been so important to the OxHRH’s growth and this anthology. Many thanks to you.
My particularly warm thanks go too to the rest of our OxHRH team, Deputy Director Meghan Campbell and our Administrator Zoe Davis Heaney.

Our funders have also been central to everything we do. Particularly helpful has been the British Academy, which awarded the Hub OxHRH the prestigious five year Additional Research Project Grant to fund our editors. Many thanks too to the Bertha Foundation for their ongoing support and to Oxford University Press which has supported the printed copies of the anthology.

In aspiring to its global inclusivity and appreciation of human rights law issues, the OxHRH Blog benefits greatly from the contribution of its volunteer Regional Correspondents. By promoting the OxHRH Blog in jurisdictions whose experiences of human rights law may be lesser known to readers, by reason of global situation or linguistic barriers, the very universality of rights and the internationality of their claim becomes reflected in the diverse origins and focus of the posts. As I sit and write in Oxford, I send warm regards and thanks to our Regional Correspondents in Brazil (Thiago Amparo) and Latin America (C. Ignacio de Casas), East Asia (Sebastian Ko), the Commonwealth Caribbean (Alecia Johns), Southern Africa (Tabeth Masengu), South Africa (Shanelle van der Berg) and Western Europe (Adélaïde Remiche).

Many thanks too to the expert commentators on the individual chapters who have helped craft the individual posts into a coherent whole. Last, but certainly far from least, I’d like to reiterate how much we value and appreciate all of those who read, contribute and promote the OxHRH Blog. The OxHRH Blog is a forum to be resourced, coloured and shaped by you.

It is with great pleasure that I present to you the second edition of the Oxford Human Rights Hub’s ‘Global Perspectives on Human Rights’.

Sandra Fredman
Rhodes Professor of Law, Oxford University
Director of the Oxford Human Rights Hub
The OxHRH Blog at a Glance

Global reach of the Oxford Human Rights Hub Blog

792 blog posts
14,000 unique views per month

*Figures at March 2015
Message from the Editors of Global Perspectives on Human Rights

When it comes to online resources, those of us interested in tracking the developments in human rights law are increasingly spoilt for choice. Just a click away from many of us are the well respected case comments and articles that line the pages of law reviews, while our inboxes and twitter feeds quickly prompt us to follow up posts appearing on various blogs and articles starring on the websites of national newspapers. The reporting of human rights issues online has become a busy, varied and fast moving space.

That such a space has emerged is very encouraging for those of us keen to see human rights law discourse and debate flourish and mature in the public arena. Where does the OxHRH Blog fit within all of this though? What does it offer human rights researchers, practitioners and policy makers navigating these online resources? The OxHRH Blog was born out of an instinct that, despite such developments, a space remained for a dynamic forum where those interested could share cutting edge analysis of developments in human rights law across the world. Rooted in legal analysis and reaching across the globe through our contributors and readers and the issues they discuss, the OxHRH Blog offers a distinctly valuable contribution in the form of its concise, accessible and consistently high quality entries from many jurisdictions.

The same interest in, and commitment to, human rights issues that fostered the creation and growth of the OxHRH Blog has also encouraged the OxHRH to explore what other initiatives and programmes could extend such dialogue and exchange of ideas around human rights law issues. In 2014 we published the first edition of Global Perspectives on Human Rights, showcasing the first 18 months of the OxHRH Blog. In 2015 we ventured into new online digital spaces, enhancing dialogue on human rights law through live webinars and a new podcast series ‘RightsUp’.

Inspired by these new projects and the growing confidence instilled by their success, we were once again keen that the anthology we published this year should not just be a collection of (high quality) posts downloaded from the OxHRH Blog, but something more than that. It too should be an extension of the OxHRH’s very aim to not only raise awareness and promote discussion of human rights law issues, but also to make connections between developing themes and trends as they develop on an eclectic global stage. Our ambition for this edition of Global Perspectives on Human Rights then, has been to offer our readers and contributors, as well as those who are perhaps new to the OxHRH Blog, another forum in which the ideas and curiosities, the concerns and aspirations raised over the last year could be collected, reviewed and reflected upon. This creative process has found expression in the how the posts have been selected, categorised into chapters, analysed in their individual introductions and ordered within them.

And in an attempt to seize this reflective opportunity, this year we encouraged those connected with the OxHRH and human rights at the University of Oxford to return to the posts on their areas of interest and expertise and to re-engage with them in the form of chapter introductions. In casting their critical eye over the posts in each chapter and the topics they raise, the authors of the anthology’s sixteen chapter introductions have produced authoritative overviews, outlining the issues and central questions that lie ahead for the reader. In doing so, it is hoped these introductions will not only entice readers to delve into the analysis contained in the substance of the posts but also stimulate further discussions and reflections on the issues raised and how they connect with other chapters in the anthology. We would like to reiterate our thanks to all the chapter introduction authors who responded with the enthusiasm and expertise that had encouraged us to first approach them to write for this anthology.

This edition of Global Perspectives on Human Rights is the culmination of this attempt to collect, review and reflect on the posts contributed to the OxHRH Blog from January 2014 to March 2015, structured around 16 central topics, which form the chapters. Similar to last year, it serves primarily as an e-resource, allowing the ideas and thinking contained within to be freely accessible to the widest possible audience. So too should we acknowledge again this year that categorisation of often overlapping and interconnected themes is an inherently difficult and imperfect task.

Chapters in this latest edition vary from last year’s, reflecting changes in themes discussed, as well as the editors’ own preferences for identification and demarcation of posts. Nonetheless, we hope that each of these chapters will prove useful to readers by organising, in some logical way, this rich and diverse body of work and enable common themes to emerge both within and across the chapters. Indeed, we also hope the anthology serves to highlight similar themes central to contemporary human rights law that are truly global. And that through such comparative dialogue and sharing of experiences based on our own countries and regions, struggles and victories, we can all benefit in learning how we might approach these issues.

This global perspective and the comparative analysis it enables is demonstrated well both within and across chapters. Posts in the migration, asylum and trafficking chapter, for example, describe the journeys of irregular migrants in the UK, other parts of Europe, Mexico, Israel and Syria, and courts and governments responses to their treatment and detention. Similarly, posts collected under the topic of criminal justice allow direct comparisons of how appeal courts and prosecutors have dealt with the issues of assisting dying (UK and Canada), the death penalty (US, India, China) and whole life sentences (UK, Europe and Canada). On the topic of institutional frameworks, the collection of posts encourages the author of the chapter’s introduction to identify those organisations across the world that serve noble purposes, but require greater support of some form, and those that make a more radical case for reform of specific human rights-related institutions.

There are also central themes that rumble below the surface of many of the chapters and serve as the links to topics that many initially appear comfortably settled within their own chapter. Perhaps the most obvious are economic policies (particularly the squeeze on public funding), citizenship, gender and race, each impacting in their own way on topics falling within, for example, chapters on access to justice, socio-economic rights, labour, business and transitional justice.

While this second anthology is certainly more than the
sum of its collected posts then, unsurprisingly much of what makes it a uniquely valuable resource reflects the very strengths of the OxHRH Blog itself. With help and guidance from the editorial team in Oxford and Regional Correspondents, contributions regularly arrive in our inboxes from across the globe. Since its inception in 2012, the OxHRH Blog has posted an impressive 792 posts. These are written by more than 325 expert contributors, situated in over 40 different countries ranging from the UK to Thailand, Romania to Uruguay, Mexico to Qatar, Rwanda to Spain, Papua New Guinea to Bangladesh, India to Australia, and many, many more. More than 50% of our contributors are based outside of the UK. We receive more than 14,000 unique visitors to our site each month.

This edition of Global Perspectives on Human Rights showcases 262 original contributions from the last year. Once again, it includes contributors from various fields, backgrounds and level of seniority. This democratic space is demonstrated by contributions ranging from judges and senior counsel, professors and senior policy makers to budding scholars, lawyers and activists, beginning their careers in various fields of human rights law and practice.

And on this note we would like to conclude by reiterating our thanks to the contributors to the OxHRH Blog whose posts form the very basis of this collection (many of whom continue to write for us). Their commentary, analysis and insight ensures the OxHRH Blog continues to offer a high quality, diverse and dynamic forum for human rights researchers, practitioners and policy-makers from around the world. Many thanks also, to Professor Sandra Fredman, Founder and Director of the OxHRH. Her daily involvement with the OxHRH Blog and her endless support for the editorial team allows the OxHRH Blog to be what it is. Without her, none of this would be possible.

We hope you enjoy reading the posts and reflecting upon the issues captured in this year’s edition of Global Perspectives on Human Rights.

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Helen McDermott (Jurisdiction & Scope)
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Richard Martin (Criminal Justice)
Fiona de Londras (Security)
Alecia Johns (Democracy & Voting)
Gautam Bhatia (Expression, Association & Assembly)
Julie Maher (Religion)
Rachel Wechsler (Migration, Asylum & Trafficking)
Elena Butti (Children)
Meghan Campbell (Equality)
Karl Laird (Equality)
Sandra Fredman (Socio-Economic)
Barbara Havelková (Labour)
Kate Mitchell (Business & Finance)
Heather McRobie (Transitional Justice)
Jaakko Kuosmanen (Development & MDG Post 2015)
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Chapter 1

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Access to Justice
Chapter 1

Introduction
By Laura Hilly

Access to justice is the cornerstone of any fair and equitable legal system. As Sir Bob Hepple in his post ‘The Equality Agenda in 2015’ contained in Chapter 11 of this anthology (p 210) emphasises: “This year marks the 800th anniversary of Magna Carta, so it is not inappropriate to recall clause 40 (still on the statute book), which states: “To no one will we sell, to no one will we refuse or delay, right or justice.”” But writing on the second anniversary of the introduction of sweeping cuts to civil legal aid by the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LAPOS’), in the wake of debilitating fee hikes in UK employment tribunals and an ongoing diminution of criminal legal aid, it is reasonable to ask what price are we all now paying for these ‘reforms’ of access to justice in England and Wales? While some of the proposed reforms highlighted in this chapter ultimately failed to make it onto the statute books (for example, the proposed presumptive cost orders to burden amicus interveners: see Daniel McCredden ‘Presumptive Cost Orders: A Threat to Public Interest Interventions’ p 17) most of them succeeded in being enacted. And with the re-election of the Conservative Party to Government in May 2015, many of these cuts are here to stay.

Michael Ford’s posts (‘New Employment Tribunal Fees and Discrimination: UNISON v Lord Chancellor; Equality and Human Rights Commission’ p 12 and ‘The Impact of Tribunal Fees’ p 13) chart the unsuccessful judicial review applications brought by UNISON in response to the introduction of a new fee regime in the employment tribunal and employment appeals tribunal. Since the introduction of the new fee regime there has been a dramatic drop in employment tribunal filings, particularly in small claims and sex discrimination claims (down a staggering 91%). This is clearly not because equality in the workplace has magically been realised in the 12 month period since the fees began, but rather because the fees pose an unsurmountable hurdle for many would-be claimants that might bring such claims.

There has been some limited success in challenging LAPOS in the courts. In Gudanaviciene & Ors v Director of Legal Aid Casework & Anor [2014] EWHC 1840 (Admin), the applicants sought judicial review of the Lord Chancellor’s guidance issued on how the ‘Exceptional Case Funding’ scheme, established under LAPOS particularly for civil claims, was to be administered. The guidance set an extraordinarily high threshold for eligibility, only for ‘those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach’ of the rights to legal aid afforded under Art 6 of the ECHR, or for EU Nationals, under Art 47(3) of the EU Charter. As Alexander Thompson describes (‘European Legal Aid in a Domestic Framework’ p 13), the court held that the guidance was ultra vires, and importantly recognised a limited right to legal aid is inherent in Art 6 (Right to Respect for Private and Family Life) in addition to Art 6 and Art 47(3) EU Charter.

Another limb of LAPOS – the introduction of a ‘residence test’ to restrict access to legal aid for persons with less than 12 months’ lawful residence – was also the subject of successful judicial review. Daniel Cashman (‘The Irrelevance of Residence: The Unlawful ‘Residence Test’ for Legal Aid’ p 15) gives an account of a unanimous High Court ruling finding the secondary legislation introducing the restriction to be both ultra vires and discriminatory. In respect to the first, the court rejected the Lord Chancellor’s argument that these provisions were intended to restrict legal aid to those who have the greatest need, powerfully stating that ‘no one can pretend that removing legal aid from non-residents is a means of targeting legal aid to those most in need’. Moreover, the test was held to unlawfully discriminate in cases of equal need between residence and non-residents.

Changes to criminal legal aid have also been subject to judicial review. Daniel Cashman’s post ‘Cutting Corners: The Procedural Illegality of Legal Aid Cuts’ (p 16) explains the High Court ruling in late 2014 that held that the consultation process adopted by the Government in its decision to reduce the number of criminal legal aid contracts was so unfair that it was unlawful. The Government’s decision saw an immediate reduction of 8.75% in criminal legal aid fees and a reduction of the number of available contracts work in police stations and associated work from 1,600 to just 525. These cuts provoked expressions of outrage by the legal community, leading to unprecedented strikes and protest action within the legal profession in late 2014. While the claimants in this case reiterated their profound disagreement with the Government’s restructuring of criminal legal aid, the actual legal argument was more confined. While the Court held that improper consultation processes were engaged in before enacting the changes, Cashman’s post highlights that the court indicated that even a ‘relatively short re-consultation period would be sufficient’, providing little armoury for would be opponents of the substance of the cuts.

While this litigation has clearly served to highlight some of the flaws in the legal aid cuts package, it has not been enough to stand in the way of a government (now with a fresh five year mandate) determined to dismantle a comprehensive publically funded access to justice framework. Litigation has been useful in generating public awareness of the impact of the cuts, but as Thompson perceptively notes: “it must be asked whether it really is more expensive to conduct this kind of satellite human rights litigation, or just to fund the litigant for the hearing in question.”

As an alternative to direct legal challenge, Natasha Holcroft-Emmes, reflecting upon the Oxford Pro Bono Publico 2014 symposium in ‘Public Interest Lawyering in Times of Austerity’ (p 19) highlights the “importance of members of the legal profession taking ownership of this injustice. It is our social responsibility, as advocates of the values of fairness and equality, to take steps to address this inequity.” Gráinne McKeever’s post ‘Clinical Legal Education as an Access to Justice Innovation’ (p 20) provides an inspiring example of how this social responsibility can be realized through innovative clinical legal projects such as the Ulster University’s
LLM in Clinical Legal Education. Programmes such as this are important not only for the immediate access to justice that they provide for clients of the clinic, but also for the sense of social responsibility that they foster in students, encouraging more people to see “poor people’s law” as a noble and necessary area of specialization that should be valued and encouraged.

While most of the posts in this chapter have focused upon the challenges that currently face England and Wales, Liz Curran’s post ‘Valuing the Work of Community Lawyers to Resolve Systematic Problems’ (p 21) reminds us that other jurisdictions are also facing similar “fiscal belt tightening” in the age of austerity. In Australia, this environment threatens to undermine the important work of community legal centres: but at what cost? In this post Curran highlights a recent Australia Productivity Commission Report that underscores the value of community legal services in ensuring that access to justice is not just a lofty aspiration for those who need it most (often the people that can least afford legal assistance), but a reality. The post also points to both the overall economic and social gains achieved through the proper funding of public legal services. This kind of long-term, “big picture” and evidence-based thinking by the Australian Productivity Commission is to be welcomed; it demonstrates that the costs in restricting access to justice by curtailing publically funded legal aid may, in the long run, be too much to bear for all.

As legal challenges to many of these reforms have begun to make their way to the courts in the last year, the posts that describe and explain them in this chapter paint a grim picture. While there have been some small moments of success, litigation has done little to dismantle this new and impoverished ‘access to justice’ framework which, as many highlight, dramatically inhibits access to the courts, and does little to safeguard justice.

Dr Laura Hilly is a Posdoctoral Research Fellow and Deputy Director of the Oxford Human Rights Hub at the Oxford Faculty of Law.
New Employment Tribunal Fees and Discrimination: UNISON v Lord Chancellor; Equality and Human Rights Commission
By Michael Ford | 7th February 2014

In R (Unison) v The Lord Chancellor & Anor [2014] EWHC 218 (Admin), the High Court (Moses LJ, Irwin J) an important judicial review proceeding was brought by UNISON to challenge the fees regime introduced in the employment tribunal and EAT. The Court rejected the application but its judgment is interesting for what it says about the effect of fees and for the possibility of a future challenge.

In summary:

1. The judgment refers to errors in the guidance on the fees and the indication from the Lord Chancellor, given in the course of the hearing, that there will now be a presumption that a successful claimant recovers fees (para 15). The rules may be amended in due course.

2. The Court rejected the claim that the Fees Order breached the EU principle of effectiveness but principally on the basis that there was as yet no sufficient evidence on this. It noted that the dramatic fall in claims “may turn out to be powerful evidence to show that the principle of effectiveness, in the fundamentally important realm of discrimination, is being breached by the present regime” (para. 46). The Court referred to the difficulties of proof in discrimination, now exacerbated by the future abolition of the questionnaire procedure, saying that it would expect tribunals to encourage a full exchange of information before the payment of a hearing fee is due. It also noted the low median awards for discrimination and a recent BIS Study in 2013, which concluded there is an even chance individuals who are successful receive payment of their award. Thus (para 29):

The evidence amply supports the conclusion that the ability to bring discrimination cases is a vital plank in the means of combating discrimination, but the outcome of bringing claims is difficult to predict and the rewards are small, with an even chance of failing successfully to enforce them.

Despite that, and evidence of the dramatic fall in tribunal claims (about 80% drop on the latest figures), the Court concluded that the hypothetical examples of claimants proposed by UNISON were not yet sufficient to show the principle had been breached.

3. The Court did not consider there was a breach of the principle of equivalence, in particular, because now that the Lord Chancellor had agreed that a successful claimant should recover his or her fees, it could not be said that the regime was
Chapter 1

The Impact of Fees in the Tribunal
By Michael Ford | 22nd September 2014

Fees for bringing claims in the employment tribunal were introduced in August 2013. Since then, the Ministry of Justice’s statistics have revealed a huge decline in the number of claims. The latest statistics continue the depressing trend of early figures, and undermine any argument that the earlier statistics were unreliable.

A comparison of claims accepted for April-June 2014 with those for the same quarter for 2013, prior to the introduction of fees, shows the following:

• An 81% drop in the total of claims accepted, comprised of a 70% drop in single claims and a 85% drop in multiple claims.
• An alarming 91% drop in claims of sex discrimination, confirming the figures from previous quarters, and 75% fewer equal pay claims.
• An unsurprising huge decline in small claims: for example, claims for deduction from wages are down 74% and working time claims are down 90%.

This decline, if anything, greatly under-estimates the deterrent effect of fees. They only show how they impact on the issue of a claim form. Any worker who wants the privilege of a hearing for a discrimination claim, for example, must pay a further fee of £950. No fees are payable by the employer unless it loses the case, and it is then for the worker to enforce non-payment in the County Court – paying another fee.

Matthew Hancock, Minister of State for Education and Business, celebrated the drop in claims. He asserted that it demonstrated the scale of false allegations that had been made against blameless employers. “Unscrupulous workers caused havoc by inundating companies with unfounded claims of mistreatment, discrimination or worse [sic]. Like Japanese knotweed, the soaring number of tribunal cases dragged more and more companies into its grip”, the Daily Telegraph reported him as saying.

No-one in government seems to have paid any heed to 2013 research for the Department of Business, Innovation and Skills that, of those claimants who succeed in the tribunal, only 49% were ever paid in full. The government responded to similar reliable empirical evidence about this problem in the consultation which preceded the introduction of fees by stating that “we expect all parties to abide by the decisions of the tribunal and pay awards and fees as ordered”. No doubt, too, it “expects” employers not to discriminate against their workers because the current fees system means that the risk of a legal claim is minimal.

Michael Ford QC acted for the Equalities and Human Rights Commission, instructed by Rosemary Lloyd.

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Less favourable than comparable County Court claims. Nor was it persuaded that the evidence showed that the public sector equality duty was breached, though it said there may be substance in the argument that the proposals failed properly to take account of the impact on women of bringing discrimination claims (para. 66).

4. The final ground was whether the regime was indirectly discriminatory. Faced with limited evidence on the effect to date and the dispute about it, the Court ultimately decided it could not determine whether there was disparate impact. But after referring to data showing the relatively low income of women and people from ethnic minorities, it said it had “a strong suspicion that there will be some disparate impact on those who fall within a protected class” (para. 84).

5. On that basis the Court considered objective justification. Both UNISON and the EHRC argued that the imposition of fees on claimants alone could not meet this test, particularly in the context of the low level of awards and the “woefully inadequate enforcement system” (para 87). But in the absence of more compelling evidence as to the disparate impact, the Court considered it could not yet determine whether the regime was discriminatory. It made clear, however, that this matter the Lord Chancellor owed a duty to keep the matter under review and to take remedial measures if it is revealed to have a discriminatory effect (para 89).

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Michael Ford QC is a barrister practising from Old Square Chambers in London. His principal area of practice is labour law, both individual and collective, including areas such as equal pay, industrial action, working time and trade union law.
A key aspect of the Government’s reform agenda regarding civil legal aid is the restriction, set out in Schedule 1 to the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’), of legal aid to certain categories of claim.

In particular, nearly all areas of immigration law work were removed from the eligibility for legal aid. However, since areas such as deportation and extradition clearly involve the potential application of human rights claims, the Act had to provide some means of catering for the limited right to legal aid itself implicit in the European Convention on Human Rights, which would apply wherever the Convention rights came into play. To take an example, where the Home Office makes a decision to deport a foreign national who has committed an offence within the United Kingdom, there will be a hearing before an immigration judge to determine if that decision can be successfully set aside by the individual concerned.

Three questions arise to that extent. The first is whether there is any right to legal aid in respect of that hearing. This would depend on whether Article 6 of the Convention itself applied. However, Article 6 is qualified by its terms which state it only applies in respect of the “determination of civil rights and obligations” or for criminal proceedings. Awkwardly, many areas of public law fit neither into the private law or criminal law paradigms (although the latter is itself a kind of public law). Whether it can be really said that the framers of the Convention intended whole swathes of domestic law to fall outside the scope of Article 6 is moot, at the very least, but the European Court followed that legalist reasoning to its logical end, and held, in Maaouia v France [2000] ECHR 455, that inter alia immigration law did not involve the determination of “civil rights and obligations”. Any procedural right to legal aid under Article 6 was therefore itself moot, since the Article could never substantively apply to the hearing at all.

This, it was soon noted, could be conveniently sidestepped by a clever expedient. Provided the claim fell within the bounds of European Union law a more extensive protection might lie. Under the EU Charter of Fundamental Rights a ‘legal aid article’ exists in the form of Article 47(3). Importantly, that article does not include the restrictive terms that Article 6 does, so that all character of law falls within its protection. Also fundamental is that the European Court of Justice had stated in its decision in DEB Case C 279/09 that this would be interpreted in line with Article 6 so that no inconsistency lay between their applications. So, the European citizen awaiting deportation could rely on EU law instead. The American, the Australian, or the Nigerian, could not.

The final question which arose was whether other Articles included a procedural aspect which required legal aid to be granted. Most notably, Article 8 would be engaged substantively to determine in many of these cases whether deportation, extradition or other state decisions were lawful as proportionate interferences with the individual’s family and/or private lives. Although Article 8 does not explicitly include a procedural aspect, it had been previously raised in other cases whether a right to legal aid might derive from Article 8. This would, for many cases, render the above discussion rather moot, and would be a boon for the non-EU foreign national.

LASPO is constitutionally a fascinating Act in the history of UK human rights jurisprudence. For the first time, in this author’s understanding, it purports to prospectively cater for the Court’s consideration of the primary legislation’s, and the Legal Aid Agency decisions’, compatibility with the Convention under sections 3 and 6 of the HRA respectively. For this purpose, it provides a scheme
in section 10 called "Exceptional Case Funding" whereby applicants may apply to be eligible for legal aid where failure to provide it would breach their ECHR or EU law rights, as considered above. That very scheme is now open to challenge under administrative and human rights law angles. In the next post we will see whether the Government policy guidance issued under the Act was held lawful in public law, and whether the recent refusals to provide aid were a breach of the HRA.

Under section 4 of LASPO, the Lord Chancellor provided guidance on how to decide exceptional case funding (ECF) applications made to the Legal Aid Agency.

The lawfulness of that guidance was open to judicial review on the basis that it was ultra vires, having misinterpreted the right answer to the three questions considered above.

In an important decision just handed down earlier this month, Collins J in Gudanaviciene [2014] EWHC 1840 (Admin) held that the Lord Chancellor's guidance was unlawful in the following respects:

1. It set the threshold for determining applications under Article 6 ECHR or Article 47(3) EU Charter, where they applied, too high. The guidance had stated that funding was appropriate in "those rare cases where it cannot be said with certainty whether the failure to fund would amount to a breach". This was perverse, since hardly any applications would ever show with certainty that the Convention required legal aid. This was borne out by the fact that only 1% of ECFs had succeeded since April 2013, when the scheme came into force. By contrast, Collins J preferred the ECtHR's jurisprudence from Steel v UK (2005) 41 EHRR 22, viz. that there must be effective access to a court, including the consideration of fairness, to be proved on a balance of probabilities.

The guidance did not consider Article 8 to have any procedural aspect at all, so that the Agency was not to take it into account. Looking at the European jurisprudence, Collins J held that this was wrong in law. In fact, Article 8 did include a procedural aspect, and that did involve a limited right to legal aid where it was engaged: see AK & L v Croatia (Application No: 37965/11). The relevant test was the same as that for Article 6.

2. That concluded the judicial review aspect to the claim. However, Collins J went further and quashed the decisions of the Director refusing aid in respect of all six claimants, on the grounds that they breached their Convention rights. Strictly, this may have been under section 6 of the HRA, or under administrative law on the basis that the decisions were founded on an irrelevant consideration, the unlawful guidance. It is plain from the first claimant, Gudanaviciene, that Collins J considered Article 8 to suffice to depose of the refusal, without any need to rely on administrative law or EU law rights instead.

There are, therefore, limited rights to legal aid inherent in Article 8 (and some of the other articles: see the discussion of Articles 3 and 5 in the case), so that exceptional case funding should be available for immigration cases notwithstanding the limitations of Article 6 ECHR. Where an individual cannot rely on any of the Articles, but is an EU citizen, Article 47(3) of the EU Charter will provide equivalent protection.

The history of this area is a fascinating insight into the cross-application of administrative and human rights law, since Page mandates the High Court to decide in effect every case: wherever the Legal Aid Agency interprets the risk of breach incorrectly, this will result in a misinterpretation of section 10 of the Act, which is a reviewable error of law. It might be queried whether Parliament in fact intended the Lord Chancellor to be able to provide more restrictive protection, even if it breached the UK's international obligations.

Such an interpretation seems to be headed off by section 3 of the HRA, however. In any case, section 6 would always require the Court to assess breach by the Legal Aid Agency. At present, and fascinatingly, if the HRA were ever repealed, Page appears to provide an equivalent result, since it mandates a "correct" interpretation of European human rights under the domestic statute. In cost terms, it must be asked whether it really is more expensive to conduct this kind of satellite human rights litigation, or just to fund the litigant for the hearing in question.

Alexander Thompson has a BCL with Distinction from Oxford, where as part of OLA he worked with legal aid firm Turpin & Miller on Gudanviciene.

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**The Irrelevance of Residence: The Unlawful ‘Residence Test’ for Legal Aid**

**By Daniel Cashman | 16th July 2014**

In R (Public Law Project) v Secretary of State for Justice [2014] EWHC 2365 (Admin), the Administrative Court held that the Government's proposed residence test for legal aid was ultra vires and discriminatory. The judgment serves as a welcome criticism of the sweeping justifications adopted by the Government in the name of austerity.
The Legal Aid, Sentencing and Punishment of Offenders Act 2012 (‘LASPO’) brought sweeping cuts to civil legal aid from April 2013. Soon after it came into force, the Government proposed a raft of further reforms in Transforming Legal Aid. Among the proposals for reform was a residence test, which would restrict access to legal aid for persons with less than 12 months’ lawful residence. The Government proposed to implement this test by secondary legislation in the LASPO (Amendment of Schedule 1) Order 2014. The Public Law Project brought judicial review proceedings to challenge the legality of the Government’s decision to propose the residence test.

First, it was argued that the proposed legislation was ultra vires. Under LASPO s.9(1)(a), legal aid is to be provided in the cases identified in Part 1 of Schedule 1, which have been identified as the situations in greatest need of public funding. Importantly, they are not cases in respect of which the United Kingdom is obliged to provide legal assistance, either under the Human Rights Act or the common law. Rather, legal aid in such ‘exceptional cases’ is (supposedly) catered for by s.10.

The Lord Chancellor sought to argue that LASPO conferred power to introduce the residence test in secondary legislation by virtue of ss 9(2) and 41(2)(b) LASPO, as these provisions grant a power to restrict legal aid by reference to a class of individuals identified by residence. However, this argument was given short shrift by Moses LJ, with whom Collins and Jay JJ agreed. Section 9 LASPO serves to identify those individuals who have the greatest need for legal aid (at [37]); so, the powers under ss 9 and 41 must serve and promote that object of the statute. A residence test falls short: in a powerful statement, his Lordship held that ‘no one can pretend that removing legal aid from non-residents is a means of targeting legal aid at those most in need’ (at [42]). As a result, the Court concluded that the proposed secondary legislation was ultra vires, as it sought to extend the scope and purpose of the statute.

Second, it was argued that the proposed amendment was discriminatory. The Government sought to argue that the discrimination was lawful because legal aid, in those cases where the law does not impose a duty to provide it, is no more than a form of welfare benefit. It is well-established that discriminatory selection in relation to the distribution of benefits is a matter for the judgment of Parliament and the Government. Given that the residence test did not apply to s. 10 LASPO cases, the Government considered that it was permissible to select which individuals could benefit from legal aid.

However, the Court also convincingly rejected this argument. Moses LJ held that legal aid differs from welfare benefits on the facts as ‘the Government has already reached the conclusion that certain categories of case demonstrate such a high priority of need as to merit litigation supported by taxpayers’ subsidy’ (at [71]). The correct question for the court was not about the denial of legal aid, but about discrimination in cases of equal need between those who are eligible and those who are not. As a result, the proposed residence test discriminated unlawfully.

The outcome of this case is no surprise – the residence test had already been widely criticised as unlawful. Nevertheless, the judgment serves as a stark reminder to the Government that its austerity measures must only be adopted within the bounds of the law. Austerity risks becoming a blanket justification for the Government’s removal of benefits and legal aid; yet, the High Court has shown that the mere identification of limited public resources cannot legitimate an unlawful discriminatory approach.

However, the residence test may survive. The judicial review was merely of the Government’s decision to introduce the proposed secondary legislation, and the Court has not yet decided on the relief to be awarded; the Government has also indicated its intention to appeal. The House of Lords will consider the proposed residence test on 21 July 2014 – it is only to be hoped that the full force of the Administrative Court’s reasoning will see the amendment rejected.

Daniel Cashman is a barrister, who completed the BA and BCL at the University of Oxford. He was a founding co-chair of Oxford Legal Assistance and on the Executive Committee of Oxford Pro Bono Publico.

Cutting Corners: The Procedural Illegality of Legal Aid Cuts

By Daniel Cashman | 24th September 2014

In R (London Criminal Courts Solicitors Association & another) v Lord Chancellor [2014] EWHC 3020 (Admin), the High Court ruled that the consultation process adopted by the Government in reducing the number of criminal legal aid contracts was so unfair that it was unlawful.

In February 2014, the Lord Chancellor announced that a radical overhaul of legal aid would see an immediate reduction of 8.75 per cent in criminal legal aid fees and a reduction of the number of available contracts for advisory work in police stations and associated work (‘Duty Provider Work contracts’) from 1600 to 525. The reforms led to protests and strike action within the legal profession, with concerns being expressed about the damage such cuts would cause to the criminal justice system.

While the claimants in the present action reiterated their profound disagreement with the merits of the Government’s decision, the judicial review focused on the narrower question of whether the process adopted in reaching the relevant decisions was lawful. The
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Presumptive Costs Orders: A Threat to Public Interest Interventions
By Daniel McCredden | 23rd July 2014

The Criminal Justice and Courts Bill received its second reading in the House of Lords on 30 June 2014 and has now been referred to committee stage. Part 4 of the Bill contains a package of reforms to the judicial review process, including a proposed new costs rule for interventions in the High Court and the Court of Appeal. The new rule is a serious concern for human rights litigation in the United Kingdom.

Clause 67 of the Bill will, in two respects, remove the courts’ general discretion in relation to costs in a judicial review proceeding. First, the court will not be permitted to order payment of an intervener’s costs, unless there are “exceptional circumstances” (cl 67(2) and (3)). Second, the court must, on application by a party to the proceeding, order an intervener to pay that party’s costs incurred “as a result of the intervener’s involvement in the proceeding” (cl 67(4)). The court may only refrain from making such an order if there are “exceptional circumstances” (cl 67(5)). This is a significant shift from the current position, where in recognition of

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the distinct, court-assisting role they play, public interest interveners ordinarily bear their own costs and are not liable to pay other parties’ costs, regardless of the outcome. It is also an unusual, restrictive incursion into the courts’ general powers to determine costs liability. In that context, one might legitimately expect the Government to provide a strong rationale for change. Worryingly, that has not been the case.

In its consultation material, the Government has described its proposals as being necessary to ensure “that those involved [in judicial review proceedings] have a proportionate financial interest in the costs of the case.” It has endorsed the “general principle” that “where a party chooses to intervene in judicial review proceedings …, ordinarily that should not result in additional expense for the existing parties to the litigation.” It has spoken before the Joint Committee on Human Rights (JCHR) of judicial review being used for “campaigning purposes” and as a “delaying” tactic; and before the Public Bill Committee of interventions becoming “a risk-free enterprise for many organisations and for which the taxpayer is shouldering the burden.”

The problem is, however, that the proposed rule is itself wholly disproportionate; it misconceives and greatly undervalues the role of interventions in the judicial review process and the courts’ responsibility for regulating their scope; and it will in practice shut out public interest interventions in Human Rights Act litigation.

As currently drafted, even where submissions made by an intervener are accepted and endorsed by the court, there is to be a presumption that the intervener will pay the state defendant’s costs. As reported by the JCHR, the presumption will also apply in circumstances where the Government unsuccessfully contests an intervener’s application for permission. It is difficult to see how an intervener could argue “exceptional circumstances” simply on the basis that the court accepted the arguments it advanced – it is surely not “exceptional” that an intervener might succeed in persuading a court to a view of the law different to that held by a state defendant. So, it is hard to see how this rule results in an intervener having a more “proportionate” financial stake in the outcome of a case.

However, the most troubling aspect of the proposed rule is what it reveals about the Government’s view of adjudication in public law litigation. Interventions typically are only sought, and certainly only permitted, where the intervention will assist the court in reaching a proper determination. As Arshi and O’Cinneide explain, (‘Third-Party Interventions: The Public Interest Re-affirmed’ (2004) Public Law 69) the “core rationale for judicial intervention” is “the introduction of relevant perspectives and expertise into the judicial process in order to serve the public interest in good adjudication.” In other words, the public interest in the court hearing from those in a position to provide relevant data, experience and legal argument concerning the issues before it. All the more so in human rights cases, where the wider contextual impact of a decision more readily engages the need for third party assistance, especially from organisations representing marginalised voices or that have particular knowledge and experience of human rights discourse at both the domestic and international level.

To encourage better adjudication and judicial decision-making – including through the use of interveners where appropriate – is, of course, simply to recognise the public aspect of the judicial function. The Government frequently refers in its consultation material to the private aspect of judicial review adjudication – resolving one-off disputes between individual and state. There is, however, very little, if any, recognition that adjudication performs a vital public function: it determines, develops and clarifies the law for the benefit of the community as a whole and the maintenance of the rule of law. As the Constitutional Court of South Africa said in Biowatch Trust v Registrar Genetic Resources and Others (CCT 80/08) [2009] ZACC 14 (in relation to costs orders in constitutional litigation) (at [23]):

“Constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.”

The same considerations apply to human rights judicial review litigation. Yet, the Government’s new costs rule has proceeded to date without change through Parliament despite the deep concern expressed by essentially every consultee that the risk of adverse costs orders will almost certainly prevent them from intervening. For example:

- “It will stop organisations such as ours that devote limited resources to [intervening] in cases where the courts might be too narrowly focused on the interests of the parties before them.” (JUSTICE)
- “[We can say with absolute certainty that [our] trustees would not give permission for applications for interventions to be made [with such a costs risk] …” (Public Law Project)
- “[It will] deter third party interventions from organisations that are unable to take any additional costs risks, whereas interventions will continue to be made by those representing well-resourced interests including companies and the government itself.” (Amnesty International UK)

Similar representations have been made by Liberty, Reprieve, Shelter, Bail for Immigration Detainees, Rights Watch UK, the Bingham Centre for the Rule of Law, the Law Society and the Bar Council. Their submissions demonstrate that interventions by charities and NGOs are certainly not “risk-free enterprises” – they involve the application of scarce resources, with legal work often performed pro bono by necessity, and they demand serious consideration before a decision is taken to seek permission. As the
JCHR has concluded, the proposed cost rule for these reasons poses a “significant deterrent to interventions in judicial review cases”.

The Government’s proposal is also troubling for its apparent lack of respect for the judiciary. The current position is that the courts, in considering permission, have regard to matters such as the additional expense and the effect of the intervention on the parties. Interventions are closely regulated by the courts, in terms of the length, type and focus of submissions permitted. The courts may also order the payment of costs by an intervener if, for example, it has acted unreasonably or has become, in effect, a principal party in the proceeding – this is indeed the current rule in the Supreme Court.

The Government has provided no evidence that the courts are making irresponsible decisions in relation to interventions, and yet the proposed rule will quite conspicuously end the very types of interventions that the courts routinely welcome. Moreover, no reason has been given as to why the same position as exists in the Supreme Court ought not continue to apply in the lower courts. An obvious undesirable consequence of the distinction between courts is that valuable interventions will be prevented from contributing at an earlier stage of litigation, where they might enhance first-instance (or appeal level) decision-making, or help facilitate a settlement (thereby reducing costs).

The upcoming committee debate in the House of Lords offers the opportunity for a rethink on these proposals. It is hoped that the serious concerns expressed by consultees and the JCHR will be given real and genuine consideration.

Daniel McCredden is an Australian barrister. In 2014 he undertook an LLM at University College London.

Public Interest Lawyering in Times of Austerity
By Natasha Holcroft-Emmess | 28th May 2014

On 24 May 2014, to mark its 14th anniversary, Oxford Pro Bono Publico presented a symposium on the importance of, and challenges to, the practice of contemporary public interest litigation. The symposium benefitted from a vibrant dialogue between prominent practitioners and academics. One of the panel discussions centred upon the impact of austerity on public interest lawyering in the UK.
Jo Renshaw, of Turpin & Miller LLP, illustrated the grave effect which austerity measures have had on the day-to-day practice of a public interest law firm. The cuts to civil legal aid brought in under the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO) affected a substantial proportion of the firm’s practice areas.

The pro bono contributions of students are a useful aid for practising solicitors, by providing clerical support in clinics through Oxford Legal Assistance. But the impact of the funding cuts has undoubtedly hit the most vulnerable. Clients from some of the more marginalised groups, such as immigrants and the destitute, have ceased to come for assistance. They know that there are simply no longer funds available to support them. These people have disappeared from the legal landscape.

Helen Mountfield QC, of Matrix Chambers, posited the difficulties of taking a public interest matter through to litigation where the individual(s) whose rights are in jeopardy lack the means necessary to satisfy an adverse costs order, should their claim be unsuccessful.

Although discretionary funding for ‘exceptional cases’ is in theory available, in practice the provision is nowhere near sufficient, and those who miss out tend to be the ones most in need of additional support. These practical considerations pose a real barrier to access to justice for those who cannot fund litigation through to completion. The criterion for justice then becomes whether the aggrieved party has sufficient resources, rather than the public interest in resolving cases fairly. This is obviously an unsatisfactory state of affairs. Helen emphasised the importance of members of the legal profession taking ownership of this injustice. It is our social responsibility, as advocates of the values of fairness and equality, to take steps to address this inequity.

Polly Glynn, of Deighton Pierce Glynn Solicitors, explicated her experience with some shocking cases of individuals gravely in need of the assistance of a social fund to protect their legal rights. Examples posited included clients who required reasonable accommodation, people living in abject poverty and those in need of immigration advice and assistance. Polly advocated some creative antidotes to the deleterious effect of the legal aid austerity measures. Greater dissemination, and improved ease of use, of information available to assist vulnerable clients would be one advance. Greater judicial awareness of, and empathy for, the plight of such individuals was another. The benefits which can be brought to litigation through third party interveners was also touched upon, and highlighted later in conversation between OPBP faculty director Professor Sandra Fredman QC and Justice Abella of the Supreme Court of Canada.

Although the context of the UK austerity measures inevitably paints a grim picture for prospective litigants in public interest matters, the existence and quality of dialogue between practitioners, faculty and those who contribute to the work of OPBP engenders some hope. The symposium in particular affirmed the clear commitment within the profession to ensure that the public interest in fair and open justice is not extinguished for the sake of austerity.

Natasha Holcroft-Emmess is a London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

Clinical Legal Education as an Access to Justice Innovation
By Gráinne McKeever | 12th September 2014

Imagine you got grant funding to develop an access to justice research agenda. Your grant application proposes the appointment of a team of law graduates to conduct research within a particular advice organisation: to talk to all the clients who come for advice; to understand why, when and how clients seek legal help; to see the difficulties for clients in engaging with dispute resolution systems; to understand where the disconnect is between what clients need and what the system provides.

Imagine that, by the end of a 12-month research contract, the researchers themselves were trained advisers, who did not just observe other advisers but were also helping to meet unmet legal need, by providing advice and advocacy for the clients of this organisation. Imagine that while your researchers provided the knowledge base and data sets that allowed you to deepen your research on access to justice and legal need, they were simultaneously developing – individually and collectively – their own informed socio-legal analysis of these and related issues. Imagine that the quality of research and advocacy provided by your researchers was sufficient to gain them a LLM in Clinical Legal Education.

In September 2012, Ulster University’s LLM Clinical Legal Education began with such an imagined process, but instead of grant-funded access to an external advice organisation, Law School staff developed an in-house legal laboratory in the shape of the Ulster Law Clinic, around which the LLM in Clinical Legal Education is constructed. Based on Nuffield-funded research conducted by this author for Law Centre (NI) (which identifies unmet legal need for users of social security and employment tribunals in Northern Ireland), the LLM in Clinical Legal Education was established to develop an understanding of the nature of this defined legal need. It achieved this by training graduate law students to provide advice and advocacy for members of the public with social security and employment law problems, while also creating a space for staff and students to reflect on and analyse the
In the past decade or more in Australia, creeping managerialism and efforts to reduce funding of services under the guise of 'fiscal belt tightening' and efficiency have threatened and sometimes jeopardised the effectiveness of the legal system in being able to respond to community need. The Australian Productivity Commission's Final Report on 'Access to Justice Frameworks' was released on 3 December 2014. It acknowledges the value of community legal centres and legal aid as 'highly committed' and supports the systemic advocacy of these providers in ensuring and improving a fairer justice system in Australia.

Community lawyers (whose work is mainly with the most vulnerable and disadvantaged clients) are uniquely placed to see the 'revolving door' of problems in the community. Exposure to client experience and case work gives them a vantage point from which to identify how things might be adjusted to enhance human rights and improve confidence in the law. Such a perspective can see lawyers finding solutions to also circumvent unnecessary cost to the judicial and administration systems that come by repeat cases with the same issues coming before the courts. They can see where early intervention or prevention of the problems arising in the first place might come from improved community legal education or law reform and identify barriers to access to justice.
Lawyers, as officers of the court in Australia, also have obligations to uphold the rule of law, to ensure confidence in the legal system and its administration. Laws that are poorly drafted, negatively impact on or alienate certain sections of the community because of their disadvantage reduce community confidence in the legal system. It is therefore incumbent on lawyers as part of this primary duty, to work to protect the integrity of the legal system in such circumstances.

Lawyers in community legal can also explain the context, complexities and barriers their clients encounter. Part of the core definition of this service includes legal education in and with the community, advocacy and law reform. This multi-pronged service model averts the fragmented nature of legal work that often exists in the private profession. Many community legal centres in Australia are also increasingly co-locating or creating ‘one stop shops’ or outreach centre, integrating their services alongside non-legal service providers where the most vulnerable or hard to reach clients are likely to be. In addition, community lawyers can provide a consistent voice for those in the community who by reason of a lack of power, media control and social exclusion can be invisible. This befits a participatory democracy.

In the past decade, I have argued for the use of strategic casework with multiple strategies involving education, policy work, media awareness raising, law reform and participation in expert and other advisories, as critical work for community lawyers. This is an efficient and effective way of ensuring a good use of finite resources and a more efficient justice system. In a climate of ever reducing funding, greater targeting to those who need help the most and with increasing demand, I have argued that resources might be strategically utilised so as to work on public interest or other cases where the greatest need and impact can be derived for the greatest number. This strategic work does not however preclude or replace the importance of case work in individual settings such as care and protection of children, court and tribunal representation and advocacy in family law, criminal law and family violence, but ought to be a compliment to it.

The Productivity Commission’s report makes many recommendations. This includes stable and sustainable funding, more closely connected to the realities of service delivery than is currently the case. It observes that Commonwealth funding for community legal centres has been largely ad hoc and historical. The Commission notes that record keeping and data collection imposed by government is unduly burdensome on services and not that useful and that there has been a disconnect between legal need and government funding and calls for funding to reflect the cost of service provision and indicators of need. To this end, the Commission stresses as a priority the need for evidence based research that is outcome based and consistently undertaken with a clearing-house to facilitate information. The Commission clearly endorses and acknowledges the important place of legal aid and community legal centres in systemic work and that the work is difficult and challenging but finds a home in the commitment and conviction of the legal assistance sector. It affirms the need for integrated, and holistic service delivery, the need for effective community legal education and the importance of the legal assistance sector working closely with the non-legal services to better reach and assist people in accessing legal help. It stresses that the sector is under-resourced, suggesting an injection of $200 million. Critically, the Productivity Commission underlines the importance of systemic law reform and policy work that can be critical in ensuring a just, accessible and smoother legal system.

It is hoped that an Australian Government, on the record as being sceptical and unwilling to fund systemic advocacy, will pay heed to this important report which points strongly to the need for government to value and support the critical work that the legal assistance sector given that legal problems, if unresolved, can have a big impact on lives.

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Globalization has led to an increase in the ability of states and other powerful actors to affect, both positively and negatively, human rights beyond their territories. The declining significance of territorial borders and the emergence of powerful non-state actors have given rise to types of human rights violations, and categories of human rights violators, that were not originally envisaged. The posts in this chapter explore new and complex issues that impact on human rights, and consider how domestic and international legal systems have and/or should respond to them.

Regulating the conduct of non-state actors is one of the biggest and most critical challenges facing international law today. Traditional approaches to human rights, which view non-state actors as beyond the direct reach of international human rights law, can give rise to a gap in legal protection. This point is made in Avani Bansal’s post (‘Human Rights in Disputed Territories – Affixing Responsibility’ p 29), which addresses the question of how responsibility for human rights law violations should be affixed in situations where non-state actors are exercising control over territory.

Economic players, especially multinational companies that operate across national borders, are another category of non-state actor that has gained unprecedented power to affect the human rights of individuals. Lucia Berro’s (‘Where will the US go after Kiobel?’ p 28) and Christina Lee’s (‘Lessons from Daimler’ p 28) contributions consider the barriers to accessing judicial remedies in USA courts for human rights violations committed by businesses abroad. As discussed in these two posts, Kiobel 69 U. S. ____ (2013) and subsequent cases brought before USA courts concerning corporate accountability for extraterritorial human rights violations demonstrate how the presumption against extraterritorial application and the limitation of personal jurisdiction continue to pose barriers to those seeking access to judicial remedies.

Even in jurisdictions where applicants have been afforded access to judicial remedies for human rights violations, justice may nevertheless go undone. Ravi Nitesh’s post (‘Right to Justice’ Deprived by State: Case of Manorama vs AFSPA from Manipur’ p 36) on India’s Armed Forces Special Powers Act is illustrative of this point. In practice, this type of legislation renders security forces immune from prosecution for human rights violations and in turn, deprives those affected from their right to justice; a right that cannot be remedied by financial compensation. Claire Overman’s contribution (‘Jones and Others v UK: Immunity or Impunity?’ p 35) discusses another jurisdictional barrier to securing justice for human rights violations; state immunity for acts of torture. The decision of the European Court of Human Rights (ECtHR) in Jones v United Kingdom [2014] ECHR 32, rejected the argument that by dismissing civil suits alleging torture on grounds of immunity, the UK had violated the applicants’ right to access justice.

In addition to expanding human rights obligations to non-state actors, Richard Martin (‘Nonsense on Stilts? Tommy the Chimp’s Legal Battle for ‘Non-Human Person Rights’ in the New York Courts’ p 39) raises the question of whether the category of human rights holders can extend to ‘non-human person rights’. In other words, does some legal notion of human rights exist for animals? The case discussed in this contribution, which was filed on behalf of a captive chimpanzee in New York, challenges the dominant legal paradigm that rights are held by virtue of being human. As Martin asks, ‘is litigation based on the rights of humans really the right way forward [in ensuring greater protection for animals]?’

Although courts often take a cautious approach towards extending jurisdiction over human rights claims, some have endorsed a broader understanding of their judicial authority to enforce human rights law. Nurina Ally’s post (‘Investigating crimes against humanity – South Africa’s embrace of universal jurisdiction’ p 30) examining the case of National Commissioner of the South African Police Service v South African Human Rights Litigation Service [2013] ZASCA 168, discusses the embrace of universal jurisdiction by the South African Supreme Court. The decision, which has since been upheld by the Constitutional Court, recognizes that the South African Police Service are both empowered and required to investigate crimes against humanity committed outside of South Africa. In addition to domestic courts, Claire Overman’s piece (‘Cyprus v Turkey: Arming the European Court against States’ Complacency?’ p 34), which considers the impact of the recent Cyprus v Turkey decision, illustrates the European Court of Human Rights’ progressive approach towards its power to remedy human rights violations. This judgment ‘heralds a new era in the enforcement of human rights’ because it is the first time the ECtHR has awarded just satisfaction in an inter-State case under the Convention.

The UK has a long history of leadership in the area of fundamental rights but there are fears that this reputation may be jeopardised if calls for the repeal of its Human Rights Act (HRA) are realised. In the wake of the recent general election, the question posed by Alice Donald is one that is on the minds of many in the UK, where next for the European Convention? (‘Brighton and Beyond – Where Next for the European Convention on Human Rights?’ p 32). The European Court is currently undergoing a process of reforms and it is hoped that implementation of these will clarify and realign the relationship of the Court with national jurisdictions and, in turn, quell some of the hostility directed at the Convention system. In the event that the HRA is repealed, Sionaidh Douglas Scott’s post (‘Why the UK Should Embrace the EU Charter of Fundamental Rights’ p 33) offers some hope. Her contribution discusses how the EU Charter of Fundamental Rights could continue to provide important fundamental rights protections to individuals against member states.
In addition to new categories of actors, globalisation has called for human rights law to respond to modes of human rights violations that were once not envisaged. Louise Arimatsu’s post (‘The Geography of International Law and the Cyber Domain’ p 37) addresses the challenge posed by advancements in cyber technology. As pointed out by Arimatsu, this type of conduct does not sit comfortably with the standard of ‘effective control’ over territory and/or persons, which has been developed and endorsed by the human rights monitoring bodies to determine the extraterritorial applicability of human rights obligations. The criteria that will be used by courts in determining when international human rights law obligations are triggered by cyber operations remains to be seen.

The contributions in this chapter show that although human rights law appears to be moving towards greater extraterritorial application and non-state actors are increasingly being subjected to human rights scrutiny, many challenges remain. The common message that emerges from the posts herein is that those charged with enforcing human rights law should respond to these challenges with increased efforts to ensure remedies for those whose rights have been violated.

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Where will the US go after Kiobel?
By Lucia Berro | 19th September 2014

Last year, the landmark US Supreme Court decision of Kiobel v Royal Dutch Petroleum Co. 133 S.Ct. 1659 (2013) held that the presumption against extraterritorial application of US law applies to the Alien Tort Statute (“ATS”). This was significant as the ATS potentially opens US federal courts to claims by non-US citizens harmed by violations of “the law of nations” – a category of international law that includes war crimes, crimes against humanity, and torture. Although Kiobel left open the possibility of resort to US courts for claims that “touch and concern the territory of the US” with “sufficient force”, Kiobel significantly restricts resort to US Courts in order to vindicate human rights violations committed against non-US citizens abroad. The direction of the case law since Kiobel has been uncertain and inconsistent. This post tracks this scattered path.

The first significant decision came from the 11th Circuit in Chiquitain Case No. 12-14898 in 2014. This case alleged that Chiquita, a US based company, provided funding and logistical support to a Colombian paramilitary group (the “AUC”). In the context of parallel criminal proceedings, Chiquita pleaded guilty to engaging in more than 100 transactions with the AUC and was fined $25,000,000. However, in respect of civil proceedings, the 11th Circuit’s majority declined jurisdiction. The majority emphasised that “all relevant conduct took place outside the United States” and concluded that Chiquita’s status as a US corporation was insufficient to rebut the presumption against extraterritoriality. Conversely, in dissent, Judge Martin considered that because Chiquita’s decisions to pay the AUC were made at company headquarters on US soil the case “touch[ed] and concern[ed] the territory of the United States.” She wrote that in holding otherwise, “we disarm innocents against American corporations that engage in human rights violations abroad. I understand the ATS to have been deliberately crafted to avoid this regrettable result.”

Similarly in August, 2014 Judge Scheindl dismissed a claim accusing Ford Motor and IBM of encouraging human rights abuses in apartheid-era South Africa. The Judge said that the plaintiffs failed to show any “relevant conduct” by Ford and IBM within the US to justify holding the companies liable. Notwithstanding she wrote “[t]hat these plaintiffs are left without relief in an American court is regrettable. But I am bound to follow [Kiobel] no matter what my personal view of the law may be”.

Conversely, in July 2014, the 4th Circuit issued a decision on the Abu Ghraib case, No.13- 1937. This lawsuit was filed by four Iraqi torture victims against CACI International Inc, and CACI Premier Technology, Inc–both with headquarters in the US. The plaintiffs argued that CACI participated in war crimes, including torture and other illegal conduct, when providing interrogation services at Abu Ghraib prison in Iraq. According to an official investigation by the US Department of Defence “numerous incidents of sadistic, blatant, and wanton criminal abuses were inflicted on several detainees”. The 4th Circuit held that Kiobel is not a categorical bar against all ATS claims based on conduct abroad. Rather, it concluded that the plaintiffs’ ATS claims did “touch and concern” the territory of the US with sufficient force to displace the presumption because, (a) CACI is a US corporation, (b) the employees who allegedly mistreated Abu Ghraib prisoners were US citizens and (c) CACI’s actions were at a US military facility operated pursuant to a contract with the US Government.

Finally, last week, the 9th Circuit allowed an ATS case against Nestlé, Cargill & ADM to proceed. The case, filed by former child slaves forced to harvest cocoa in Ivory Coast, alleges that the companies “aided and abetted child slavery by providing assistance to Ivorian farmers” in an attempt to reduce costs. The decision (an expanded replacement of an earlier opinion) vacated the district court decision stating, “the prohibition against slavery is universal and may be asserted against the corporate defendants in this case”.

Notwithstanding international pressure to enforce Ruggie’s Third Pillar of access to judicial remedies for human rights violations by transnational businesses, the case law thus far is discouraging. This is because, as Justice Kennedy noted in his concurring opinion in Kiobel, the majority opinion left “significant questions” unanswered. The effect of this decision on future litigation against businesses for liability under the ATS for acts occurring outside the US remains unclear, aggravating an already uphill battle to hold US corporations accountable for abuses abroad.

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Lessons from Daimler
By Christina Lee |16th February 2014

On January 14, 2014, in the case of Daimler AG v Bauman et al 134 S. Ct. 746 (2014) the United States Supreme Court held that Daimler AG (“Daimler”) could not be sued in federal court in California for injuries allegedly caused by conduct of its Argentinian subsidiary when this conduct took place entirely outside of the United States.

The case arose out of a claim brought by twenty-two Argentinian residents alleging that during Argentina’s “Dirty War” in the 1970s and 1980s, Mercedes-Benz Argentina worked with state security forces to kidnap, torture, and kill workers, and seeking damages...
for human rights violations. After the plaintiffs brought suit in federal court in California, Daimler moved for lack of personal jurisdiction, which the district court granted. The Ninth Circuit eventually reversed with Judge Reinhardt, writing for the panel, asserting that an agency relationship existed between Mercedes-Benz USA (“MBUSA”), an indirect subsidiary of Daimler, and considerations of reasonableness did not bar exercise of general jurisdiction.

In the Supreme Court, the majority reversed the decision of the Ninth Circuit. They rejected Judge Reinhardt’s agency relationship reasoning, noting that the Ninth Circuit’s conception of agency theory for personal jurisdiction would be sweeping and always yield a “pro-jurisdiction answer.” The Court went even further to say that even if MBUSA’s contacts were attributable to Daimler, Daimler still did not have enough contact to render general jurisdiction. Relying on Goodyear 131 S. Ct. 2846 (2011) and International Shoe 326 U.S. 310 (1945), the Court asserted that the correct inquiry for a foreign corporation was not whether the corporation’s in-forum contacts could be “in some sense ‘continuous and systematic’ but whether the affiliations with the State are so ‘continuous and systematic’ as to render it essentially at home in the forum state.” The Court found that the Ninth Circuit erred in finding personal jurisdiction, for two main reasons. First, neither Daimler nor MBUSA was incorporated in California nor had a principle place of business in California. Second, consideration had to be had of international comity in cases involving foreign governments.

Given the oral arguments, the decision from the overwhelming majority is unsurprising – almost all the justices expressed scepticism at the plaintiff’s attorney’s arguments. Moreover, as evidenced from the questions and the opinion, the Court expressed strong reservations about the sweeping nature of Judge Reinhardt’s Ninth Circuit opinion and the desire to limit forum shopping for litigants.

Nevertheless, for those who had hoped, or even wished, for the Supreme Court to clarify the jurisprudence in favour of foreigners who bring suit in the United States in the wake of Kiobel, 133 S.Ct. 1659 (2013) the Daimler opinion was a disappointment and has similarly far-reaching repercussions compared to Kiobel. Justice Ginsburg’s opinion rejected the notion that the U.S. federal courts had a particular interest in international human rights (briefly mentioning Kiobel) and limited the importance of agency theory and corporate liability, relying on the level of contact in determining personal jurisdiction.

However, Daimler serves as a lesson for those who want to access U.S. federal courts. Justice Ginsburg’s opinion emphasises the tangential connection between MBUSA, Daimler, and California. This suggests that other states might have served as options as the Court emphasised that California as a state had such tangential contacts that there could not have been general jurisdiction. However, given the criteria of principal place of business and headquarters, this suggests that if the plaintiffs had brought suit in Michigan, or another state, the suit would not have been dismissed based on personal jurisdiction. While Ginsburg’s opinion limits the ability to bring suit compared to the Ninth Circuit’s sweeping opinion, the framework provided by Goodyear and Daimler may provide future litigants more clarity in where and how to bring suit so that the case could move beyond the procedural hurdles and to the merits and the real issues of the case.

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Human Rights in Disputed Territories – Affixing Responsibility
By Avani Bansal | 14th February 2014

“Human rights do not have any borders. It is vital to address underlying human rights issues in disputed territories, regardless of the political recognition or the legal status of a territory” – Navi Pillay.

Under normal circumstances, the responsibility of protecting human rights of persons residing within the territory of a State lies with the de-jure State (and its de-jure government). The problem with regards to the application of human rights law arises in disputed territories where the legitimacy of control over the territory is disputed, thereby creating a protection gap. So how should we affix responsibility for human rights violations in territories which are under the effective control of non-State actors, especially since non-State actors cannot ratify human rights instruments such as the International Covenant on Civil and Political Rights?

These questions present a quagmire for a human rights lawyer. This piece suggests the ways in which one could seek to affix responsibility on non-State actors for upholding human rights in disputed territories.

One way to impose responsibility on non–State actors for protecting human rights of people in disputed territories is by arguing, that since human rights norms contained in the Universal Declaration of Human Rights (UDHR) are customary international law, they need to be guaranteed by the authority having effective control of the territory, regardless of its political status internationally. The responsibility to protect these human rights norms which form part of customary international law does not require specific accession to, or ratification of, treaties by concerned authorities.

Another argument could be that since non-state actors have responsibility for human rights violations in International Human Rights Law (IHRL) and International Humanitarian Law (IHL), they ipso facto have responsibility in disputed territories where they have effective control. While Public International Law (PIL) in general has developed in order to regulate the conduct of States in their international relations, IHRL and IHL have developed specific particularities, aimed at imposing certain types of obligations on others, including individuals and non-State actors.

It is generally accepted that IHL related to non-international armed conflicts, in particular the provisions contained in common article 3 of the Geneva Conventions and, when applicable, Protocol II, applies to parties to such a conflict, whether State or non-State armed groups. It is also recognized that rules of customary international law related to non-international armed conflicts, such as the principles of distinction and proportionality, are applicable to non-State armed groups.

Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfill human rights. For instance, the Security Council has called in a number of resolutions, such as Resolution 1564 (2004) and Resolution 1894 (2009), on States and non-State armed groups to abide by international humanitarian law and international human rights obligations, though these have been in the context of an armed conflict.

These arguments set a stage to better protect human rights in disputed territories, thereby avoiding their protection gap. It is clear that the international legal order is expanding slowly and human rights will not remain State-centric for long. However in disputed territories today, de-facto State governments can be seen as non-State actors with effective control, and therefore obligated to enforce human rights.

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Investigating crimes against humanity – South Africa’s embrace of universal jurisdiction
By Nurina Ally | 10th January 2014

“What business is it of the South African authorities when torture on a widespread scale is alleged to have been committed by Zimbabweans against Zimbabweans in Zimbabwe? It is that question that is at the heart of this appeal.” (Judge Navsa, National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre [2013] ZASCA 168 paragraph 5)

In a ground-breaking judgment, handed down in November 2013, the South African Supreme Court of Appeal resoundingly affirmed South Africa’s international obligations to exercise jurisdiction over alleged crimes against humanity, even when committed in another country. Being the first case that has directly raised the question of South Africa’s competence to investigate crimes against humanity, National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre has been instrumental in testing the exercise of investigative powers of South African authorities, as mandated by the implementation of the Rome Statute of the International Criminal Court Act, 2002 or “the ICC Act”.

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The matter dates back to 2008, when the South African Litigation Centre sent a dossier to certain South African authorities detailing allegations of crimes against humanity (particularly torture) committed against Zimbabwean nationals in Zimbabwe. The memorandum implicated senior officers in the Zimbabwean government. For various reasons (including resource constraints, diplomatic considerations, and scepticism regarding the evidence placed before them), the South African authorities declined to initiate an investigation.

The authorities asserted that the obligation to investigate crime was territorially limited to inhabitants of South Africa and their property. Furthermore, they argued that in terms of the ICC Act, the actual presence of the perpetrator was required in South Africa before an investigation could be initiated (it was claimed by the authorities that the alleged perpetrators were not present in South Africa, and that the majority had never previously visited South Africa). Ultimately, the Supreme Court of Appeal rejected these arguments and the South African Police Service was ordered to initiate an investigation into the alleged offences.

Charting the development of the universality principle and the foundations of international criminal justice, the Court emphasised that the purpose of the ICC Act is to ensure that South Africa exercises international criminal jurisdiction over crimes against humanity. Through the enactment of the Act, South Africa had undertaken to fulfil its obligations as a party to the Rome Statute. The Court made three principal findings regarding these obligations.

1. First, it affirmed the power of South African authorities to initiate an investigation into conduct criminalised in terms of the ICC Act, even where such crimes have been committed extra-territorially.
2. Second, it declared that appropriate authorities may initiate an investigation into such crimes irrespective of whether or not the alleged perpetrators, or their victims, are present in South Africa. In this regard, and despite a more restrictive approach adopted in some foreign jurisdictions, the Court held that “a strict presence requirement defeats the wide manner in which our legislation is framed, and does violence to the fight against impunity.” However, the Court does recognise that if there is no prospect of the alleged perpetrator’s presence then it would be arguable that no purpose would be served by initiating an investigation.
3. Third, the Court recognised that the ambit of investigative powers is restrained in that, absent the consent or co-operation of foreign states, authorities cannot pursue an investigation in another country. It should be noted, however, that in the present case the complainants had not called for the requested investigation to extend outside of the borders of South Africa and had offered to make witnesses available to authorities within South Africa.

These broad principles are to be welcomed as giving proper effect to the obligations that South Africa has undertaken under international law. Whilst there is no doubt room for further development, the judgment has set fertile ground for the possibility of pursuing the prosecution of crimes against humanity in South African courts.

In the most recent set of developments, application for leave to appeal has been made to the Constitutional Court of South Africa. Whilst it has yet to be seen if the Court will grant leave for the matter to be heard, recent judgments from the highest court suggest a strong emphasis on ensuring that South Africa fulfils its international law obligations. It is hopeful then that the Constitutional
Court will reinforce the general thrust of the principles endorsed by the Supreme Court of Appeal.

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Brighton and Beyond – Where Next for the European Convention on Human Rights?

By Alice Donald | 20th December 2014

Two reports have been released which shine a spotlight on the relationship between national authorities (especially parliaments) and the European Court of Human Rights (ECtHR). Both take stock of the reforms initiated under the UK Government’s chairmanship of the inter-governmental arm of the Council of Europe, the Committee of Ministers, in 2011-12, culminating in the Brighton Declaration.

The first report, by the parliamentary Joint Committee on Human Rights (JCHR), recommends that the UK should ratify Protocol 15 of the European Convention on Human Rights (ECHR). The second report by the Committee on Legal Affairs and Human Rights (CLAHR) of the Parliamentary Assembly of the Council of Europe, examines how to ensure the future effectiveness of the ECHR; it also (among other steps) encourages states to ratify Protocol 15.

In the JCHR’s view, the most significant aspect of Protocol 15 is the addition to the Preamble of the Convention of references to the principle of ‘subsidiarity’ and the doctrine of ‘the margin of appreciation.’ Both reports are keen to dispel common misconceptions about what these principles mean. They are not, the JCHR stresses, a basis either for asserting the primacy of national law over the Convention, or for demarcating national spheres of exclusive competence, free from Strasbourg’s supervision. Rather, as the CLAHR ventures, ensuring the long-term effectiveness of the Convention system is a ‘joint enterprise for the executive, legislative and judicial organs, at both the national and European levels’ (para 5 of the ‘Explanatory memorandum’).

The JCHR welcomes Protocol 15 as signifying (para 3.17) ‘a new era in the life of the Convention, an age of subsidiarity, in which the emphasis is on States’ primary responsibility to secure the rights and freedoms set out in the Convention.’ It states that Protocol 15 creates opportunities and obligations both for national actors and for the Court itself.

Protocol 15 should not be viewed by national actors – governments, legislatures and courts – as an opportunity to assert their superiority over the ECtHR. Instead, the Protocol places a greater onus on governments to conduct detailed assessments of, and justify the reasoning behind, the Convention-compatibility of their laws and policies – and on parliaments to subject executive action or inaction to conscientious and well-informed scrutiny and debate. As I have recently argued at the Council of Europe, and as the CLAHR report underscores, too few parliaments in Council of Europe states are presently equipped to conduct such rigorous human rights oversight – the JCHR being one of a few striking exceptions.

The principles to be enshrined in the Preamble via Protocol 15 provide strong incentives for national authorities to strengthen their systems of human rights protection. As the Court’s President Dean Spielmann notes (p. 12), the margin of appreciation is ‘neither a gift nor a concession’ to states, but an incentive to earn the deference of the Court. The JCHR argues, for instance, that it should incentivise ministers to continue to improve the quality of the human rights memoranda that accompany Bills, and create more opportunities for informed parliamentary consideration of Convention-compatibility issues.

The JCHR gives equal focus to the implications of Protocol 15 for the ECtHR. It urges the ECtHR (para 3.19) to accelerate and make more transparent the recent trend in its case law that pays respectful attention to detailed and reasoned assessment by national authorities of the Convention-compatibility of laws and policies (exemplified by the judgment in Animal Defenders International v UK Application No. 48876/08).

The practical import of Protocol 15 is as yet unknown. It will not come into force until it has been ratified by all 47 states (to date, ten have done so), which could take years. Meanwhile, the CLAHR has some more immediate recommendations.

It urges national authorities to discharge ‘with renewed urgency’ their obligations under the Convention to implement ECHR standards and ECtHR judgments in order to stem the flood of applications to the ECtHR.

It implores the Committee of Ministers to support the Court financially to dispose of its (once mountainous, but now reducing) backlog of cases – and to be tougher with recalcitrant states, including by deploying its (as yet unused) power to initiate infringement proceedings.

The CLAHR report also reflects on more fundamental suggestions for reform of the Convention system. It rejects proposals to turn the ECtHR into a constitutional court, at the expense of its role as the ‘guardian of individual rights’. The CLAHR also urges
vigilance against reform plans that appear to be motivated by ‘a desire to dismantle the Court and undermine its authority’ and any ‘backsliding’ on either the rights enshrined in the Convention, the Court’s dynamic interpretation of those rights, or the right of individual application.

The message is clear: while Protocol 15 remains on the far horizon, political threats to the authority of the ECtHR are gathering – and will be resisted.

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Why the UK Should Embrace the EU Charter of Fundamental Rights
By Sionaidh Douglas Scott | 28th November 2014

The UK evinces a certain amount of scepticism for both human rights and for Europe. There has been much publicity about the plans of a Conservative government to repeal the UK Human Rights Act, should they be elected with a majority at the next general election. However, if the Human Rights Act is repealed, the EU Charter of Fundamental Rights would still remain in force in the UK.

Perhaps, unsurprisingly, the Charter has also come under attack, for example by the 2014 recommendation of the House of Commons European Scrutiny Committee, that the UK Parliament adopt legislation to disapply the Charter in the UK. Eurosceptics have woken up to the existence of the Charter. I believe that the Committee is misguided in its call for the Charter’s disapplication. Much of the Committee’s argument targets a lack of clarity in the Charter, including a fear that it could be used to extend EU competences. The report also expresses frustration that the UK’s so-called ‘opt-out’, in Protocol 30 of the Lisbon treaty, is incapable of operating as such, despite the claims made for it by politicians at the time of its drafting. However, while there are some uncertainties in the Charter’s application, these are no greater than those applying in human rights law generally, and European Court caselaw is in any case clarifying this law.

On the other hand, we should be clear that the alternative of disapplying the Charter would lead to far greater legal uncertainty and also expose the UK to large fines for breaching EU law. Further, the UK would also risk an action being brought under Article 7 TEU, which allows the EU to suspend the membership rights of a member state where that State is in serious and persistent breach of the EU’s common values, which include fundamental rights. Art 7 has not been put into effect to date, and it would be highly regrettable if it were to be applied to the UK. In that case, there would also be some irony – the eurosceptics’ longed for ‘Brexit’ would occur not through an ‘in-out’ referendum but through the means of expulsion from the EU – a humiliating and shameful end to the UK’s relationship with the EU.

But crucially, what the Committee report also ignores are the important safeguards that the Charter offers against an overreaching EU – safeguards which have become visible in cases such as Digital Rights Ireland, in which the European Court invalidated
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a whole EU measure for its failure to comply with privacy rights in the Charter. This legislation required telecoms companies to retain personal telephone and internet records, with the aim of ensuring that state authorities could use such records in future investigations. The ECJ criticized the sweeping nature of the measure, holding that it ‘entails an interference with the fundamental rights of practically the whole European population’. Why should UK citizens lack the protection of the Charter in areas such as these?

One cannot ignore Charter’s role in upholding human rights within the scope of EU law. The Charter provides an important bulwark against abuse by the EU of its powers, but it is to be hoped that the EU would not commit the very gravest human rights violations, such as torture or inhuman and degrading treatment. Yet many EU states are still regularly found in violation of even the core human rights such as Art 3 ECHR, the prohibition on torture. States such as Greece have difficulties in complying with human rights obligations to asylum seekers. In N.S., the ECJ gave precedence to fundamental rights over the obligations of member states to comply with the provisions of the EU Dublin II Regulation, recognising that member states must not return asylum seekers to other EU states when there would be a real risk of their being subjected to inhuman or degrading treatment within the meaning of Article 4 EU Charter. In this way, the Charter provides important protection to individuals against other member states abusing fundamental rights. The further the EU goes down the road of requiring mutual recognition of other states’ practices (whether it be of food standards, technical requirements or criminal justice systems) the more the Charter is needed to provide human rights based exceptions to otherwise enforced recognition.

Therefore, rather than seeking to disapply the Charter in the UK, perhaps at the next general amendment of the EU treaties, the UK should seek to repeal Protocol 30 completely.

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Cyprus v Turkey: Arming the European Court against States’ Complacency?
By Claire Overman | 23rd May 2014

The European Court of Human Rights (“ECtHR”) recently handed down judgment in Cyprus v Turkey [2014] ECHR 478. This case, the first to award damages to an applicant government in an inter-State case, may mark a development towards the ECtHR’s more extensive use of damages as a punitive device against States.

This judgment represents the culmination of over 10 years of legal developments. In 2001, the ECtHR found various violations of the European Convention on Human Rights (“ECHR”) by Turkey, arising out of Turkish military operations in northern Cyprus in the 1970s, the continuing division of the territory of Cyprus, and the activities of the “Turkish Republic of Northern Cyprus.” Under
Article 41 ECHR, a party is entitled to ”just satisfaction” following a finding of violation. However the ECtHR held that the issue of just satisfaction was not ready for decision. It was not until March 2010 that the Cypriot government submitted to the Court its claims for just satisfaction.

The first question for the Court to consider was whether it was too late for Cyprus to make such a claim. It noted that general international law does, in principle, recognise the obligation on applicant governments in inter-State disputes to act without undue delay. However, it pointed out that, as the delay in this case occurred (a) due to the Court holding that the issue was not ready to be decided; (b) following judgment on the merits, meaning that Turkey would anticipate developments; (c) without the Cypriot government renouncing or waiving its right to just satisfaction, the claim could still validly be made over a decade later.

The second issue was whether just satisfaction could be claimed in an inter-State case. Up until this point, damages had only ever been awarded to individual complainants whose rights had been violated by a State. In the only previous case to consider this issue, Ireland v the United Kingdom [1978] ECHR 1, the applicant government had stated that it did not invite the Court to consider just satisfaction.

In its judgment, the Court pointed out that the general logic of the just satisfaction rule was directly derived from principles of public international law on State liability, one of which was that the breach of an engagement involves an obligation to make reparation in an adequate form. It therefore considered that Article 41 did apply to inter-State cases, but noted that whether granting just satisfaction was justified “has to be assessed and decided by the Court on a case-by-case basis.” Relevant factors included the type of complaint made by the applicant Government, whether the victims of violations could be identified, and the main purpose of bringing the proceedings.

The Court then imposed a caveat. According to the very nature of the ECHR, it was the individual, not the State, who was primarily injured by a violation of Convention rights. Therefore just satisfaction should always be awarded for the benefit of individual victims. In the present case, the claims submitted on behalf of 1456 missing persons and enclaved Greek Cypriots were therefore found to merit an award of just satisfaction. This was assessed at €30 million and €60 million respectively.

As noted by the concurring judges, “the present judgment heralds a new era in the enforcement of human rights.” The Court has made clear that States will be held accountable in damages for invasions, wars, and other large-scale violations of the rights of citizens of other States. An interesting point raised by Judges Pinto de Albuquerque and Vučinić was that the just satisfaction awarded in this case, without reference to practicabilities such as division of the award between individuals, was clearly intended to be punitive, rather than compensatory. One wonders whether this mechanism could be used more widely in future to provide the Court with greater weaponry when States fail to implement its judgments. It is not hard to imagine, for instance, UK prisoners launching fresh claims against the State for its continued non-implementation of the judgment in Hirst v UK [2005] ECHR 681, where a blanket ban on prisoner voting was deemed to violate the Convention. If such a claim were to succeed, would the Court impose a more punitive measure of just satisfaction? Such a development would lead to an interesting change in dynamic between domestic courts and the ECtHR.

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**Jones and Others v UK: Immunity or Impunity?**
*By Claire Overman | 19th January 2014*

The decision of the European Court of Human Rights in Jones and Others v UK [2014] ECHR 32 represents a missed opportunity to take a lead in developments in international law concerning state immunity for acts of torture. Yet, it expresses a cautiously optimistic view that such developments are set to continue.

The applicants were British nationals living in Saudi Arabia. They brought civil claims in the UK courts for damages for alleged acts of torture inflicted upon them by various agents of the Saudi Arabian government, including Lieutenants, police officers and prison governors. These claims were brought against the state of Saudi Arabia itself, and against these agents. The UK House of Lords rejected these claims holding that, under the State Immunity Act 1978, foreign states were generally immune from jurisdiction in the UK courts, and that this immunity extended to their government officials.

The applicants appeared before the ECtHR, arguing that this grant of immunity to Saudi Arabia and its officials violated their right of access to court under Article 6 of the European Convention on Human Rights. The ECtHR, however, disagreed, holding that there had been no violation.

It began with the premise that sovereign immunity is a concept of international law, by virtue of which one state shall not be subject to the jurisdiction of another. As such, it pursues the legitimate aim of promoting comity and good relations through the respect of another state’s sovereignty. The next question was whether the UK’s grant of immunity to foreign states and their officials
was a proportionate way of achieving this aim. In answering this, the ECtHR stressed that the need to interpret the Convention harmoniously with other rules of international law meant that, if the UK measures reflected generally recognised rules of public international law on state immunity, they could not in principle be disproportionate.

The ECtHR accepted that there were some exceptions to state immunity in public international law. However, the recent decision of the International Court of Justice in Germany v Italy (I.C.J. Reports 2012, p.99) holding that a state was not deprived of immunity simply because it was accused of serious violations of international human rights law, was important. For the ECtHR, it provided conclusive evidence that international law had not moved on sufficiently from its previous decision in Al-Adsani v UK (Application no. 35763/97) in which state immunity was upheld in the context of torture allegations.

With regard to immunity of state agents for acts of torture, the position was less clear. The ECtHR noted that international law instruments and materials on state immunity give limited attention to that particular question. Whilst accepting that there was some emerging support in favour of a special rule in public international law in cases concerning civil claims for torture lodged against foreign state officials, the bulk of the authority was in favour of the argument, made by the UK House of Lords, that a state’s right to immunity may not be circumvented by suing its agents instead. As a result, the Court held that the grant of immunity to the Saudi officials reflected generally recognised rules of public international law.

This decision is disappointing in two respects. First, on the facts of the case, the applicants have been left with no real means of redress for the alleged torture suffered at the hands of the Saudi authorities. Rosalind English notes, in the UK Human Rights Blog, that “judicial avenues are not the only, or indeed not even the most appropriate means to secure” accountability. However, this overlooks the reality that governments, shackled to diplomatic concerns, are likely to be much less inclined than courts to act upon allegations that other states have been complicit in torture. The very role of courts, as independent bodies, is to rule on difficult issues without political bias.

Secondly, the Court undertakes no real analysis of the question of what should happen when two important international principles – international comity, and the denunciation of torture – compete. It relies on the existence of a historical status quo as a conclusive reason for maintaining it, despite itself acknowledging that, due to the recognition in some countries of an exception to state immunity for acts of torture, international opinion may be changing. This very dynamism should have pushed it to engage independently with underlying principles in this area. In not so doing, the ECtHR has missed this opportunity to assist the development of this issue with an authoritative international judgment.

Claire is a former Editor and Communications Manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.

‘Right to Justice’ Deprived by State: Case of ‘Manorama Vs AFSPA’ from Manipur, India
By Ravi Nitesh | 7th January 2015

Recently, in the case of Union of India and ANR v State of Manipur and NR Case 14726 -14730 OF 2011, which concerned Thangjam Manorama Manipur, (who was allegedly killed in 2004 by Assam Rifles, a security force of government), the Supreme Court of India directed the Government of India to award 10,00,000 INR or £10,340.00 GBP as compensation to Manorama’s mother. But the serious concern is that in spite of such direction, the court could not spell any judgment against the culprits in the case of Manorama and other similar cases yet.

I visited Manorama’s house two months ago and met her brother and mother. My visit was part of a solidarity visit where I participated in Asian solidarity events organized by May 18 Memorial, Forum Asia and Just Peace Foundation at Imphal, Manipur.

‘I don’t want to speak anything’ were the words of Manorama’s mother Thangjam Khumanleima, when it was conveyed by our local host, a human rights activist, Babloo Loitongbam, that we all came from various parts of India and from abroad to meet her. We were there for 40 minutes but she remained silent and appeared full of sorrow, despair and anger.

Manorama’s brother Thangjam Dolen talked to us. He described what happened on that night of July 10-11 2004, when soldiers of Assam Rifles knocked on the door, called Manorama outside of house, tortured her, and forcefully took her away. They alleged that Manorama was associated with PLA (People’s Liberation Army), an insurgent group in north east India. The denial by Manorama did not stop them. After few hours, the dead body of Manorama was found on the roadside. People came to protest as they noticed that there were bullet shots in her private parts and therefore suspected rape by the soldiers.

There were massive protests across Manipur. 10 women had staged a nude protest in front of the historical Kangla Fort with a banner reading “Indian Army Rape Us”. These protests had forced the state government to order for an inquiry under the Justice Upendra Commission. However, Assam Rifles went to higher court in August 2004 and petitioned that no inquiry can be made as the concerned soldiers were protected by the Armed Forces Special Powers Act (AFSPA) and therefore, as per the AFSPA rule,
a prior sanction is required from central government. While the Higher court (Guwahati High Court) had passed an order in the year 2010 and upheld that an inquiry commission could be set-up and the State of Manipur is authorised to act on the report of commission, however the Government of India moved to Supreme Court against this order. Now, Supreme Court of India agreed to hear the petition but only ordered compensation of Rs. 10 lakhs (INR) to the victim’s family.

It is a case that witnessed massive protest. Still 10 years on, the order was for compensation, not justice. There are many such cases, of rapes, fake killings, torture, reported and unreported in the AFSPA imposed areas of North East Region of India (through AFSPA 1958) and in Jammu & Kashmir (through AFSPA 1990). AFSPA provided extra-ordinary powers of shoot on suspicion, search and arrest. It also provides impunity to armed forces with its section 6 where no criminal case can be lodged against any armed force personals without prior sanction from central government. Unfortunately, the sanction has not ever been provided, not even in a single case.

AFSPA is a draconian law. It is responsible for gross human rights violations by security forces and many national/international human rights groups including UN bodies have called for India to repeal it, but it is still surviving.

During the recent parliamentary elections in India, the state unit of Manipur of BJP promised to repeal AFSPA if voted into power. It has been 7 months now since the BJP has come to power, but AFSPA remains operational.

This scenario where the right to justice of common people has been deprived by ‘impunity’ granted to functionaries of state violence has only worsened people’s despair and made them disillusioned by the state. Now it is upon the new government of India and civil society, together with activists from all over the globe to work towards the end of culture of violence and to ensure repeal of AFSPA and restore the right to life, the right to justice.

Ravi Nitesh is a freelance writer, Founder-Mission Bhartiyam, Convenor-Save Sharmila Solidarity Campaign (A nationwide campaign for repeal AFSPA).

The Geography of International Law and the Cyber Domain
By Louise Arimatsu | 25th February 2015

The geographical scope of the law of armed conflict (LOAC) has engaged the interest of IHL experts for some years dividing opinion as to whether the reach of the law is determined by the territorial border, the location of the parties to the conflict, or restricted to the site of the hostilities. This is more than just a theoretical question since the consequence of adopting one particular
view rather than another can result in different findings as to the legality of the conduct in question. International human rights law (IHRL) experts have likewise concerned themselves with the geographical scope of IHRL albeit in a different vernacular given the different point of departure.

Since the purpose of IHRL is to regulate the state’s relations with persons in its territory, in contrast to LOAC, there is consensus that the law applies throughout the state’s territory. However, divisions have surfaced on whether a state’s obligations are geographically limited to the state’s sovereign territory or, in exceptional circumstance, such obligations arise extraterritorially. Over the years, member states of the European Convention on Human Rights have accepted the idea that their obligations are triggered extraterritorially in situations where they have ‘effective control’ over persons and/or territory irrespective of sovereignty. Arguments persist over specific situations but the principle is now well-established.

The UN human rights bodies have long favoured a similar approach when interpreting the applicability of a state’s obligations pursuant to the ICCPR. In General Comment 31, the Human Rights Committee expressly maintained that “a State party [to the ICCPR] must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”. Not all states subscribe to this interpretation including, for example, the US which has consistently asserted that the Covenant does not apply extraterritorially.

Measures adopted by the US following the Snowden disclosures have reinforced this distinction exemplified by the legal reforms (even if inadequate) which have been introduced to protect the privacy of US citizens in contrast to the policy announcement that the US would “take into account that all persons should be treated with dignity and respect, regardless of their nationality or wherever they might reside” when conducting digital surveillance operations.

But the challenge does not end there, since even if all states accepted the extraterritorial applicability of the Covenant, the traditional notion of ‘effective control’ sits uncomfortably with the nature of digital operations. One option is for states to agree that control over digital communication infrastructure through tapping or penetration amounts to effective control as suggested by the UN High Commission for Human Rights. An alternative way forward is for states to concede that their obligation is to respect the rights of all persons irrespective of geographical location or effective control. In time this latter option may prove to be the more attractive for technologically advanced states including, most notably the US, demonstrated by the experience of the Obama Administration following the cyber-attack on Sony Pictures in November 2014.

That the hackers violated US criminal law was not in doubt: the attack caused significant destruction and constituted theft on an unprecedented scale. As evidence suggesting North Korea’s involvement in the attack mounted, legal experts opined that the hack also constituted a violation of international law: namely, a breach of US sovereignty. But when Sony cancelled the Christmas release of The Interview in response to subsequent threats by the hackers, as far as the American public were concerned, the
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perceived wrongdoing constituted – above all – an attack on the freedom of expression. This sentiment was echoed in a White House statement which stated, “we take seriously North Korea’s attack that aimed … to threaten artists and other individuals with the goal of restricting their right to free expression.” But if North Korea does have a legal duty not to violate the freedom of expression of US citizens it must surely be on the basis that its Covenant obligations are extraterritorial in scope. This raises the question of whether, as societies become increasingly networked, states will feel the need to re-evaluate the scope of their IHRL obligations, if only for reasons of self-interest.

Dr Louise Arimatsu is an Associate Fellow at Chatham House and Honorary Senior Research Fellow in the Law Department at Exeter University. She was a member of the Group of Experts on the Tallinn Manual on the International Law Applicable to Cyber Warfare.

Nonsense on Stilts? Tommy the Chimp’s Legal Battle for ‘Non-Human Person Rights’ in the New York Courts
By Richard Martin | 15th January 2015

Tommy has been imprisoned for most of his life. Locked in a room in upstate New York, he has no money and cannot speak any languages. With the help of lawyers, he is now invoking the historic writ of habeas corpus to challenge his detention. Tommy, though, is not a human; he is a chimpanzee, and his representatives are on a quest for ‘non-human person rights’ for animals.

What are lawyers and those seeking better protection for animals to make of Tommy’s case?

The legal battle, which began over a year ago, reached the New York Third Appellate Court last month, in the case of ex rel. The Nonhuman Rights Project v Lavery (2014 NY Slip Op 08531). Recognizing the novelty of the case, the court noted that animals have never been explicitly considered capable of asserting rights under US law. Rejecting the appeal, it reasoned that chimpanzees, unlike humans, cannot submit to societal responsibilities or be held legally accountable for their actions and, therefore, it would be inappropriate to confer upon such animals legal rights, including the right to liberty. To support this, the court pointed towards the historical ascription of rights with responsibilities in America stemming from principles of social contract, as well as the consistent definition of legal personhood in terms of both rights and duties.

The judgment poses a central conceptual question concerning the nature of rights-based claims and the extent of correlative duties. For legal theorists, this maps onto well-worn jurisprudential debates, where the answer depends on whether we grant rights an internal logic or complexity and how this to be understood. Off the jurisprudential map though, the court’s reasoning remains curious. Firstly, biologists would probably remind us that whether animals can in fact bear social responsibilities is less clear-cut than the court would like to think. Chimpanzees such as Tommy share 99% of our human DNA and can demonstrate highly complex cognitive functions, such as self-awareness and self-determination. Anyway, as a society would we not be willing to say that we have submitted a social responsibility to the likes of guide dogs tasked with assisting the blind or police horses used on our streets? Secondly, the strict aligning of rights with duties, pinned onto the responsibilities owed under the court’s vague and sparse description of an America’s social contract in 2014, creates a more general feeling of discomfort. Surely we would be reluctant to accept that those who are less able to shoulder societal responsibilities- babies, the elderly, the infirm- are in some sense written out of the social contract, thus losing the rights that come with it?

For those interested in ensuring greater protection for animals, is litigation based on the rights of humans really the right way forward anyway? Just last week, in a landmark case, Sandra, a 29-year-old ape, won an appeal similar to Tommy’s before an Argentinian court. The full judgment has yet to be released, but the notion of ‘non-human person rights’ seems to have found favour with the court and Sandra is being moved to a sanctuary in Brazil. Tommy’s application to the Court of Appeals has just been lodged. Maybe the real battle, though, should be one of hearts and minds outside the courtroom, encouraging us to reflect on the impact that our consumer habits and lifestyles, be it food, clothes, holidays, have on animals and their habitats. Steps have already been made by legislatures to better protect animals, as seen in the UK, for example, by the Animal Welfare Act 2006.

Over a century ago, the father of Utilitarianism, Jeremy Bentham, scoffed at the notion of universal rights held by virtue of being human. They were, he famously said, “nonsense on stilts”. Yet this very idea has become a dominant legal paradigm in the last century. With increasing concern about the sustainability of our planet, its creatures and future inhabitants, should we be reluctant to dismiss as nonsense something akin to human rights, with the weighty normative and legal claims they carry, being extended to those not currently understood as legal persons?

Richard is an Editor of the Oxford Human Rights Hub Blog. He is completing his DPhil on human rights law and practice within the police at the Law Faculty’s Centre for Criminology, University of Oxford.
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Introduction

By Max Harris

Lawyers can be inattentive to the social and political context of law. In law, it is so often text that matters – the words of judgments, the phrasing in legislation – and a focus on such text can lead to neglect of the background to that text, or ignorance of the consequences of adopting a particular textual formulation. The posts collected in this chapter aim to redress that tendency in the law to marginalize context. The posts address the subject of “institutional frameworks”: that is, the structures governing organizations or positions that have a degree of permanence on the legal landscape. Analysis in these posts of institutional frameworks helps to remind us of the importance of policy design and politics for human rights protection. And it reveals the value of constantly reviewing institutions, to ensure that they advance the cause of human rights.

The posts in this chapter fall into two groupings. The first set draws attention to human rights institutions that serve noble purposes, but require greater support of some form. Vincent Ploton’s forceful article (Addressing the Critical Funding Gap at the UN, Human Rights Office” p 43) discusses the United Nations Office of the High Commissioner for Human Rights (OHCHR). He talks about the important efforts being made to publicise the OCHCR’s impact, but notes that weak outreach capacity and over-reliance on lawyers within the OCHCR may be hindering these efforts. Ploton also urges the OHCHR to push for reform of the major UN treaty bodies. Shanelle van der Berg’s similarly cogent piece (“The South African Public Protector’s Remedial Powers: A Need for Clarity” p 45) examines the South African Public Protector, an institution set up by the South African Constitution akin to what is known as an ‘ombudsman’ in many jurisdictions. Van der Berg describes the Public Protector as “critically important” in tackling “maladministration and corruption”, but raises concern about a recent judgment, Democratic Alliance v South African Broadcasting Corporation. Both the judgment and the government’s response to it threaten to weaken the Public Protector’s constitutional function, according to van der Berg. Natasha Holcroft-Emmess’s summary of the 2014 United Nations Forum (“Why Should Anyone Care About The UN? The UN Forum 2014” p 44) raises similar issues to those discussed by Ploton, although Holcroft-Emmess writes about the UN as a whole, as opposed to the OHCHR. She observes that there are good reasons to care about global issues – including the fact that there are transnational problems that require transnational solutions – but that the UN Forum indicated a lack of interest from the British public in foreign affairs or aid. Holcroft-Emmess also provides perceptive commentary on what was said at the Forum about the universality of the UN, nuclear disarmament, the responsibility to protect doctrine, and development. Michelle Farrell’s post (“Human Rights in the UK Media: Representation and Reality” p 46) reports from another significant conference, a one-day seminar on human rights in the UK media at the University of Liverpool. Farrell highlights the important role that the media plays as an institution in framing human rights issues. However, the conference suggested that the media in the UK can be inaccurate and misleading on human rights issues, according to Farrell. The entire seminar, said Farrell, showed the need for better public debate about human rights. Finally, within this grouping, Brice Dickson’s post (“The Handbook of Human Rights in Northern Ireland: Where Are We Now?” p 47) refers in a complimentary way to the Northern Irish NGO, the Committee on the Administration of Justice, and its new 2015 handbook on human rights. Dickson points out that while the handbook might need to be expanded in future, it provides a valuable resource which underscores success stories (such as the police’s compliance with human rights) as well as ongoing challenges (including social and economic rights, and discrimination).

Overall, the common theme in these articles is that certain human rights institutions have been established with important goals – but that we need to be vigilant to ensure that these institutions get the publicity and resourcing they deserve.

The second set of posts makes the case more radically for the reform of specific human rights-related institutions. Peter Lawrence describes a conference at the Oxford Martin School (“Building Institutions for the Long-Term: the Need for Normative Transparency” p 48) that suggested different ways in which institutions can be more oriented towards the long-term. The conference indicated that there might be value in creating positions with a mandate to consider the interests of future generations. Lawrence argues that such positions need to have some teeth if they are to be influential, but cannot be so powerful that they are never introduced. Giovanni Gruni (“The Missing Human Rights Impact Assessment of European Union Free Trade Agreements” p 49) calls for significant change in how human rights are considered in the context of free trade agreements. Human rights are regularly implicated in trade issues, says Gruni, and human rights impact assessments (described by the United Nations Human Rights Council in a recent report) could monitor the extent of violations. Ignacio de Casas (“Third Conference of States Parties to the American Convention on Human Rights: Another Brick on the Wall or is it another brick off?” p 50) records efforts by Ecuador to reform the Inter-American System for the Protection of Human Rights at a meeting of the States Parties in January 2014. de Casas says that while Ecuador faced some resistance, the meeting was not a “complete loss” for Ecuador and showcased the country’s “remarkable perseverance”. Arghya Sengupta (“The Committee of Judicial Independence and Accountability”, and argues that an upcoming case could well be a landmark reform in this area. Ernesto Castillo-Sanchez (“The Mexican Human Rights Constitutional Amendment and Impunity: Victims in a Labyrinth” p 52) also looks at a constitutional amendment, this time in Mexico. He outlines the way that this amendment attempts to end forced disappearances in Mexico, and relays the poignant story of a mother, Maria, who lost her son, Christian, in 2010. In all of these posts, there is a message that human rights institutions are in a state of flux – and that these institutions must be capable of being reformed if they are to serve the needs of victims in the twenty-first century.

The posts in this chapter move from the local to the global, across courts and NGOs and educational institutions, and, ultimately, communicate the importance of institutional context for the understanding of human rights law as a whole.
Addressing the Critical Funding Gap at the UN Human Rights Office
By Vincent Ploton  |  6th December 2014

High Commissioner Zeid Al Hussein is right to point to the shockingly low proportion of the UN budget which is allocated to his office. But he also needs to implement some major reforms to embrace a larger funding base.

The funding situation of the UN human rights office is at an all times low. The High Commissioner is right to bang on the UN table on lack of resources. But there are also serious risks in overemphasizing the resource problem without proposing solutions. And these are plentiful. Two of those that seem most critical to me are addressed below. This is by no means a comprehensive list, but these 2 factors certainly make up for a good rationale of the current critical funding situation at the Office of the High Commissioner for Human Rights (OHCHR).

• **Improve the global perception of the office**

Extraordinary problems call for radical solutions. After 20 years of existence, what is the global perception index of the UN human rights office? The OHCHR is still too often at best mistaken for the High Commissioner for Refugees. Over recent years, the office has had limited exposure in the world media. The OHCHR’s weak outreach capacity is incommensurate with its tangible ability to deliver on the ground. Clearly, the overwhelming representation of lawyers and legal practitioners within the office and associated bodies is hindering its capacity to reach out to people with simple and powerful messages. Of course, this is not just an OHCHR-specific problem. A 2013 survey revealed that only 22% of the young believe the UN is effective. Yet their opinion would probably be very different if they could only see what the UN does for them. People need to feel and see the difference that the UN, and particularly the OHCHR, is making for them.

The current acting Director of the UN in Geneva, Michael Moller, seems to have gotten that point. By putting forward slogans such as “#GenevaMeans” or “Geneva Impact” and by insisting on the global impact of the UN, he is contributing to prove his affirmation that “Everything that is done in Geneva has a direct impact on every person on this planet, in any 24 hour period”. Slogans of that sort are certainly exaggerated, but they serve the purpose to demonstrate the relevance of the UN to the lives of ordinary people, not some privileged elite in New York or Geneva.
Why should anyone Care about The UN? The UN Forum 2014
By Natasha Holcroft-Emmess | 15th July 2014

The UN Forum 2014, orchestrated by the United Nations Association-UK on 28 June 2014, was the largest public event on the United Nations in recent decades. UN representatives explained to the public how the international organisation attempts to grapple with the most formidable challenges of our time.

The first debate asked: why should anyone care about the UN? Empirical data provided by YouGov has recently indicated that the UK public is not engaged with foreign affairs: many considered foreign aid ineffective or a luxury that we simply cannot afford. A lack of efficient communication about the benefits of the UN’s work added to this general indiffERENCE.

But why should we care? Here’s one reason: global problems affect everyone locally to some extent. Floods on the other side of the world mean crops fail, and the price of everything goes up. People flee oppression in their own state and immigration rises elsewhere. People are too busy lamenting the symptoms and forget to look at the cause. These are transnational issues, requiring a transnational response.
Institutional Frameworks
Chapter 3

Another trend revealed that the general public believes UK spending on foreign aid is too great, especially during a period of austerity. Many thought we spend too much, but few knew the statistics. The UK recently hit the Millennium Development Goal of spending 0.7% of the Gross National Income on foreign aid. But this achievement was kept quiet, lest it fuel the anger of introspective backbench politicians. We need to stop thinking about international aid as a luxury or a moral choice, but as a legal duty on wealthy countries and a good investment in the world’s future.

The puzzle of human rights universality was also briefly addressed. Some consider the UN’s global goals to be unattainable in the face of such diversity in norms and customs around the world. The argument that human rights standards do and ought to differ geographically, however tempting and easy it would be to accept, should not be our approach. The value which the UN brings to the problem of achieving universality is the collective global weight which it can lend to address a particular problem. Take a few examples: child marriage, child soldiers, forced labour – the UN is uniquely placed to set minimum international standards of human rights.

The three other debates varied in focus. One asked whether nuclear weapons keep us safe, or whether the catastrophic consequences of detonation around the world justify nuclear disarmament. There is no doubt that these weapons have the potential to decimate the planet. But the only real hope for disarmament is for the most powerful countries to disband their nuclear weapons programmes. Another debate asked whether the responsibility to protect (R2P) is an appropriate means of response to humanitarian crises. All international uses of force, even those for ostensibly humanitarian purposes, must be viewed with deep suspicion and only ever justified in circumstances of the utmost necessity. The value of the R2P is that it is narrowly constructed and ought to remain so. It is submitted that the Permanent Members’ (P5) power of veto is also nowadays difficult to justify, and the P5 ought to reserve its application to the most fundamental questions of military intervention.

The final debate asked whether our approach to development is flawed. The majority of those present believed that the goal of addressing global poverty ought to be granted the highest priority. It must be borne in mind that by our inaction we condemn millions of people around the world to malnutrition, disease and death. We can remedy these dire straits by supporting the work of the UN and its associates, the World Health Organisation and UNICEF. They provide famine relief, refugee aid and respond to health epidemics, most recently the Ebola virus outbreak in Africa. We are the first generation which could see an end to global poverty. It is a choice we make to allow it to continue, and that fact is difficult to live with. It may not feel like the UN has an impact on your daily life, but it certainly has a part to play in your future, and the future of our planet. Let us reconsider our localised way of thinking and unite again in the common cause of enhancing conditions for all within our international community.

Natasha Holcroft-Emmess is a London-based solicitor. She completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

The South African Public Protector’s Remedial Powers: A Need for Clarity
By Shanelle van der Berg | 14th November 2014

The South African Public Protector is a critically important constitutional institution. The Public Protector is tasked, along with other Chapter Nine institutions, with strengthening constitutional democracy in South Africa. Indeed, the Supreme Court of Appeal has recognised that the Public Protector often constitutes a “last defence” against maladministration and corruption. Where irregular spending, corruption or maladministration is permitted to continue unchecked, such public conduct holds obvious implications for the realisation of the human rights enshrined in the South African Constitution’s Bill of Rights. For example, where the President spends R246 million on purported security upgrades to his private residence, and the Public Protector confirms such expenditure, the question immediately arises as to whether such funds could have been better spent on realising resource-intensive rights such as the right of access to adequate housing, access to sufficient food and water or basic education.

The status of the remedial powers of the Public Protector is thus of crucial importance. If government is free to disregard the Public Protector’s findings and persist in irregular or even downright corrupt conduct, the ability of the Public Protector to safeguard constitutional democracy and facilitate the realisation of the rights on which our democracy is built, becomes severely hampered. The government’s response to a recent Western Cape High Court judgment holding that the Public Protector’s findings are not binding or enforceable, is therefore particularly worrisome. In the recent case of Democratic Alliance v South African Broadcasting Corporation Case No. 12497/2014, the High Court held that the institution of the Public Protector differs from that of a court of law in that unlike a court order, a finding by the Public Protector is not binding on persons or organs of State. The Court hastened to add that were government to simply ignore the findings of the Public Protector, it would flout the constitutional imperative enshrined in section 181(3) of the Constitution, which directs that “other organs of state, through legislative and other measures, must assist and protect [Chapter Nine] institutions to ensure the independence, impartiality, dignity and effectiveness of these institutions”.

Relying on English law pertaining to the remedial powers of an ombudsman, the Court held that an organ of State which chooses to reject the Public Protector’s remedial directions must have cogent reasons for doing so. The Court clarified that the process by which such decision is reached, as well as the decision not to accept the Public Protector’s remedial directions, must be rational.
Significantly, the Court pointed out that a decision to reject the Public Protector’s remedial directions is itself capable of being subjected to judicial review.

The parliamentary committee (now consisting solely of ANC party members) established to investigate President Zuma’s upgrades to his residence in Nkandla was quick to use the judgment for justifying its decision to absolve the President from any wrong-doing, despite the Public Protector’s explicit findings to the contrary. Given the Public Protector’s comprehensive report on the matter, the rationality of the committee’s decision is dubious. Meanwhile, the Public Protector intends to take the judgment on review, citing the Court’s over-reliance on the powers of an ombudsman in the UK as one reason for disagreeing with the court’s judgment. Whatever the outcome of the review proceedings may be, there is an urgent need to clarify the remedial powers of the Public Protector in a manner which will promote the effectiveness of this crucial democratic institution. Government’s continued refusal to respond to the Public Protector’s findings, or to support the role that the institution plays, has the potential to imperil the foundations on which South Africa’s constitutional democracy is based.

Shanelle van der Berg is a member of the Socio-economic Rights and Administrative Justice Research Project at Stellenbosch University, Faculty of Law. She is also the OXHRH Blog’s Regional Correspondent for South Africa.

Human Rights in the UK Media: Representation and Reality
By Michelle Farrell | 16th October 2014

On 19 September 2014, the Human Rights and International Law Unit of the School of Law and Social Justice at the University of Liverpool hosted a one day seminar – part funded by the Modern Law Review – exploring the representation of human rights in the media in the UK.

The seminar brought together constitutional and international law scholars, media and communications scholars, journalists, legal practitioners and civil society actors for what became an informative, often provocative, frequently entertaining and certainly challenging discussion.

Beyond developing the debate and exchanging knowledge, the seminar was envisaged as an opportunity to think about the gap between European and UK legal and political institutions and human rights as experienced by communities and individuals. The media which arguably bridges this gap, playing no small part in both denigrating human rights and in uncritically celebrating human rights, seemed an intuitive starting point for getting to grips with public perceptions of human rights.

This seminar was certainly timely. With the Conservatives’ “plans” for the Human Rights Act and the European Court now unveiled, the scene is set for much legal wrangling and political contestation over the future of human rights in the UK. The media will play a significant part in displaying, portraying and developing these discussions.

Reporting on rights
David Mead, Professor of UK Human Rights Law at the University of East Anglia, delivered the keynote speech. Asking the enticing question, ‘do we learn more about the media than about human rights from tabloid coverage of human rights?’, Mead set the ball rolling on the theme of print media (particularly, Daily Mail) misrepresentation of human rights cases and issues. Drawing on empirical data and media theory, Mead provoked us to think about the language and techniques of inaccurate and misleading reporting. This line of inquiry was also taken up by Adam Wagner, editor of the UK Human Rights Blog. Wagner encouraged us to
consider the political backdrop to this media reporting and to take into account, in trying to understand why the ‘media [is] doing such a bad job’, both the practical realities and challenges of contemporary media and the ideological tenor of media outlets. Drawing on similar themes, Owen Bowcott, legal affairs correspondent at the Guardian, and Susana Sampaio Dias, a media and journalism specialist at University of Portsmouth, imbued the discussion with the strong sense that, in order to understand media representation, we do need to understand the constraints and challenges of media reporting.

Public perception of rights
Rights are assumedly codified in the interest of individuals. Yet there is a chasm in the relationship between the rights-enforcing institutions – the Strasbourg Court, for example – and the particular localities, communities or individuals that rights allegedly safeguard or empower. Do human rights make a difference in the UK? Are human rights viewed as relevant by individuals at the local level? What is public opinion and what influences this opinion? These questions were taken up by a number of the speakers; in particular, Nicky Hawkins, Communications Director at Equally Ours spoke of her organisation’s work to disseminate positive messages about rights.

Scepticism about rights
It became an underlying theme of the seminar that the contest over the HRA and the European Court – this media war – masks a deeper unease and uncertainty about rights. A number of speakers (Colm O’Cinneide and Mike Gordon in particular) raised the issue of a marked failure to really engage with rights scepticism. As O’Cinneide suggested, supporters of rights fail to fully engage or challenge the arguments put forward by critics, some of which arguably have merit. Gordon’s presentation provoked the collective’s thinking on whether the pervasiveness of rights-talk in the media and beyond has quashed alternative avenues for apprehension, leaving, for example, little room for democratic scepticism of rights. These are key themes that ought to dominate the upcoming and now inevitable debates. A rich political discussion about the factual impact and desirability of human rights in the UK is needed.

To be continued
With the battle over rights already in full swing, it seems that an informed political debate about the effects, the utility and the benefits, if any, of rights is needed. However, the debate on the future of UK human rights law seems to be largely cornered in the academic, political and judicial institutions. What does get through is mediated in a press that, in some sections, is entirely disdainful or misrepresentative of rights and, in other sections, is often celebratory and rarely critical of rights. This seminar was productive in opening up new ways of talking and thinking about rights, and how the media understands and portrays them, beyond the ‘good or pro rights v bad or anti rights’ stalemate.

Dr Michelle Farrell is a lecturer in law in the School of Law and Social Justice at the University of Liverpool.

The Handbook of Human Rights in Northern Ireland: Where Are We Now?
By Brice Dickson | 27th January 2015

Northern Ireland’s most prominent human rights NGO is the Committee on the Administration of Justice. Founded in 1981, it has played a significant role in ensuring that human rights and equality are central to the way forward in Northern Ireland. One of the techniques it has used to do that is providing basic information about relevant laws. This manifested itself most significantly in the publication of a ‘Handbook’ in 1990, the foreword to which was written by Lord Scarman. Three more editions followed in 1993, 1997 and 2003. Now, in 2015, a new version of the book has been produced, entitled Human Rights in Northern Ireland: The CAJ Handbook, published by Hart and with a foreword by Lord Lester of Herne Hill QC.

I have been privileged to edit or co-edit every incarnation of this book during the last 25 years. Reflecting on the latest version two points strike me. First, the book is as much about social and economic rights as it is about civil and political rights. This is because issues such as education, employment, mental health, housing, social security and the environment impinge much more on most people’s lives than do police powers, prisoners’ rights, free speech or freedom of association. Even in Northern Ireland, where disputes over flags, parades, inquests and prosecutions still hit the headlines, more bread-and-butter issues are what cause people real personal concern.

The second reality is that discrimination is just as big a worry as it has traditionally been in Northern Ireland. But the focus of that worry has shifted. While there is still far too much discrimination based on religious belief, there has been a huge rise in discrimination based on race, sexual orientation and age. Women’s rights are still under-protected too, not least in the realm of reproduction. The new CAJ Handbook therefore devotes six of its 26 chapters to the law relating to equality and discrimination. Having once led the pack in these fields, Northern Ireland now lags behind other parts of the United Kingdom as well as the other part of Ireland. The Equality Act 2010 has no application outside England, Wales and Scotland.

There are good news stories in Northern Ireland too. The police service is one of the most human rights compliant in these islands, or anywhere in Europe, partly because of the completely independent Office of the Police Ombudsman (which investigates
Institutional Frameworks
Chapter 3

Building Institutions for the Long-Term: the Need for Normative Transparency
By Peter Lawrence | 5th December 2014

The Oxford Martin Programme on human rights for future generations brought together politicians, philosophers, and NGOs in its conference on ‘How can institutional mechanism safeguard for tomorrow, today?’ on 21 October 2014. The following comprises some impressions from a participant in this conference.

Simon Caney emphasised that the drivers of short-term policy —making were varied, with some incentive structures easier to modify than others. He proposed three criteria for evaluating institutional proposals aimed at promoting long-term policy-making: effectiveness, political feasibility and moral legitimacy. He then explored some specific institutional proposals, some of which complaints), the Criminal Justice Inspectorate (which examines police efficiency in the same way as it looks at every other agency within the criminal justice system) and the Policing Board (which ensures police accountability). A glance at the Policing Board’s annual human rights reports, the latest of which is to be released on 20 February, demonstrates just how thorough that accountability has been.

The Stormont House Agreement, reached by local politicians and the British and Irish governments just before Christmas, has the potential to ensure that problems associated with dealing with the past (in particular the hundreds of unresolved killings which occurred during the Troubles between 1968 and 1998), the disputes over flags and marches, and the need for more integrated schooling and housing, are once and for all put to bed. A set of new quangos is to be established and more money is to be made available. Perhaps most importantly, a timetable has been set, against which progress is to be monitored.

Mercifully the threat from dissident republicans, while still significant, seems to be being managed quite successfully. There are still emergency powers, including juryless courts, but the safeguards in place are greater than ever before. The recent annual review of some of the emergency powers by David Seymour strikes a more optimistic note than of late.

Going forward, the rights issues that matter most to people in Northern Ireland are likely to be those relating to surveillance, welfare and living standards. The new CAJ Handbook will no doubt be widely consulted in those areas. Its 650 pages may need to be expanded even further in a few years’ time.

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Institutional Frameworks
Chapter 3

The Missing Human Rights impact assessment of European Union Free Trade agreements
By Giovanni Gruni | 21st August 2014

The European Union is pursuing a proactive policy to conclude free trade agreements with numerous countries around the world. The policy includes major trade partners of the EU such as the United States and Canada as well as emerging economies and developing countries in the Caribbean and sub-Saharan Africa.

These free trade agreements regulate many areas which can interfere with the free movement of goods and services between the countries involved. Notably, the new generation of free trade agreements does not only include limits on the use of trade barriers such as tariffs but also extensive regulation of "non-tariff" barriers: legislation or other red tape that can hinder international trade between countries. Accordingly, the agreements which the European Union is negotiating include subjects such as trade in goods and services, intellectual property rights, investment protection, sanitary and phytosanitary measures, agriculture, subsidies and public procurement.

Over the last two decades research has demonstrated a correlation between some of these trade-related norms included in free trade agreements and the realisation of human rights. For instance, the inclusion of intellectual property rights in a free trade agreement can lead to the "mainstreaming" of long-term thinking, for example, through the incorporation of long-term thinking into audit systems. Such systems have the advantage of being less vulnerable to political whims.

Other participants at the conference addressed specific institutional reforms:

- Juliana Bidadanure explored whether the introduction of youth quotas into parliaments would increase the likelihood of meeting the demands of intergenerational justice. She noted that while there is mixed evidence in terms of whether young people are more or less inclined to care about the future than older persons, there are nevertheless instrumental reasons for supporting youth quotas in Parliament.
- Joerg Tremmel argued that the time had come for a new type of Constitution involving a fourth branch which represented the interests of future generations. He was cautious about such a branch having an overly prescriptive role owing to disputes about what policy best represents future generations’ interests.
- Peter Davies, Wales’ Commissioner for Sustainable Futures introduced a practitioner’s perspective drawing on his heavy involvement in current processes to reform Welsh lawmaking including new reporting requirements that would require political parties in the lead up to elections to have their policies tested in terms of long-term impacts.
- Oresk Tynkkynen – the youngest ever member of the Finnish Parliament – shared insights into the workings of the Finnish Parliamentary Committee for the Future over its 25 year life. While the Committee lacks teeth in terms of its capacity to override legislative proposals, Tynkkynen emphasised the educative role that it played in relation to policy makers. This includes its role as an "incubator" for future prime ministers, given that over the last 25 years all Finnish PMs had spent some time working for the committee.
- Peter Lawrence argued that democratic legitimacy criteria should be used for evaluating international proposals for factoring in the interests of future generations, including a UN Commissioner for future generations. He argued that, in spite of the fractured nature of international society, the ‘demos’ (public) could be extended into the future by relying on an interest-based notion of representation.
- Catherine Pearce from the World Future Council gave a convincing argument as to why a UN Commissioner for future generations was required. She emphasised the role of moral leadership that would be entailed in such a position. Her presentation stimulated an interesting debate into the question of strategy, in terms of how best to shake citizens out of complacency to take an interest in future generations. During the debate it was suggested that innovative communication methods could help bring alive the rather abstract questions of future generations.

I came away from this Conference more convinced than ever of the need to make explicit the normative underpinnings behind institutional proposals which factor-in future generations’ interests. Being clear about such normative underpinnings can help in building political support for reforms. ‘Mainstreaming’- style institutional reform (such as accounting methods) can only be a positive.

Introducing new institutions with a specific mandate to represent the interests of future generations is justified given the tendency for their interests to be marginalised. Such mechanisms, however, face a dilemma. If they lack teeth, they may have less direct effect, but be more inclined to survive changes in political fortunes. If they have teeth, they may run the risk of never being introduced. The workshop provided an excellent example of the value of interdisciplinary research and debate around a vital contemporary issue.

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The Missing Human Rights Impact Assessment of European Union Free Trade Agreements
By Giovanni Gruni | 21st August 2014

The European Union is pursuing a proactive policy to conclude free trade agreements with numerous countries around the world. The policy includes major trade partners of the EU such as the United States and Canada as well as emerging economies and developing countries in the Caribbean and sub-Saharan Africa.

These free trade agreements regulate many areas which can interfere with the free movement of goods and services between the countries involved. Notably, the new generation of free trade agreements does not only include limits on the use of trade barriers such as tariffs but also extensive regulation of "non-tariff" barriers: legislation or other red tape that can hinder international trade between countries. Accordingly, the agreements which the European Union is negotiating include subjects such as trade in goods and services, intellectual property rights, investment protection, sanitary and phytosanitary measures, agriculture, subsidies and public procurement.

Over the last two decades research has demonstrated a correlation between some of these trade-related norms included in free trade agreements and the realisation of human rights. For instance, the inclusion of intellectual property rights in a free trade
agreement can interact with the right to health by influencing access to medicine. Supranational protection of intellectual property and norms on tariffs, export restrictions, subsidies and sanitary and phytosanitary measures are also relevant to the right to adequate food. The right to health is then called into question when a free trade agreement attempts to liberalise health care services, especially when the countries involved have a public system of health care such as the UK’s NHS. In addition, certain agreements might include a clause allowing private companies to sue States in order to protect their investments, an instrument which also has human rights implications. This is the case of the trade deals between the EU and the US and the EU and Canada.

For these reasons the conclusion of a free trade agreement requires a careful assessment of its impact on human rights, and the United Nations Human Rights Council recently published a Report on how such assessment might be carried out. Other guidelines on this human rights impact assessment have been developed by scholars and international organisations. However, in European Union law, the procedure to negotiate and conclude free trade agreements does not require a human rights impact assessment at any stage. Since external trade is now an exclusive competence of the European Union, negotiations are carried out mainly by the European Commission, the Council of Ministers and the European Parliament, which provides its consensus at the end of the process. In this procedure, the relationship between the free trade agreement and human rights law lacks an institutionalized method of assessment highlighting the trade clauses relevant to the realisation of fundamental rights. In particular, within the European Commission negotiations are mainly carried out by the Directorate General for trade: the Directorate Generals specialising in human rights and development cooperation have no role, or a marginal one, in the process.

A human rights assessment of free trade agreements would provide several benefits. First, it would clarify areas of negotiation which are particularly sensitive for human rights, so that negotiators can take them into account. Second, since the free trade agreements would be binding and enforceable, the assessment would avoid later potential conflicts between international trade law and human rights. This is particularly important since the ex post dispute settlement mechanisms enforcing free trade agreements only take trade law, and not human rights law, into account. Third, the assessment could provide an institutional mechanism for the Directorate Generals of the Commission specialising in human rights law to contribute to the negotiation of the free trade agreement. The process would become more coherent, and allow the European Commission to develop valuable know-how on the interactions between international trade law and human rights. Finally, the assessment could be the occasion for obliging human rights groups and civil society to express their opinions in a structured and legal manner, identifying exactly the trade clauses that might be problematic for human rights protection.

Overall, a human rights assessment of free trade agreements has the potential to be beneficial to the negotiation process, bridging the gap between international human rights law and international trade law. At the same time, the assessment would increase the legitimacy of the free trade agreement smoothing the ratification process and reducing the oppositions to the trade deal present in civil society.

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**Third Conference of States Parties to the American Convention on Human Rights: Another Brick on the Wall (or is it another brick off?)**

By Ignacio de Casas | 12th February 2014

On January 21st and 22nd 2014, the Third Conference of States Parties to the American Convention on Human Rights (ACHR) took place in Montevideo, Uruguay. Once again, Ecuador was working behind the scenes, pushing for reforms that it was unable to achieve months before through the “Process of Strengthening of the Inter-American System for the Protection of Human Rights.” Days before the conference started, it was announced through the press that the meeting was going to decide a change of location for the Inter-American Commission on Human Rights’ (IACHR) headquarters (now located in Washington, DC). Chancellor Patiño, from Ecuador, travelled to several countries throughout Latin America to lobby this issue. And he arrived in Montevideo with a true task force ready to push this and other topics at the conference. Here are the outcomes.

Ecuador’s first agenda point, changing the seat of the IACHR, is an objective for which the government of President Correa has long battled. Its rationale is that that the United States has an undue influence upon the organ due to its location, and since the United States is not a State Party to the Convention, this influence is completely out of order. But once again, as has happened in the previous conferences as well as within the Organization of American States (OAS), no consensus was reached on this issue.

During the second day of discussions in Montevideo, Ecuador moved forward with another issue: the reform of the IACHR’s Rapporteur system. Although Ecuador has an important point here, there are many countries—as well as members of civil society— that suspect that Ecuador is lobbying this issue because of its declared war with the Special Rapporteur on Freedom of Expression. The issue was hotly contested, with Costa Rica leading the opposition to Ecuador’s position. Proposals varied from eliminating the existing rapporteurships, to balancing the economic resources of the different rapporteurs, to raising the budget of the poorer rapporteurs while leaving the budget of the richer ones unchanged. It was eventually decided that a working group of States
In India, several significant developments have taken place in the last two months on how judges to the Supreme Court and High Courts will be appointed.

On 31st December 2014, the President assented to the 99th Constitution Amendment Act, 2014 and the National Judicial Appointments Commission Act, 2014. Taken together, these two pieces of legislation have established the National Judicial Appointments Commission (NJAC), which is vested with the power to appoint judges to the Supreme Court of India and the High Courts. The NJAC is comprised of the Chief Justice of India, two senior-most Justices of the Supreme Court, the Minister for Law
and Justice, Government of India and two eminent persons selected by the Chief Justice of India, Prime Minister and Leader of Opposition in the Lok Sabha (Lower House of Parliament). Given that the sanctioned size of the judiciary in the Supreme Court of India is 31, including the Chief Justice of India, and over 900 that in the High Courts, the NJAC has considerable responsibility. Further, the NJAC, replaces the judicial collegium, a group of senior judges hitherto centrally responsible for all appointments, making its establishment politically controversial and raising issues of judicial independence and autonomy.

In fact, the new mechanism for appointments is not in force yet, despite the constitutional amendment having received presidential assent, owing to a constitutional challenge to its validity in the Supreme Court. In Supreme Court Advocates-on-Record Association v. Union of India Writ. Petition Nos. 1303 of 1987, filed in January 2015 before the Supreme Court, the petitioners have contended that the amendment violates the independence of the judiciary, which is part of the basic structure of the Constitution. The fact that the Chief Justice of India will no longer have primacy in appointments (as he does currently) is the key basis for such a claim. Moreover, the NJAC Act, 2014 has also been challenged on technical and substantive grounds. Technically, it has been contended that the Act is non-est because it was passed before the constitution amendment on which its validity depends, was passed. Substantively, it is claimed that the introduction of a super-majority (all decisions to be taken by five positive votes) denudes the primacy of the judiciary; at the same time, the non-specification of criteria for appointment suffers from the vice of excessive delegation. No date has been set for the hearing of the matter yet.

The filing of this constitutional challenge continues a trend of Judges’ Cases, seminal litigation in the Supreme Court on how judges of the higher judiciary are to be appointed. Whereas in the First Judges’ Case AIR 1982 SC 149, the Court had underlined the executive government’s power to appoint judges, it was reversed in the Second Judges’ Case Writ Petition (civil) 1303 of 1987 on the ground that executive appointment affects the independence of the judiciary. This led to the establishment of a judicial collegium, a group of senior most justices of the Supreme Court, without whose concurrence no appointment could be made. This was clarified in the Third Judges’ Case AIR 1999 SC 1 which provided details of the procedure and practice pertaining to collegium appointments. For the last two decades when collegium appointments have been operational, the judiciary has been riddled with allegations of nepotism and cronyism in appointments. Further the system is entirely opaque with no transparency in decision-making and no scope of holding the collegium accountable. While the raison d’etre of the collegium, protecting the judiciary from unwarranted executive interference, was served, several newer problems emerged, which, on balance, made the remedy arguably worse than, or as debilitating as, the disease. That it needed change is a platitude.

The ball is now firmly in the court of the Supreme Court. The case provides an ideal opportunity for the Court to clarify the contours of judicial independence and accountability, neither of which have been explicated sufficiently. At the same time, the court is placed in the awkward position of having to adjudicate on the extent of its own power of appointment. It is too early to tell how the case will play out; however, it can be said with some certainty that whichever way the decision unfolds, it will be a landmark in Indian judicial history.

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The Mexican Human Rights Constitutional Amendment and Impunity: Victims in a Labyrinth

By Ethel Nataly Castellanos-Morales and Camilo Ernesto Castillo-Sánchez | 26th July 2014

The human rights situation in Mexico has suffered a notorious deterioration in the past few years due to multiple factors (such as the weakness of the rule of law, the rise of organized crime, and high rates of petty crime). At the same time, Mexico has tried to modernize its constitutional system to protect human rights, in a similar way to other countries in Latin America. The most significant recent changes in Mexico are the Reforma constitucional en materia de derechos humanos (Human Rights Constitutional Amendment) and the new Amparo law (the writ of constitutional protection, and the most important procedure for protecting rights in the country).

These mechanisms have opened many possibilities for the protection of human rights but also entail many challenges, one of which is the fight against impunity with respect to serious violations of human rights. Individuals whose rights have been violated must confront a complex web of procedures and institutions which appear designed to favor impunity.

This is the case with forced disappearances. Maria Eugenia Padilla García, a Mexican woman, lost her son Christian – who was illegally arrested by the Policía intermunicipal (Inter Municipal Police) – in 2010. Maria began the search for her son immediately, knowing that his detention was groundless. Her son was never brought before a court, and Maria herself has had to surmount many obstacles.

The first obstacle was the attitude of local authorities. They tried to persuade her to abandon the search: in their words, she was risking both her and her son’s life as the people involved in the disappearance were more powerful than the Mexican Government. This persuasion, or arguably intimidation, increased Maria’s feelings of frustration and defenselessness. Additionally, the majority
of government officials who did engage with Maria showed disrespect for her and her situation. In some cases they did not use the expression “forced disappearance”, preferring the expression “levantón” (a kidnapping associated with criminal activity). The use of this euphemism masks both the seriousness of the crime and the government’s accountability.

Maria has attempted to challenge the government’s inefficiency at various levels: before the local and the federal authorities; before the judiciary and the executive; before the Policía Municipal (municipal police) and even the President of Mexico’s office. Nevertheless, Maria has not found her son or justice for the perpetrators, even though some of them have been fully identified.

Maria is navigating a complex labyrinth; she has learned from bitter experience and has now suffered her son’s absence for four years. She has witnessed the authorities’ lack of interest, and their incompetence. Despite of these obstacles, Maria is still fighting to find Christian. This is her main goal; she still hopes to learn what happened, to find those responsible and to have the state judge and condemn them.

Have the Mexican Human Rights Constitutional Amendment and the new Amparo law brought changes in the human rights situation in this country? Maria’s case proves that to fulfill the Reforma and change the situation of human rights in Mexico, the government must consider that – like Maria – hundreds of people are trapped in this labyrinth, surrounded and attacked by an enormous and useless bureaucracy which only serves to turn the families of those who have disappeared into further victims. Could the Reforma and the new Amparo Law solve those problems? How? It is now the Mexican Government’s turn to speak.

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Chapter 4

Criminal Justice
Introduction
By Richard Martin

Subject to the prevailing winds of politics, public sentiment and evidence-based policy, the notion of criminal ‘justice’ was famously said by Herbert Packer (1968) to be found somewhere on the conceptual continuum between due process and crime control. In a climate of penal punitiveness - the decline in rehabilitative ideals, rising prison rates, harsher prison conditions, cuts to legal aid – which extends from the UK and USA to parts of Europe and Australasia, the criminal process may be seen drifting closer to crime control ideals. What role has human rights law played in responding to such punitive trends? Where has it, or could it have, protected the rights of victims, defendants and offenders? Indeed, how have human rights fared in other penal climates across the globe? Answers to these questions can be found in this eclectic and engaging collection of posts from the last year.

Linking many of the posts is the tension states face in their simultaneous desire to heavily punish the most serious of offenders while fulfilling their domestic and international human/civil rights obligations. Contributors to this chapter demonstrate how rights-based, judicial review challenges the courtroom have continued to loosen the grip of those states that cling on to the death penalty. Writing in the context of the USA, Carol Steiker (‘Federal Judge Strikes Down California Death Penalty as Unconstitutional’ p 75) describes how the judgment in Jones v Chappell, which scrutinized the California death penalty system, adds a new critique “to the growing chorus of consternation”. Similarly, Jon Yorke (‘Executing the Intellectually Disabled: A Stronger Prohibition’ p 78) commends the US Supreme Court’s rejection of the appeal court’s decision that would have seen Florida execute those of the most limited intellectual capacity. Yorke draws particular attention to the Court’s implicit recognition of international rights discourse when it emphasised that death penalty is a violation of human dignity. The significance of this international discourse is captured in posts by Roger Hood and Carolyn Hoyle (‘Capital Punishment in China: Room for Cautious Optimism?’ p 72), suggesting cautious optimism for China’s path towards abolitionism, and by Vincent Ploton (‘A New Opportunity for the UN to Move Forward the Global Abolition of Death Penalty’ p 71), outlining the importance of the UN Human Rights Committee and the challenge it faces in encouraging the ratification of the ICCPR second Optional Protocol. The centrality of the judiciary and rights-based appeals in retentionist countries remains clear though when reading the posts by Gautam Bhatia on India (‘Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation’ p 73) and Jon Yorke on Sudan (‘Meriam Ibrahim Saved from 100 Lashes and the Death Penalty’ p 74).

Another key exchange between human rights law and punitive sentences of the last year has been the compatibility of whole life sentences with the right to freedom from inhuman and degrading treatment. The judicial dialogue the issue has generated between the European Court of Human Rights (ECHR) and the Court of Appeal of England and Wales is critically outlined in a series of authoritative posts by Neil Shah (‘Hutchinson v UK – A Change in Direction on Whole Life Orders?’ p 79; ‘Court of Appeal Affirms Ability to Pass Whole Life Tariffs for Murder’ p 82) and Natasha Holcroft-Emmess (‘Whole Life Sentences in Hutchinson v UK – Compromise or Concession?’ p 80; ‘Throwing Away the Key – Whole Life Sentences in the Court of Appeal’ p x81). The contributors explain how this dialogue is set against an important sub-plot concerning the UK’s increasingly contentious relationship with Strasbourg, which, they suggest, may have left the ECHR reluctant to criticise the Court of Appeal’s inadequate response to its earlier judgment in Vinter [2013] ECHR 66069/09. The cost of this perceived concession by the ECHR for prisoners is continued uncertainty as to what they must demonstrate to be considered for eventual realise and how meaningful such a review, if carried out, would in fact be. In the year ahead, this is an issue contributors and readers of the blog might return to in other jurisdictions. Ravi Amarnath’s post (‘Prisoner Rights at the Forefront of Canadian Debates’ p 85) raises awareness of introduction of indefinite detention of prisoners in Canada and Vishwajith Sadananda (‘Perpetual Life Sentences, Reformation and the Indian Supreme Court’ p 83) describes how indefinite life imprisonment in India is replacing the gap left by the Indian Supreme Court’s tacit abolition of the death penalty.

This increase in the length of sentences for those convicted of serious crimes has also been coupled with a more general deepening of the pains of imprisonment. As discussed Natasha Holcroft-Emmess (‘Restricting Receipt of Rehabilitative Resources: The Prisoner Book Ban’ p 86) the introduction in England and Wales of sweeping of restrictions on the ability of family and friends of prisoners to send them the semblances of normal life – clothing, underwear, books – marks a particular low in the respect shown to the inherent worth of the individual. These pains of imprisonment are particularly severe for certain groups of prisoners, as illustrated by Jo Barker’s post (‘Women in Prison: The Particular Importance of Contact With the Outside World’ p 84) outlining the research on women’s experiences of imprisonment. Similarly, Andrew Wheelhouse’s post (‘Reporting Restrictions in Criminal Cases Involving Juveniles’ p 58), focusing on the High Court’s decision to ‘name and shame’ a child who murdered his teacher, touches on the issue of custodial sentences for younger members of society and the relative moral capacity of children and adults.

Moving on, a series of posts sensitively addressed the issue of criminal liability for persons assisting those who wish to end their lives but cannot do so themselves. Writing in the UK context, where this is an offence, Keir Starmer (‘Prosecuting in the Public Interest: CPS Guidelines from Assisted Suicide to Social Media’ p 65), former Director of Public Prosecutions, outlines his ‘red thread’ – its strands comprised of guidelines, explanations and challenge – which ought to inform prosecutorial discretion. The need for such discretion remains in the UK, after the Supreme Court held it could not declare the prohibition to be incompatible with right to private life in the instant case before it (discussed in Claire Overman’s post ‘Moral Arguments on the Right to Die: Should Courts Intervene?’ p 66). As reported by Jennifer Koshan (‘Supreme Court of Canada Strikes Down Ban on Physician Assisted
Death’ p 68), across the Atlantic the Supreme Court of Canada was faced with a similar question, but instead used domestic human rights provisions to unanimously strike down the prohibition against physician assisted death. It is worth noting both the rights that each Court perceived to be engaged, as well as the difference in the deference shown to the respective legislatures, reflecting the constitutional status of each court. Although a landmark judgment, perhaps, as the title of Ravi Amarnath’s post (p 69) suggests, the ‘Implementation of Carter will be the Ultimate Gauge of Success of the Decision’.

Finally, the police, as the gatekeepers of the criminal justice system who exercise considerable powers under the law, can significantly impact on the fulfillment of human rights. Andrew Wheelhouse (‘The Duty of National Authorities to Investigate Allegations of Torture’ p 61) discusses how the positive duty of the police to investigate serious crime has been interpreted and developed by the Constitutional Court of South Africa to require the South African Police Service to investigate crimes against humanity in Zimbabwe. In contrast, the gross rights violations resulting from abuse of police power, facilitated by systemic immunity before the law, are demonstrated strongly in the accounts of police violence in Brazil by Eloisa Machado de Almeida (‘A Guide to the Perpetuation of Human Rights Violations: Police Violence and Impunity in Brazil’ p 62) and in Colombia by Castellanos-Morales and Castillo-Sanchez (‘Impunity for Police Violence: Nine Years Since Jhonny Silva-Aranguren’s Death’ p 63).

With a particular focus on sentencing and punishment, this collection of posts demonstrates the considerable power that actors of the criminal justice system have to both crucially protect and desperately undermine the value, experience and even existence of human lives. The posts effectively illustrate how human rights law and discourse has proved central in efforts to challenge how this power is used, and remedied when it is abused. Though the collection also hints at how, in interpreting the content and scope of human rights, the judiciary too can be swayed, for better or worse, by the penal climate produced by politics and public sentiment.

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On 3 November 2014 Will Cornick was sentenced to a minimum of 20 years imprisonment for the murder of his teacher Ann Maguire, after stabbing her in front of her own class. Aged 15 when he committed the crime, he expressed no remorse and it became clear during the trial that he suffered from a type of personality disorder.

Some commentators have expressed doubts over the appropriateness of imposing such a lengthy custodial sentence on a child. But an interesting aspect of the case of R v Cornick [2014] EWHC 3623 (QB) and one deserving criticism, is the decision of Coulson J to drop the reporting restrictions on Mr Cornick’s identity.

Section 39 of the Children and Young Persons Act 1933 (CYPA) empowers the Court to prohibit newspapers from revealing a child or young person’s identity. Such an order was made a few days after the murder but The Sun newspaper had already flouted what used to be convention by publishing Mr Cornick’s name before the Court had a chance to rule.

After sentencing the defence applied for the s.39 order to be extended. Media organisations, led by The Guardian newspaper contested this. An argument based on the right to life under Article 2 ECHR was rejected on the basis that any risk was either too vague (the risk of attack from other inmates) or insufficient (the defendant was on suicide watch) for the claim to succeed. Of greater interest is the balancing exercise between the offender’s welfare under s.44 CYPA and Article 8 ECHR and the right to freedom of expression under Article 10 ECHR.

The judge noted the principles identified by Simon Brown LJ in R v Winchester Crown Court ex parte B (A Minor)[1999] 1 WLR 788 including that:

- “Considerable weight” is to be given to the age of the offender, in particular the potential damage of a young person being identified as a criminal before they reach adulthood.
- The court must “have regard to the welfare of the child or young person” (under s.44 CYPA).
- Being named in court, with the “accompanying disgrace” is a “powerful deterrent” that it is proper for the Court to pursue.
- There is a “strong public interest in open justice and in the public knowing as much as possible about what happened in court” including the identity of the perpetrator.

In lifting the restrictions Coulson J quoted authority to the effect that s.33 CYPA is not concerned with rehabilitation and rejected the idea that rehabilitation would be made more difficult. He noted that publication had already occurred and that the anonymity order would only last until Mr Cornick turned 18 in 2016. Crucially, on the public interest argument, he said:

“This is an exceptional case. Public interest has been huge. There are wider issues at stake such as the safety of teachers, the possibility of American-style security measures in schools and the dangers of ‘internet loners’ concocting violent fantasies’.

It is submitted that here the judge gave in to the worst aspects of media culture. There was no reason why the above could not be
Righting Wrongful Convictions: Is Anguish Enough?
By Siddharth Peter de Souza | 10th June 2014

In a recent judgment, Adambhai Sulemanbhai Ajmeri v. State of Gujarat Criminal Appeal Nos. 2295-2296 of 2010, the Supreme Court of India acquitted all six men convicted by the High Court of Gujarat for the attack on the Akshardham temple in Gandhinagar, Gujarat between 24th and 25th of September 2002, which resulted in the death of 33 people, and the injury of more than 85.

The judgment highlighted various peculiarities and deficiencies in the method of investigation, the nature of confessions, the absence of independent evidence etc., but it received traction more so for the strictures passed against the then Home Minister of Gujarat and current Prime Minister of India for granting sanction for prosecution without any application of mind and independent analysis.

The Court emphasized that it could not sit with ‘folded hands’, given the perversity in the conduct of the case, from investigation, to the conviction and awarding of sentence by the Special Court (set up under the Prevention of Terrorism Act 2002), and later confirmation by the High Court. The Court emphasized the need for it to be more proactive when gross violations of fundamental rights of citizens were taking place. Before parting with the judgment, the Court registered anguish about the incompetence of the investigating agency and lamented the fact that the police had booked innocent persons instead of booking the real culprits.

For those acquitted, the past 11 years have been lost, their families have been shattered and the stigma of being a terrorist has been permanently embedded in their lives.

By merely registering anguish, has the Court abdicated its responsibility of being the custodian of rights and liberties of the most vulnerable, irrespective of precedent or provisions? To quote Justice Bhagwati “Why should the Court not be prepared to forge new tools and devise new remedies for the purpose of vindicating the most precious of the precious fundamental right to life and personal liberty?” (Khatri v State of Bihar).

Given the perversity of conduct, were strictures and adverse comments about actions of organs of the State and the Judiciary sufficient? Would such comments hold weight? More importantly did the Supreme Court administer ‘complete justice’?

These are questions which the Court should have considered.

Article 142 of the Constitution of India provides the Supreme Court with a wide amplitude of power seen as supplementary to the limits of the jurisdiction conferred on the Court by statutes. These inherent powers are in respect of “any cause or matter” especially where provisions of the existing law are inadequate. Moreover these powers are engineered towards ensuring “complete justice” seen as representative of myriad situations and not constrained by procedure or the technicalities of the law.

Interestingly while the Court has used these powers to acquit one of the six convicted in this case, without him even filing an appeal, it has not extended the same powers to provide relief to the six as victims of wrongful conviction.
While there is little data which has mapped out wrongful convictions in India, it is the duty of the Court to use such opportunities, in pursuit of rendering complete justice, to signal to State organs that life and personal liberty cannot be abused on whimsical grounds. Providing relief to victims of wrongful convictions is the first step. Compensatory jurisprudence for violation of personal liberty is not new in India and emerged when the Supreme Court, by invoking the right to constitutional remedies under Article 32 in Rudal Shah v. State of Bihar, awarded compensation to a victim of the erring and arbitrary State. Further the right to compensation for wrongful convictions is provided under Article 14(6) of the International Covenant on Civil and Political Rights as well as under Article 10 of the American Convention on Human Rights and Article 3 of the European Convention on Human Rights. In exploring these provisions the Court should also examine conditions required for smooth transitions of persons back into society like housing, transportation, education, skill development and health care in addition to adequate monetary compensation for the years lost. There must also be an official acknowledgment of wrongdoing by the State as recommended by the Innocence Project – this would facilitate the long battle against social stigma.

If punishment entails responsibility, isn’t there equally responsibility for wrongful convictions?

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**Equal Treatment for All... Except the Highest?**

By Jordana Adams | 31st January 2014

A recent resolution of Member States of the International Criminal Court (ICC) puts into question their commitment to respect the fundamental right of equality for all embedded within Article 1 of the Universal Declaration of Human Rights.

The ICC, established as the first permanent International Criminal Court in 2002, aspires to provide a model for national jurisdictions throughout the world, mandating that impunity for the most serious crimes of international concern should not be permitted.

In adopting the resolution by consensus during the 12th plenary meeting, Member States made three seemingly innocuous additions to Rule 134, which essentially provide for the Accused to be physically absent during part or parts of the trial process. Concerns have been voiced as to the motivations for adopting this resolution and its compatibility with Article 63 of the Rome Statute (the “Statute”), which contains the requirement that the Accused be present during their trial. It would be difficult to deny that the adoption of this resolution was a direct reaction to calls by the Kenyan delegation, whose President and Deputy President are currently facing charges before the ICC for crimes against humanity.

Yet the impact of amendments 134bis and 134ter, which allow for presence at trial through the use of video technology and permit the Accused to be absent and represented by Counsel for part or parts of their trial, respectively, will probably be negligible to trial proceedings. Moreover, they mitigate the prejudice of subjecting the Accused to a premature sentence in The Hague for the duration of their trial, which is typically significantly longer than national proceedings.

However, by contrast, Rule 134 quarter, which permits excusal from presence at trial due to extraordinary public duties, creates a hierarchy of Accused, which goes beyond the remit of the Rules of Procedure and Evidence (the “Rules”). This rule directly conflicts with Article 27(1) of the Statute and presents a source of real concern. This article embodies one of the core principles of the court, which is that “the statute shall apply equally to all persons without any distinctions based on official capacity.” Thus, the actions of the Member States are in conflict with the Statute and are contrary to its spirit.

Rule 134quarter goes beyond the scope of both Rules 134bis and 134ter, since unlike the previous rules, it makes no mention of the duration of the excusal from trial. This omission potentially allows a certain privileged class of Accused, meeting the necessary requirements, to have a trial in absentia at the Trial Chamber’s discretion. Should this occur, it is uncertain how the Court would reconcile such unequal treatment for those elite Accused with the Statute, since Article 63(1) has been interpreted to prohibit trials in absentia.

The impropriety of Member States seeking to amend the Statute through the Rules and the resultant lack of legal effect will doubtless be the subject of much discussion and a future Appeal Chamber Decision. However, irrespective of its legal effect, their irreverence in adopting a Resolution which so patently affords special treatment to the highest members of States sends a damaging message. That message sorely undermines the establishment of the ICC as a model system for criminal justice. The idea that “we are all equal…except the highest” just doesn’t meet the standards of Article 1 of the Universal Declaration of Human Rights.

Jordana Adams, a Solicitor at BH Solicitors in the UK, holds an LLM in Public International Law from Leiden University and has worked at the International Criminal Court and the International Criminal Tribunal for the Former Yugoslavia.
The Duty of National Authorities to Investigate Allegations of Torture
By Andrew Wheelhouse | 8th December 2014

Proponents of universal jurisdiction for international crimes will be gratified by the judgment of the Constitutional Court of South Africa in the case of National Commissioner of the South African Police Service v Southern African Human Rights Litigation Centre and Another [2014] ZACC 30 which was handed down on 30 October.

The case concerned allegations that the Zimbabwean Police tortured a number of detained persons following a raid on the headquarters of the opposition Movement for Democratic Change in Harare in March 2007. The raid allegedly occurred under the instructions of the ruling ZANU-PF party of President Robert Mugabe.

SALC and the Zimbabwe Exiles’ Forum compiled a dossier, which included sworn statements alleging acts of torture such as beatings with baseball bats and iron bars, waterboarding, mock executions and electrocution of the genitals of detainees. This was passed onto the National Prosecuting Authority and the South African Police Service (SAPS) in March 2008.

After much delay the National Director of Public Prosecutions eventually refused to initiate an investigation in June 2009 on the curious basis that the matter had been inadequately investigated and that further investigations would be difficult.

SALC and the ZEF turned to litigation, seeking to have the refusal to investigate set aside. The lower courts uniformly found in their favour. By the time the matter reached the Constitutional Court it had sparked huge interest, with no fewer than nine amici curiae piling into court to weigh in on the side of the NGOs.

The question before the court was whether “in the light of South Africa’s international and domestic law obligations, the SAPS has a duty to investigate crimes against humanity committed beyond our borders”. In a unanimous judgment penned by Majeidt AJ, the court ruled that there was a duty to investigate and dismissed the appeal by the SAPS. The Court held that the starting point is the Constitution, which provides for the incorporation of international agreements into South African law by legislation (section 231) and which makes customary international law part of South African law except where inconsistent with the constitution or primary legislation (section 232). Accordingly, the Rome Statute and the Torture Convention became part of South African law when they were incorporated through the ‘ICC Act’ 2002 and the ‘Torture Act’ 2013 respectively.

The Court then moved onto the question of presence. It was argued by the SAPS that presence of a suspect was required in South Africa before an investigation could commence. In rejecting this, Majeidt AJ adopted the comparative analysis of the Supreme
Court of Appeal below and held that while presence may be needed for prosecution to commence, it is not required to launch an investigation. It was noted that requiring presence would rob the ICC framework of its efficacy (the suspects include Zimbabwean cabinet ministers and senior civil servants who, it was intimated at the hearing, periodically visit South Africa for shopping and other activities).

In light of this there was a duty on the SAPS to investigate international crimes, limited by the principles of subsidiarity (not relevant here as the Zimbabwean Police have not shown any interest in investigating the allegations and are unlikely to do so any time soon) and practicability (not relevant here for a number of reasons, not least the proximity of South Africa to Zimbabwe and the fact that SALC had done the “initial spadework” to make further investigation viable). The court was particularly unimpressed with the argument advanced by SAPS that political relations between South Africa and Zimbabwe would be damaged, noting that interstate tensions were the unavoidable consequence of universality:

“The cornerstone of the universality principle, in general, and the Rome Statute, in particular, is to hold torturers, genocidaire, pirates and their ilk, the so-called hostis humani generis, the enemy of all mankind, accountable for their crimes, wherever they may have committed them or wherever they may be domiciled.”

The premium that the South African legal system places on conforming with international law certainly assisted the Constitutional Court in deftly negotiating the obstacles that were placed in its way by counsel for the SAPS. By speaking with a unanimous voice the justices were able to hand down a powerful judgment that also has the benefit of according with common sense. However, it remains to be seen whether the ordered investigation bears fruit. It could well be years before the alleged perpetrators stand trial, if any do at all.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madlanga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

A Guide to the Perpetuation of Human Rights Violations: Police Violence and Impunity in Brazil
By Eloisa Machado de Almeida | 26th August 2014

Police violence in Brazil is endemic. It frequently occurs at the time of arrest and during the collection of evidence, and is embedded in the daily practice of the police institution. Police violence also results in an alarming number of extrajudicial killings – in the State of Rio de Janeiro alone, 3029 people were killed by the police between 2000 and 2010.
More recently, police violence in Brazil was on full display during mass demonstrations demanding better governmental services and benefits, which peaked in June 2013 and are still occurring in several Brazilian cities. The police have reacted to these demonstrations with excessive and disproportionate force, including unlawful arrests and beatings.

The degree of police violence in Brazil is shocking, particularly in light of the 1988 Constitution, which guarantees fundamental rights (such as the right to life and due process), and of the country’s incorporation of the major international and regional human rights instruments. Brazil has laws that prevent police misconduct, criminalize torture, and hold the state accountable for human rights violations. Therefore, Brazil is not a lawless environment; rather, there is an issue of immunity before the law.

The judicial system in Brazil guarantees the police institutions’ immunity, which is illustrated in three structural problems facilitated by its institutional design and its relationship with other national, regional, and international review mechanisms. The first of these problems is “institutional paralysis”. Internal monitoring mechanisms, such as ombudsmen (“corregedorias”), are inefficient and lack transparency. Moreover, in the case of police violence, investigations lie in the hands of the police themselves. In this context, several justifications for the violent actions of police officers have been used in order to protect them. For instance, legal terms such as “resistance to arrest followed by death” and “contempt of authority” are often used to distort facts to prevent investigations into police misconduct, such as summary executions and arbitrary arrests (as evidenced by the UN).

Moreover, on the rare occasions that the judiciary is called to act in these cases, it does not offer appropriate responses to victims of human rights violations, which leads us to the third problem, namely, “monitoring ineffectiveness.” Mechanisms created to step in when the justice system at the state level does not work are inefficient. For example, federalization of serious human rights violations, when – due to failure of the state court system – cases can be transferred to the federal judicial system, was accepted by the federal system in only one case and was requested just five other times. In addition, national institutions treat the international and regional systems of human rights protection, the UN and the OAS, with contempt. Their decisions are invariably disregarded, exemplified by the way in which Brazil dismissed, as merely political with no binding legal effect in the country, the decision of the Inter-American Court of Human Rights ordering an investigation of crimes of the dictatorship.

However, there are rare exceptions. In the Carandiru Massacre case, in which an alleged rebellion of prisoners was violently suppressed by the police and resulted in the 111 deaths in 1992, police officers were convicted twenty-four years later (although no police commander has been convicted). In the May Crimes case, where a police response to gang attacks in São Paulo led to the death of over 450 civilians in 2006, only one officer was convicted, and not until this year. That these convictions are the exception demonstrates the overwhelming immunity of the police before the law.

The structural problems within the Brazilian judicial system facilitate widespread police violence and impunity. Monitoring and accountability mechanisms must be improved in order to stem the tide of human rights violations perpetrated by Brazilian police.

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Impunity for Police Violence: Nine Years Since Jhonny Silva-Aranguren’s Death
By Ethel Nataly Castellanos-Morales and Camilo Ernesto Castillo-Sánchez | 4th December 2014

Colombia’s critical human rights situation is a result of both political violence, and organized and petty crime. Whilst ongoing peace talks with guerrilla forces bring the country closer to the end of formal armed conflict, the protection of human rights will remain hollow due to the generalization of institutional impunity in all levels. This is harrowingly demonstrated by two historical cases which shocked Colombian public opinion.

Jhonny Silva-Aranguren was a Chemistry student tragically murdered in September 22nd of 2005 in the Universidad del Valle’s campus during a demonstration against the U.S.-Colombia Free Trade Agreement. According to witnesses, a member of ESMAD (anti-riot police) shot Jhonny when he left the library to go home. Although the individual was fully identified, and the testimonies and the ballistic evidence were conclusive, nine years on he has not been brought to justice.

Why the state has not investigated, prosecuted and punished the perpetrator? Three main causes of this institutionalized impunity
have been identified: the attitude of the national government; the negligence of the assigned Fiscalía (the prosecutor’s office); and the general state of institutionalized corruption.

As an example, immediately following the murder, the Colombian President reacted by rejecting ESMAD’s responsibility, even though the criminal investigation had not yet begun. Further, the case was in charge of over ten different government prosecutors in two years.

It soon became apparent that the negligence of the assigned prosecutors was affecting the progression of the case, which did not advance for periods of months at a time. To reactivate the case, Jhonny’s parents presented an Acción de Tutela in 2007 against the Fiscalía. They invoked the violation of their fundamental rights to truth and justice, and sought a judicial order to force the Fiscalía to continue with the case. Despite this, the Fiscalía took the decision to end the process, on the ground that there was insufficient evidence.

Jhonny’s parents are still fighting for justice. Following the closure of the case in 2007, they brought a claim before the Tribunal Administrativo del Valle to obtain a declaration of the Colombian Government’s administrative responsibility for Jhonny’s death, but the case has not been solved. Mr. and Mrs. Silva presented a petition before the Inter American Commission of Human Rights in 2008 but the process has not gone beyond the initial stage.

A further case of police brutality occurred in August 2011. A police officer killed a teenage graffiti artist who refused to comply with a request to stop. The officer involved remains unpunished three years later, although the case remains open in the Prosecutor’s Office.

These cases, characterised by inefficient mechanisms for bringing those responsible to justice, are becoming the norm in a country where institutionalised impunity blights the judicial system.

The Colombian government has continued its efforts towards negotiating a peace process with the main Marxist guerrilla group (FARC – Fuerzas Armadas Revolucionarias de Colombia or the Revolutionary Armed Forces of Colombia). It is hoped that this will lead to lasting peace, but the above cases demonstrate that even formal peace may not be sufficient to protect human rights if institutional impunity remains entrenched. Peace will only be a realistic outcome once the authorities focus on eradicating corruption within the police force, and on educating it on the importance of human rights.

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Prosecuting in the Public Interest: CPS Guidelines from Assisted Suicide to Social Media
By Keir Starmer | 23rd January 2014

Although the DPP’s consent is required before a prosecution for assisted suicide can be brought, the discretion whether to prosecute or not exists in all cases. In this post, drawn from a lecture given as the LAG Annual Lecture on 5 December 2013, Sir Keir Starmer KBE QC, DPP, considers how this is, and should, be exercised.

The case of Debbie Purdy
Debbie Purdy suffers from MS for which there is no known cure. Her condition is deteriorating and she expects that there will come a time when her continuing existence will become unbearable. When that happens she wants to end her life, but by that stage she will almost certainly need assistance to do so. Her husband is willing to assist but Ms. Purdy does not want to expose him to the risk of prosecution for assisted suicide.

Before the House of Lords, she accepted that her husband could not be guaranteed immunity from prosecution. Instead she argued that in order to enable her to make an informed decision as to whether or not to ask her husband for assistance, she needed to know the factors that the DPP would take into account in deciding whether a prosecution is required in the public interest.

As a result, the House of Lords required me, as DPP, to “clarify what [his] position is as to the factors that [he regards] as relevant for and against prosecution in this very special and carefully defined class of case”.

I complied with the Judgment by publishing assisted suicide guidelines. The thrust of the guidelines is reasonably clear. Broadly speaking if the ‘victim’ had a clear and settled intent to commit suicide and if the suspect was wholly motivated by compassion and had not persuaded the ‘victim’ to commit suicide, the likelihood of a prosecution was low.

The red thread
But, there are risks attached to the exercise of discretion. Whilst in appropriate circumstances it can be a force for good, poorly exercised discretion can mask corruption and malevolence.

How then can the prosecutor and the system work through the potential for abuse? My answer is very straightforward – and simple. It runs like a red thread through everything I tried to achieve in my five years as DPP. The CPS should:

1. Guidelines: Set out in advance how it intends to approach the exercise of discretion in any given category of case.
2. Explanation: Explain how any given decision has been reached.
3. Challenge: Provide a practical and effective way of allowing prosecutors’ decisions to be challenged.

Guidelines
One of the features of my tenure as DPP has been the publication of publicly facing guidelines, setting out in clear terms how the CPS will approach decision making in difficult and often sensitive areas of the law. Freedom of speech was the thorny issue that I tried to tackle when drawing up guidelines for CPS prosecutors in cases involving offensive messages sent by social media. Here we have the problem of old law and new technology rubbing up against each other.

At the turn of the century and in the early 20th century, telephones were developed. Parliament thought that the staff at telephone exchanges should be protected from exposure to abuse. Accordingly it passed the Post Office (Amendment) Act 1935, making it an offence to communicate any message by telephone which was grossly offensive or of an indecent, obscene or menacing character.

This offence has remained on the statute book ever since. But, given the recent explosion of social media, the need to find a sensible balance between free speech and the reach of the criminal law becomes obvious.

In the guidelines I issued to CPS prosecutors, I sought to find that balance by reminding them that just because the content expressed in a communication is in bad taste, controversial or unpopular, and may cause offence to individuals or a specific community, that is not, in itself, sufficient reason to engage the criminal law.

Explanation
Indicating publicly what approach will be taken to the exercise of discretion in difficult or sensitive cases achieves nothing if the prosecution refuses to explain its decisions and to give reasons.

That is why another feature of my tenure as DPP was the more visible prosecutor. I asked my staff to go out and explain their decisions. Neither they, nor I, could properly be held to account unless the public knew what decisions we took and why.
Challenge
Here the principles are very well established. A CPS decision can be challenged if it fails to comply with settled policy, is unreasonable because irrelevant factors were relied upon, or relevant factors were left out of accounts, or the decision is otherwise “perverse”: see R v DPP ex parte Manning ([2001] Q3 330). Where Convention rights are in play, the Human Rights Act 1998 adds further bite because it allows the courts to subject CPS decisions to even greater scrutiny.

Conclusion
The blunt instruments that criminal law statutes necessarily have to be, can be honed into compassionate and appropriate casework decisions by the exercise of the public interest discretion. But the exercise of prosecutorial discretion also calls for strict accountability. And real accountability requires transparency. Hence my red thread: Guidelines; Explanation; and Challenge.

Sir Keir Starmer QC is barrister at Doughty Street Chambers. From 2008 to 2013 he served as Director of Public Prosecutions in England and Wales and was elected as the Labour Member of Parliament for Holborn and St Pancras in the 2015 General Election.

Moral Arguments on the Right to Die: Should Courts Intervene?
By Claire Overman | 27th June 2014

On 25th June 2014, the UK Supreme Court, sitting as a full bench of nine, handed down judgment in the joined cases of R (on the application of Nicklinson and another) v Ministry of Justice, and R (on the application of AM) (AP) v Ministry of Justice and DPP [2014] UKSC 38. The full background to the cases, and the conclusions reached, may be found in the press summary released by the court.

The court was required to consider two broad issues. One was whether the guidance of the Director of Public Prosecutions on when assisted suicide would be prosecuted was sufficiently clear. It was unanimously held that it was. The other, which was whether the court could declare that the present prohibition on assisted suicide was incompatible with the right to private life under Article 8 ECHR, was more controversial.

Two questions predominated the judgment on the latter issue. First, given that the ECtHR had previously held that laws on assisted suicide fell within the margin of appreciation of member states, was it nonetheless open to national courts to decide whether there had been an infringement of Convention rights? The court unanimously held that the compatibility of the UK’s assisted suicide laws with Article 8 fell within the state’s margin of appreciation, and was therefore for the UK to decide. It was pointed out that Article 2 of the Human Rights Act requires UK courts to have regard to ECtHR jurisprudence, but not to be bound by it.
The more difficult question was whether, given the nature of the issue, it was for the courts rather than Parliament to decide. Five of the nine Justices decided that the court could do so. Lord Neuberger noted, at paragraph 98, that the court has previously had to rule on cases raising important moral issues (for instance, Airedale NHS Trust v Bland [1993] AC 789, involving the withdrawal of medical treatment from an individual in a permanent vegetative state). Further, Parliament had not yet sought to intervene in the present debate with legislative solutions, and in any case, had, by virtue of the Human Rights Act, “cast on the courts the function of deciding whether a statute infringes the Convention.”

It was pointed out at paragraph 107 that the court was not being asked to set up a specific scheme for assisted suicide, which would plainly go beyond its mandate. In contrast, it was not forbidden from concluding that there were a number of possible schemes.

Nevertheless, despite deciding that the court could hold that the present state of the law on assisted suicide was incompatible with the applicants’ Article 8 right, the majority of that majority (three of the five) held that the court could not in the instant case. Lord Neuberger, at paragraph 116, outlined four reasons for this finding: (1) the question raised a difficult and controversial issue; (2) the incompatibility was not simple to identify or cure; (3) Parliament had actively considered the issue on a number of occasions; (4) the House of Lords, in the previous case of Pretty v DPP [2002] 1 AC 800, had held that a declaration of incompatibility of the same legislation would be inappropriate.

Interestingly, Lord Sumption, of the minority who held that courts could not make a declaration under any circumstances, relied heavily on precisely the moral arguments that Lord Neuberger had deemed to be of little weight, or in any case, no deterrent to judicial intervention. Lord Sumption goes further, stating that issues involving a choice between fundamental moral values are “inherently legislative in nature.” This appears to fly in the face of cases such as Bland. Indeed, Lady Hale and Lord Kerr, who would have made a declaration of incompatibility in the present case, themselves engage with moral issues in reaching this conclusion.

It is likely that, for pragmatic reasons, the fact that Parliament was currently debating the issue was, in reality, determinative. In particular, both the majority and minority emphasised the fact that the Assisted Dying Bill was presently before Parliament. Given the judiciary’s past willingness to concern itself with thorny moral questions, clear inaction by Parliament in this matter would certainly have led to a different result. Indeed, Lord Clarke would “expect the court to intervene” in such a situation. The majority is therefore clear – difficult moral questions do not of themselves preclude judicial intervention.

Claire is a former Editor and Communications Manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.

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**Canadian Constitutional Challenge to Prohibition on Assisted-Dying**

**By Ravi Amarnath | 21st October 2014**

Canada’s top court is once again set to decide on the constitutionality of physician-assisted dying for terminally ill patients.

The Supreme Court of Canada heard oral arguments in Carter v Attorney General of Canada 2015 SCC 5 regarding the constitutionality of physician-assisted dying. Canada’s Criminal Code makes it illegal for doctors to assist patients who wish to end their own lives. In particular, section 241(b) of the Criminal Code makes it a punishable offence of up to 14 years in prison for any person to “aid or abet” another individual with taking their own life.

In 1993, Sue Rodriguez, a 42-year-old woman suffering from amyotrophic lateral sclerosis (ALS), challenged the constitutionality of this provision. Ms. Rodriguez sought allowance for a physician to assist her with taking her own life at a time of her choosing after she lost the ability to enjoy it. She argued section 241(b) of the Code violated her constitutional rights to life, liberty and security of the person and to equality, and that the provision constituted cruel and unusual punishment.

By a 5-4 majority, the Supreme Court of Canada ruled against Ms. Rodriguez in the case of Rodriguez v. British Columbia (Attorney General) [1993] 3 S.C.R. 519, and upheld the constitutionality of the provision. Ms. Rodriguez passed away the following year.

The current challenge to the prohibition on assisted dying started in the Canadian province of British Columbia and was brought by a number of individuals, including Gloria Taylor and the daughter and son-in-law of Kay Carter. Both Ms. Taylor and Ms. Carter suffered from intractable diseases and wished to end their own lives. Prior to the commencement of legal proceedings, Ms. Carter travelled with her family and ended her life at a clinic in Switzerland.

In June 2012, a British Columbia trial judge ruled in favour of Ms. Taylor and Ms. Carter’s family in Carter v. Canada (Attorney General), 2012 BCSC 886, declaring certain provisions of the Criminal Code that prohibit physician-assisted dying to be unconstitutional. The judge noted changes in domestic and international law since the Rodriguez case which allowed her to reach
this conclusion.

The Court of Appeal for British Columbia subsequently overturned this decision in 2013 on the basis that the trial judge was bound to follow the Supreme Court's decision in the Rodriguez case. Ms. Taylor had passed away prior to the release of the Court of Appeal's decision.

Proponents of physician-assisted dying argue that adequate safeguards can be developed to ensure that the practice is not misused, while opponents fear exploitation of vulnerable citizens. The federal government of Canada, which has jurisdiction over criminal law and therefore the Criminal Code, opposes physician-assisted dying and has expressed no desire to open the debate in Canada's Parliament.

Currently four European countries – the Netherlands, Belgium, Luxembourg and Switzerland – and five states in the United States – Vermont, Oregon, Washington, New Mexico and Montana – permit physician assisted dying.

Despite Canada's Criminal Code provision, in June 2014, the Canadian province of Quebec passed its own bill providing terminally ill patients with the right to choose to die. Section 26 of "An Act Respecting End-of-Life Care" specifies a number of conditions an individual must satisfy to request medical aid in dying.

Notably, a person must be in an advanced state or irreversible decline in capability, be of full age and capable of giving consent to care, and must request medical aid in dying in a "free and informed manner" by the means of a form signed in the presence of a health or social services professional. Quebec claims its legislation does not contradict the Criminal Code provision as the law deals with palliative care, which is within the jurisdiction of provinces in Canada, as opposed to criminal law, which is within the jurisdiction of the federal government.

Quebec's law is set to take effect at the end of 2015, to give hospitals time to establish clinical protocols. Any challenges to Quebec's legislation will likely be contingent on what the Supreme Court decides from last Wednesday's hearing.

The Court has reserved its judgment and will likely release a decision within the next year.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

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Supreme Court of Canada Strikes Down Ban on Physician Assisted Death

By Jennifer Koshan | 16th February 2015

In a landmark decision, on February 6, 2015 the Supreme Court of Canada unanimously struck down the criminal prohibition against physician assisted death (PAD) in Carter v Canada 2015 SCC 5. The Court declined to follow its 1993 decision in Rodriguez v British Columbia, which had upheld the prohibition, finding that both the legal framework and socio-legal context had changed since that time. In Carter, the Court held that the ban on PAD unjustifiably violates the rights to life, liberty and security of the person contrary to the principles of fundamental justice under section 7 of the Canadian Charter of Rights and Freedoms.

The decision focused on persons who have a grievous and irremediable medical condition causing suffering that is intolerable to them, and who clearly consent to the termination of life. The Court indicated that for such persons, denial of PAD presents a “cruel choice” – they can take their own lives prematurely, or suffer until they die from natural causes (at para 1). This choice engaged the right to life under section 7 of the Charter, which protects individuals from government actions that increase the risk of death directly or indirectly (at para 62). While the Court took no position on whether the right to life also includes a more qualitative right to die with dignity, it did affirm that section 7 does not create a “duty to live” (at para 63). Dignity was engaged by the rights to liberty and security of the person however. As noted by the Court, “an individual’s response to a grievous and irremediable medical condition is a matter critical to their dignity and autonomy” (at para 66).

Section 7 of the Charter requires proof that the violation of life, liberty or security of the person is contrary to the principles of fundamental justice. In Carter, the Court found that the prohibition against PAD violated these principles because it was overbroad. The object of the law – to protect the vulnerable from inducement to suicide at times of weakness – went further than necessary, as not all persons seeking PAD were vulnerable to such inducements.

The overbreadth of the law also meant that it could not be justified as a reasonable limit under section 1 of the Charter. While protecting the vulnerable – including persons with disabilities and the elderly – is a pressing and substantial objective, the Court rejected the government’s argument that an absolute ban on PAD was reasonably necessary to achieve this objective. The evidence showed that a regime permitting PAD with safeguards to allow physicians to ensure patient competence, voluntariness, and the absence of undue influence was feasible and would minimize the risks associated with PAD (at para 106). Evidence of a
“slippery slope” from other jurisdictions permitting PAD – such as Belgium and the Netherlands – was not seen as persuasive in the Canadian context. The Court clarified that some of the controversial cases arising in these jurisdictions, including euthanasia for minors and for persons with psychiatric conditions, would not fall within the scope of its decision (at para 111). It also clarified that its decision would not compel physicians to provide PAD, noting that their freedom of conscience and religion – protected under section 2(a) of the Charter – must be reconciled with the rights of patients (at para 132).

The relevant sections of the Criminal Code were declared void as applied to persons with grievous and irremediable medical conditions causing suffering intolerable to them who consent to the termination of life. The Court suspended this remedy for 12 months to allow Canadian lawmakers to respond with legislation meeting the requirements of its decision.

Carter is consistent with other recent decisions of the Supreme Court giving broad scope to section 7 of the Charter (see e.g. PHS Community Services Society and Bedford [2011] 3 SCR 134), and, in that context, was not unexpected. Unfortunately, however, the Court did not find it necessary to consider the equality rights claim under section 15 of the Charter that the ban on PAD had an adverse impact on persons with material physical disabilities who were unable to take their lives without physician assistance. As Jonnette Watson Hamilton and I have argued, consideration of the equality dimension of the case would have allowed the Supreme Court to clarify the law of adverse effects discrimination in Canada. It may also have allowed the Court to engage more deeply with the competing arguments of disability rights groups who intervened in Carter. Given that new legislation for PAD is now in the hands of government, it can be expected that this debate will continue in that realm.

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Section 14 of the Code provides: “No person is entitled to consent to have death inflicted on him, and such consent does not affect the criminal responsibility of any person by whom death may be inflicted on the person by whom consent is given”. Section 241(b) of the Code makes it a punishable offence of up to 14 years in prison for any person to “aid or abet” another individual with taking their own life.

Applying section 7 of the Canadian Charter of Rights and Freedoms, the Court held these provisions are “void insofar as they prohibit physician-assisted death for a competent adult person who (1) clearly consents to the termination of life; and (2) has a grievous and irremediable medical condition (including an illness, disease or disability) that causes enduring suffering that is intolerable to the individual in the circumstances of his or her condition” (para. 127).

The Carter decision brings to an end a two-decade long debate over the constitutionality of criminalizing physician assisted death.

While the courts have now had their say on the matter, two major issues must be addressed to translate the decision into a workable system for Canadians.

First, while the federal government is responsible for redrafting the criminal legislation, Canada’s federal and provincial governments must determine whose responsibility it is to implement the healthcare scheme that permits assisted death.

The Carter judgment simply requires the federal government to amend the aforementioned Criminal Code provisions. The Court held: “It is for Parliament and the provincial legislatures to respond, should they so choose, by enacting legislation consistent with the constitutional parameters set out in these reasons” (para. 126).

Under the Constitution Act, 1867, provinces are responsible for the “establishment, maintenance and management of hospitals” (s. 92(7)). For Canadians to have uniform access to assisted death, the federal and provincial governments must work together to implement a workable regime for these services.

The province of Quebec has already passed its own bill that permits physician assisted death and is set to take effect at the end of 2015. The Quebec government has not indicated whether the bill is subject to change following the Carter decision.

A worst case scenario for advocates of assisted death would be for the Criminal Code provisions to be revised, but for no uniformity in access to be reached nationwide.

In the case of abortion, for example, in 1988 in the case of R. v. Morgentaler, [1988] 1 SCR 3, the Supreme Court of Canada struck down a Criminal Code provision which required women to obtain a certificate from a therapeutic abortion committee prior to obtaining an abortion. To date, the federal government has not passed revised legislation and the practice is not standardized in Canada, leading to major discrepancies in access across the country.

The second major issue, hinted at by Professor Koshan, will be how to ensure any future scheme accommodates doctors who object to the practice of assisted death according to their constitutionally protected rights to religion and conscience.

The Court stated: “In our view, nothing in the declaration of invalidity which we propose to issue would compel physicians to provide assistance in dying. The declaration simply renders the criminal prohibition invalid. What follows is in the hands of the physicians’ colleges, Parliament, and the provincial legislatures.” (para. 132)

Any future scheme will have to balance the rights of these doctors while ensuring patients who seek assistance with death can be accommodated – something that is not unique to this area of health policy.

Recently, the College of Physicians and Surgeons for the Canadian province of Ontario released a draft policy paper which requires physicians who do not provide certain health services on moral or religious grounds to refer the patient to another health care provider. The draft policy is still under review by the College.

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DEATH PENALTY

A New Opportunity for the UN to Move Forward the Global Abolition of Death Penalty
By Vincent Ploton | 16th December 2014

On the 2014 world day against the death penalty, Ban Ki Moon made a strong statement calling for global abolition. This declaration reflects a growing trend toward abolition, and yet 25 years after the adoption of the international treaty to abolish the death penalty, the level of ratification remains too low.

The United Nations’ commitment to eradicate the death penalty globally is quite evident. High Commissioners for Human Rights have consistently been calling on States to abolish and ratify the second Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR OP2), which provides the best guarantee for sustainable and categorical abolition. 2014 was a particularly active year of UN engagement against the death penalty: in June, the Human Rights Council adopted a resolution which highlights abolition as a recurrent item of its work. In October, the OHCHR launched a specific webpage and a compilation of the most recent arguments and trends for global abolition. Two Special Rapporteurs, Christof Heyns and Juan Mendez, have also been quite vocal in calling for abolition. With 98 countries having abolished death penalty for all crimes, the global abolition movement has never looked so strong.

Despite these positive developments, the reality of the situation remains alarming in various ways:

- Only 81 states have ratified ICCPR OP2
- Several countries such as Indonesia or the Gambia have in recent years resumed executions after multiyear moratoriums
- The latest Amnesty International report on death penalty highlights a 15% increase in executions around the world compared to the previous year
- A small number of countries continue to hold the record for most executions carried out, namely China, Iran, Iraq and Saudi Arabia

Of these record executioners, Iran and Iraq, as well as another notorious executioner, the US, have ratified the ICCPR. That international treaty currently constitutes one of the most restrictive in regards to death penalty: it can only be applied for the most serious crimes and “pursuant to a final judgment rendered by a competent court” (Art.6). Yet the ICCPR, which has been ratified by 167 countries, does not strictly prohibit the application of death penalty.

A new opportunity for the UN to move abolition forward
The UN Human Rights Committee (HR Ctte), almost systematically recommends ratification of the international treaty on abolition
Capital Punishment in China: Room for Cautious Optimism?

By Roger Hood and Carolyn Hoyle | 12th January 2015

Recent weeks have seen the resumption of executions in Jordan, after an 8-year de facto moratorium, and in Pakistan, following the murderous terrorist attack on a school in Peshawar, along with news of numerous executions each week in Iran. While these are clear setbacks for those of us who believe that the use of the death penalty is in any circumstances an infringement on the universal human rights to life and freedom from cruel, inhuman and degrading punishment, they stand in stark contrast to the declining use of the death penalty worldwide. Since the end of 1988, the number of actively retentionist countries (countries that have carried out judicial executions in the past 10 years) has declined from 101 to 39, while the number that has completely abolished the death penalty has almost trebled from 35 to 99, with a further 33 regarded as abolitionist in practice.

When a critical mass is reached and especially when influential powers abandon the death penalty, those who still maintain it will come under international pressure to conform to international standards for human rights in the enforcement of punishment. Asia – home to more than 90 per cent of global judicial executions – seems to be a thorn in the side of abolitionists, but even there the picture is somewhat optimistic, as its approach to capital punishment has changed considerably in the past decade.

In 2004 the statement that ‘the State has respect for and protects human rights’ was written into the constitution, and beginning around the turn of the millennium there was a distinct change in the discourse, evidenced by the willingness of the Chinese authorities to discuss the death penalty in human rights seminars and dialogues with European countries and the gradual opening up of the subject to research. There followed three significant reforms.

In order to ensure more uniformity in the imposition of the ultimate sanction, and to reduce its infliction only for the most serious crimes, the Supreme People’s Court (SPC) decided in 2004 that it would in future review all death penalty cases itself. The new review system came into effect on 1 January 2007, with an order that execution should be reserved for ‘an extremely small number of serious offenders’ and carried cautiously in order to avoid wrongful executions. Three months later, China’s representative, Mr La Yifan, promised the UN Human Rights Council that the scope of the death penalty would be reduced ‘with the final aim of abolishment,’ in line with UN resolutions. Change came in 2011, with the Eighth Amendment to the Criminal Law which removed 13 non-violent capital offences from the criminal law and excluded the elderly from the death penalty, unless the crime was exceptionally atrocious. Since then, plans have been announced to abolish it for nine more non-violent crimes.

Another factor that has helped to reduce the rate of executions is the increasing use of ‘Sihuan’, which suspends death sentences for a period of two years to give the convicted person an opportunity to show that they have repented. And from January 2007, the SPC President instructed lower court judges to use immediate execution ‘only as a last resort and only for the most serious criminals’.

While the number of death sentences and executions regrettfully remains a state secret (which is widely regarded as a human rights abuse in itself), they appear to have declined significantly. Indeed, in December 2011, it was revealed at a seminar jointly organized by the UN Office of the High Commissioner for Human Rights and China’s Foreign Ministry that since the SPC regained the final review power over death sentences in January 2007, the number of executions had dropped by approximately 50 per cent. It has been estimated that China executed 4,000 people in 2011, half of the estimated total for 2006. While this is intolerably high, it is undoubtedly a significant reduction on past rates. But perhaps as important as execution rates is the changing nature of the relationship between Europe and China and the success of European ‘soft power’ to bring about political and cultural change.
While Chinese political leaders still strongly defend capital punishment as an essential tool to fight crime and preserve social order in a country of 1.3 billion that is undergoing wrenching economic and social changes, the former defensiveness has largely evaporated and the debate has come to centre on how abolition might be achieved and what lessons can be learned from experiences abroad in this regard; how, pending eventual abolition, pre-trial and fair trial procedures with adequate legal defence in cases liable to the death penalty can be brought into line with international standards to guarantee procedural justice; how the number of citizens put to death can be restricted and the infliction of the death penalty be based on more rational criteria and made more equitably; and how public opinion can be moderated and cultural attitudes changed to make abolition acceptable to both the masses and the legislative and judicial elites. Efforts by the UN, the European Union, the Council of Europe, and the UK Foreign and Commonwealth Office are clearly paying off.

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Indian Supreme Court Changes Stance on Death Penalty: Holds Delay to be a Ground for Commutation
By Gautam Bhatia | 5th February 2014

Recently, in the case of Shatrughan Chauhan v. Union of India, 1 Writ Petition (Criminal) No.55 of 2013, a three-judge bench of the Indian Supreme Court delivered a landmark judgment on the death penalty: holding, in particular, that an excessive delay in carrying out the death sentence was an essential mitigating factor in a plea for commutation. In doing so, it joined jurisdictions such as the United States and the Privy Council, and overruled its own 2013 judgment in Bhullar v. NCT, Writ Petition (Criminal) D.No. 16039 of 2011.

In Bhullar, the Supreme Court relied upon a concurring judgment in the previous case of Triveniben 1989 SCR (1) 509 that appeared to hold that delay need not be a ground for commutation. The Court drew a distinction between ordinary capital crimes and capital crimes under terrorism statutes (at issue in Bhullar). It held that because of the serious nature of the crimes involved, an excessive delay in processing a death row convict’s mercy petition need not be a ground for commuting the death sentence to life imprisonment. Thus, the Court had effectively held that the nature of the capital crime determined the due process treatment that the convict was entitled to.
In Shatrughan Chauhan, the Supreme Court comprehensively rejected this reasoning. It held that the Bhullar court had overlooked the Triveniben’s majority judgment’s contrary stance that a delay in carrying out the death sentence was, indeed, one ground for commutation; and thus, the Court held Bhullar to be per incuriam (i.e. decided without reference to an earlier relevant judgment, and thus having no force as precedent). The Court held, on the other hand, that: “There is no good reason to disqualify all TADA cases as a class from relief on account of delay in execution of death sentence.” (para 63)

The Court, however, refused to provide a specific time after which a delay would render commutation necessary, and held that each case would be adjudicated on its own merits. In essence, the Court thus made delay an essential mitigating factor. This would be considered on the Court’s “balance sheet” enquiry, under which it draws up a list of aggravating and mitigating factors, in order to decide whether or not to award the death penalty in a particular case.

At the heart of the argument is the idea that keeping a death row convict under the shadow of death for years is a form of cruel, inhuman and degrading punishment that no civilized society (whether or not it allows capital punishment) should inflict upon human beings. The inevitable mental agony that accompanies waiting for an inevitable death, demeans individual dignity. Insofar as the Court has interpreted Article 21’s guarantee of the right to life to include treating all individuals with dignity, the judgment reaffirms the humanism that is the foundation the Constitution, and that whatever the crime might have been, human beings continue to have a legitimate claim to be treated with dignity under the Constitution.

The Court further held, referring to a copious body of foreign law and international law, that insanity was a ground for commutation (paras 71 – 78); this is justified by our basic, intuitive notion that persons in a democracy ought to suffer penalties and burdens only to the extent that they are responsible for the actions that they undertake – and that punishment must respond not just to the nature of the crime, but to the ability of the actor to understand or comprehend the nature of his actions.

Coming to the fifteen individual cases before it, the Court applied the delay principle to reduce the sentences to life imprisonment. It ended by framing guidelines for the purpose in future, laying down various requirements such as the written communication of the outcome of a mercy petition to a convict and his family, the provision of free legal aid, a post-mortem report to verify whether hanging, as a form of capital punishment, caused undue amounts of pain, and so on.

The Shatrughan judgment is a progressive step in Indian death penalty jurisprudence. Perhaps it is best to leave the last word to the Court, in its penultimate paragraph, suggesting not just that the death penalty should be administered humanely, but that the very idea – say it softly – of State-sanctioned killing of human beings has no place in a civilized democracy:

“Remember, retribution has no Constitutional value in our largest democratic country.” (para 263)

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Meriam Ibrahim Saved from 100 Lashes and the Death Penalty
By Jon Yorke | 28th June 2014

On 11 May 2014, Meriam Yahia Ibrahim was found guilty by the Al-Haj Yousif Criminal Court of charges under the Sudanese Penal Code (1991), Articles 126 for the crime of ridda (apostasy from Islam) and 146 for the crime of zena (unlawful intercourse in the act of adultery).

Her husband, Daniel Wani, a US citizen, was not found guilty, but Mrs Ibrahim was sentenced to 100 lashes for the zena crime and death by hanging for the ridda crime. These are Shari’a Hudud punishments. She was detained in the Omdurman’s Women’s Prison, with her 20 month old son, and on 27 May, whilst shackled, she gave birth to a daughter.

On 22 May, Mrs Ibrahim’s lawyers filed in the Sudanese Court of Appeal, in the Khartoum North and Sharg-el-nil Criminal Circuit, and claimed that the lower court had made errors in both procedure and merit.

It was argued in the defence petition that the court made a procedural error in that it did not have jurisdiction to hold the marriage null and void, and that the Personal Status of Muslims Code 1991 contained no conclusive provision banning such marriage (Christian and Christian, see below). Further, Article 61 of the Code establishes that, “a void marriage does not yield any consequence of marriage,” and yet, it was argued, “this judgment has impacted directly on the Appellant, her child and her [then] unborn baby.”

As to the merits, after stating that there is “no compulsion in religion” (Surat Al-Baqara, verse 256), the defence brief identified that Mrs Ibrahim had been a Christian who attended Khartoum Catholic Church, and met her husband whilst a practising Christian. Her marriage was conducted in public at the church on 19 December 2011, and the authorities only became aware of the Ibrahim family
in September 2013 when a man claiming to be her brother, informed the authorities that she had married a Christian and that she had committed adultery. It was the misrepresented position of her personal faith and beliefs that set in motion the horrific events that followed.

Mrs. Ibrahim’s lawyers, along with Redress, the African Centre for Justice and Peace Studies, the Sudanese Organization for Development and Rehabilitation, the Sudanese Human Rights Initiative and the Justice Center for Advocacy and Legal Consultancy, submitted a Complaint on 2 June, with the African Commission on Human and Peoples’ Rights. On 10 June, an Urgent Appeal was lodged with the Special Rapporteur on Women’s Rights, Soyata Maiga. It was claimed that Sudan had violated the African Charter on Human and Peoples’ Rights ("ACHPR").

In essence, the claims were that Mrs Ibrahim suffered gender and religious discrimination under ACHPR, Articles 2 and 3, suffered torture and ill-treatment under Article 5, and that her right to liberty and security of the person had been violated under Article 6. Her right to a fair trial had been violated under Article 7, and her freedom of conscience and religion was violated under Article 8. Furthermore, her children’s rights were violated, contrary to Article 18(1), which states that “the family…shall be protected by the State which shall take care of its physical health and moral.”

As these appeals were pending, there was an immense global outcry by politicians and civil society, and on 31 May, Abdullahi Alazreg, Under-Secretary of the Sudanese Foreign Ministry, appeared to speak out of turn as he indicated that Mrs Ibrahim would be released. However, the domestic courts, and the African Commission, were still considering the case and so this statement was premature.

The Sudanese Court of Appeal judgment of 22 June, which overrules the Al-Haj Yousif Criminal Court judgment, is to be commended. It is judicial affirmation of the rule of law and a protection of human rights.

However, this case, and the international exposure it has received, has demonstrated that there are serious questions concerning women’s rights, religious freedom, the protection of the family, and the welfare of children, which the government of Sudan must address. If there is not legislative change to remedy these deficiencies, it is hoped that the lower courts in Sudan will adhere to this Court of Appeal decision and protect others from the horrific treatment which the Ibrahim-Wani family has recently endured.

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Federal Judge Strikes Down California Death Penalty as Unconstitutional
Carol S. Steiker | 6th August 2014

In a stunning – and possibly prescient – decision of Jones v Chappell, Case No.: CV 09-02158-CJC, the United States District Court Judge Cormac J. Carney of the Central District of California struck down the state of California’s death penalty system as unconstitutional under the Eighth Amendment’s prohibition against cruel and unusual punishment.
Instead of addressing the particularities of the defendant’s case, Judge Carney widened his lens to scrutinize the California death penalty system. He noted that while over 900 people have been sentenced to death since California’s current system was adopted in 1978, only 13 have been executed. He observed that California’s lengthy delays between sentence and execution have “quietly transformed” a sentence of death into a sentence that “no rational jury or legislature could ever impose: life in prison, with the remote possibility of death.” In such a system, Judge Carney concluded, the “random few” who actually do eventually get executed “will have languished for so long on Death Row that their execution will serve no retributive or deterrent purpose and will be arbitrary.”

This decision is extraordinary along a number of dimensions.

First, the messenger: Judge Carney is no bleeding heart liberal on criminal justice matters. He was appointed to the federal bench by Republican President George W. Bush after serving briefly as a California state court judge in conservative Orange County following a substantial career in private practice. A ruling from an experienced, cautious, and non-ideological jurist like Judge Carney will and should receive careful attention.

Second, the zeitgeist: We are in an extended period of greatly increased skepticism about the American death penalty. Today, executions are down more than half from their nationwide peak in the late 1990s, and new death sentences are down by more than two-thirds. Six states have legislatively repealed capital punishment over the past decade. Concerns about wrongful convictions in capital cases and botched executions from lethal injection protocols are on the rise. Judge Carney’s decision adds a new critique to the growing chorus of consternation.

Finally, the context: California has long been known as Exhibit A in the case against the American death penalty on procedural dysfunction grounds. As Judge Carney points out, execution is not the leading cause of death on California’s Death Row. Indeed, execution is not even the second leading cause of death on California’s Death Row; it comes in third after natural causes and suicide. Such a system cannot possibly deliver any benefit from the rare and random execution that does eventually occur. California’s systemic dysfunctions may be extreme in their degree, but they are not unusual. Across the country, the steep decline in death sentences and executions has rendered capital punishment both more rare and random than it has been in decades.

The current dysfunctional state of the American death penalty is not without precedent, however. In the 1960s and early 1970s, a spate of legislative abolitions preceded a steep decline in public support and use of capital punishment. The few death sentences that were imposed were the product of broad and standardless sentencing statutes that permitted, even invited, arbitrary application. These conditions led key swing Justices Potter Stewart and Byron White to join the five-Justice majority that (temporarily) invalidated the American death penalty in the landmark decision of Furman v. Georgia in 1972 408 U.S. 238. As Justice Stewart wrote, the Constitution “cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.” Justice White agreed on the ground that arbitrary imposition of the death penalty could not serve the punishment’s legitimate penological goals of deterrence or retribution:
Glossip v. Gross: SCOTUS to Consider Oklahoma’s Lethal Injection Protocol
By Jon Yorke | 4th February 2015

On Friday 23rd January, 2015, the US Supreme Court granted three Oklahoma death row inmates certiorari to challenge the state’s three-drug lethal injection protocol. In Baze v. Rees 553 U.S. 35 (2008), it was held that an execution protocol which provided for an initial injection of a fast-acting barbiturate (sodium thiopental), then a paralytic agent (pancuronium bromide) which stops respiration, and finally a drug to induce a cardiac arrest (potassium chloride), did not violate the US Constitution’s Eighth Amendment’s Cruel and Unusual Punishments Clause.

In Warner v. Gross, (No. 14-6244, 12 January, 2015) the United States Court of Appeals for the Tenth Circuit, denied a challenge to Oklahoma’s adoption of midazolam as a replacement for sodium thiopental. As a result of the post-Baze decline in Food and Drug Administration licences to American pharmacological companies to supply drugs to state and federal prisons for the use in executions, and the contributory effect of international human rights law, such as the EU’s Commission Implementing Regulation (EU) No. 1352 (2011), there has been a depletion of supplies of sodium thiopental for the use by American prisons in the death penalty.

The retentionist states have had to identify an alternative drug to formulate an execution. Whilst Baze acknowledges that “some risk of pain is inherent in any method of execution,” and that “the Constitution does not demand the avoidance of all risk of pain in carrying out executions,” a violation of the Eighth Amendment does occur when “the conditions presenting the risk must be sure or very likely to cause serious illness and needless suffering,” and give rise to “sufficiently imminent dangers.”

The current litigation has introduced substantial medical evidence that Oklahoma’s use of midazolam produces adverse reactions. On 29 April 2014, midazolam was used in the execution of Clayton Lockett. He strained on the gurney in extreme physical pain, claiming, “something is wrong” and the “drugs aren’t working.” He was not in a “coma-like state” following the initial drug, and the execution team observed a large swelling at the IV access point. The White House released a statement that the execution, “fell short of humane standards.”

There is significant doubt as to whether midazolam can effectively act as a sedative in compliance with the Baze criteria and the three questions the US Supreme Court will consider in Glossip v. Gross are:

1. Is it constitutionally permissible for a state to carry out an execution using a three-drug protocol where (a) there is a well-established scientific consensus that the first drug has no pain relieving properties and cannot reliably produce deep, coma-like unconsciousness, and (b) it is undisputed that there is a substantial, constitutionally unacceptable risk of pain and suffering from the administration of the second and third drugs when a prisoner is conscious?
2. Does the Baze-plurality stay standard apply when states are not using a protocol substantially similar to the one that this Court considered in Baze?
3. Must a prisoner establish the availability of an alternative drug formula even if the state’s lethal-injection protocol, as properly administered, will violate the Eighth Amendment?

The first two questions can be classified as normative constitutional issues within the assessment of the protocol. The third question places upon the defendant the task of establishing to a degree of medical certainty that the sedative will not act in accordance with constitutional standards. It potentially will place the burden on the defendant to establish that there is an alternative protocol that if the state adopts, will produce an execution of the defendant that does meet the Baze criteria.

Are we going to see the Court establish a new rule that assessing the legitimate standards set out in Baze, for pain in punishment, shifts from the responsibility of the state to the responsibility of the prisoner? This would be a quixotic result. What the litigation concerning the Oklahoma protocol demonstrates is that there are still, and perhaps always will be, irredeemable consequences that

“... At the moment that [the death penalty] ceases realistically to further these purposes, . . . its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.”

These quotes both appear in Judge Carney’s opinion striking down the California death penalty. And appropriately so – the same concerns that initially led the Supreme Court to first invalidate and then attempt to regulate the American death penalty under the Constitution are the very same concerns that are growing today about our current death penalty practices. Whatever happens in the review process of Judge Carney’s decision, the observations and arguments that he made will continue to echo – and may well prove him to be a prescient voice in the constitutional history of the American death penalty.

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renders lethal injection a form of torture.

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Executing the Intellectually Disabled: A Stronger Prohibition

By Jon Yorke | 12th June 2014

On 21 February 1978, Freddie Hall and his accomplice, kidnapped, raped and murdered a young woman, and in a separate incident, killed a sheriff's deputy. Hall's siblings, teachers, and the Florida sentencing judge acknowledged that he was raised under horrific family circumstances. As a child, he was beaten between ten to fifteen times a week.

There is substantial evidence that Hall suffers from a severe intellectual disability, and it is clear that he was unable to contribute effectively to his own defence. However, this evidence was not considered enough to mitigate the capital offence. In Hall v. State No. SC10-1335 the Florida Supreme Court upheld his death sentence, holding that because his IQ was identified at 71, he was above a strict threshold of 70, as established in Cherry v. State No. SC02-2023.

Previously, the U.S. Supreme Court in Atkins v. Virginia 536 U.S. 304 (2002) had used diagnostic standards to formulate a three pronged test for identifying intellectual disability for capital proceedings – (a) significant sub-average intellectual functioning (established through an IQ test); (b) deficits in adaptive functioning (the inability to learn basic skills and adjust behaviour to changing circumstances); and, (c) onset of defects during the developmental period (e.g. before 18 years of age).

The Florida statute acknowledges the diagnostic flexibility for Atkins proceedings, but the Florida Supreme Court interpreted the statute narrowly, at variance with the American Psychiatric Associations' (APA) Diagnostic and Statistical Manual, which provides that, “A person with an IQ score above 70 may have such severe adaptive behaviour problems...that the person's accrual functioning is comparable to that of individuals with a lower IQ score.” The APA amicus curiae brief stated, “the relevant clinical authorities all agree that an individual with an IQ score above 70 may properly be diagnosed with intellectual disability if significant limitations in adaptive functioning also exist.”

In Hall v. Florida 572 U.S. ___ (2014) decided by the US Supreme Court on 27 May, 2014, Justice Kennedy held, in a 5-4 majority, that the Florida Supreme Court ruling disregards established medical practice as it takes the IQ score as final and conclusive evidence of a defendant's intellectual capacity. Furthermore, while experts say that IQ should be taken within a "standard error of measurement," the Florida Supreme Court used the test score as a fixed number, thus denying the imprecise nature of diagnosis.

Justice Alito dissented, joined by Chief Justice Roberts, and Justices Scalia and Thomas, stating that "what counts are our society's standards – which is to say, the standards of the American people – not the standards of professional associations, which at best represent the views of a small professional elite."
However, Justice Alito provided no specific guidance to demonstrate how “American society” is better equipped than the “small professional elite” to determine complex cognitive evaluations. He further inadequately opined that “the Court implicitly calls upon the Judiciary either to follow every new change in the thinking of these professional organizations or to judge the validity of each new change.”

The judicial system will always have to grapple with the ethical and scientific questions posed by advances in medicine. The courts can most appropriately do this after and not before new medical techniques, diagnosis and treatment, are identified.

Justice Kennedy did not base his decision upon diagnostic standards. He used evaluative criteria to inform the adjudication of what is considered appropriate protection of human dignity under the Eighth Amendment’s prohibition against, “cruel and unusual punishments.” He held, “Florida’s law contravenes our Nation’s commitment to dignity and its duty to teach human decency as the mark of a civilized world.”

It is not insignificant that he shifts the focus from the “Nation” to the “world.” It reflects the evolving international discourse that the death penalty is a violation of human dignity, most specifically advanced by the European Union and the Council of Europe, and it is consistent with the denunciation of the death penalty for persons suffering from intellectual disabilities in R.S. v. Trinidad and Tobago.

The furtherance of dignity and decency is our global, cosmopolitan, call. If the dissenters had had their way, simply put, it would have made it easier for states to execute people with intellectual disabilities. Justice Kennedy’s judgment is a victory for human rights and the evolution of science and medicine.

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WHOLE LIFE SENTENCES

Hutchinson v UK – A Change in Direction on Whole Life Orders?
By Neil Shah 23rd | February 2015

The European Court of Human Rights (ECtHR) has ruled in Hutchinson v UK 2015] ECHR 111 that the imposition of a ‘whole life order’ for murder does not violate Article 3 ECHR. The decision, a clear victory for the UK, is surprising given the Court’s previous case law and is unlikely to be the last word on this controversial issue.

The case concerned a challenge brought by Arthur Hutchinson who was convicted in 1984 for three counts of murder, rape and aggravated burglary. The circumstances of the crimes were particularly egregious with the then Lord Chief Justice commenting that Hutchinson should never be released “quite apart from the risk that would be involved”. The Home Secretary (then responsible for determining the minimum term a prisoner should serve after a murder conviction) imposed a whole life order. Following the passing of the Criminal Justice Act 2003 Hutchinson applied for that sentence to be reviewed. Tugendhat J held that there was no reason to change it and the Court of Appeal dismissed Hutchinson’s appeal. Hutchinson accordingly turned to the ECtHR.

In July 2013 the Grand Chamber of the ECtHR held in Vinter [2013] ECHR 66069/09 that the imposition of whole life orders under English law did violate Article 3 because the law lacked clarity as to the existence of an Article 3 compliant review mechanism (the Court stated that for a sentence to be Convention compliant there had to be a prospect of release and possibility of review and that the mechanism for this had to exist at the time the sentence was passed). A specially constituted Court of Appeal considered this decision in R v McLoughlin [2014] EWCA Crim 188 and expressly rejected the ECtHR’s conclusion. Instead it implied that the ECtHR had misunderstood English law, set out how domestic law would treat applications for release and declared that it did provide offenders with a clear hope or possibility of release in exceptional circumstances (a power which, under the relevant legislation, is the Secretary of State’s to exercise).

Hutchinson argued that this was insufficient, that the reasoning of the Court of Appeal in McLoughlin did not differ in substance from earlier English decisions which Vinter had considered before nevertheless finding a violation, and that review of whole life orders required a judicial not executive decision. One might have expected these arguments to succeed, not just in light of Vinter, but also the court’s other recent decisions (considering this issue albeit in different contexts) in Magyar v Hungary [2014] ECHR 491 and Trabelsi v Belgium [2014] ECHR 893. The Court of Appeal may have confidently declared that English law was clear but nothing has actually been done to remove the uncertainty of what steps a prisoner needs to take, from the time of incarceration, to be considered for eventual release – one of the ECtHR’s main sticking points.

Yet the Court’s Fourth Section rejected them noting that given a Contracting State’s margin of appreciation it was not its task to prescribe the form (executive or judicial) that a review should take and, significantly, that the Court of Appeal’s direct and reasoned
response to the Grand Chamber’s concerns in Vinter was sufficient; the Court of Appeal, it said, had set out an "unequivocal statement of the legal position" and the ECHR had to accept that interpretation of domestic law. As such there was no violation of Article 3.

Much has been said of the importance of judicial dialogue between Strasbourg and our domestic courts, particularly in the current climate (see for example Natasha Holcroft-Emmess’ post) but Hutchinson simply muddies the waters. The decision undercuts Vinter without saying so. The ECtHR has back pedalled in the past (the Grand Chamber’s decision in Al-Khawaja and Tahery [2011] ECHR 2127 in response to R v Horncastle [2009] UKSC 14 is one example) but it must acknowledge that such is the course being taken. If Vinter went far enough to require the existence of a detailed review mechanism at the time of incarceration (with the English system therefore being sufficiently Convention complaint) then Strasbourg should say so; if it didn’t (which seems more likely) then it is hard to see how McLoughlin really addresses one of the key areas of complaint. Ambiguous and contradictory decisions are not conducive to legal certainty and it seems likely that Hutchinson will go to the Grand Chamber.

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Whole Life Sentences in Hutchinson v UK – Compromise or Concession?
By Natasha Holcroft-Emmess | 5th February 2015

In Hutchinson v UK [2015] ECHR 111 the ECtHR again addressed the vexed question of the compatibility of whole life sentences with human rights law. This post analyses the Chamber decision, recognising the value of judicial dialogue, but also highlighting cause for concern where problematic questions remain.

The starting point is the Grand Chamber case Vinter v UK [2013] ECHR 66069/09. In this decision, the highest authority in the ECtHR criticised the English law on mutability of whole life sentences. It was held that the narrow scope for reducibility of such sentences under s 30 Crimes (Sentences) Act 1997, on compassionate grounds limited primarily to terminal illness or physical incapacitation, was incompatible with Article 3 ECHR (freedom from inhuman and degrading treatment / punishment).

In McLoughlin [2014] EWCA Crim 188, the Court of Appeal disagreed with the ECtHR. Despite the restrictive written policy of the Secretary of State, found in the 1997 Act and the Lifer Manual, the court held that Article 3 was adequately protected. This was because the Secretary of State was obliged to make decisions compatibly with Article 3, and this would involve a consideration of all the relevant ‘exceptional circumstances’. The effect of the Court of Appeal decision was that it did not matter that the policy on reducibility of sentences has not been reformulated. The combination of that policy with the judicial interpretation provided by the Court of Appeal made the law sufficiently clear and did not violate Article 3.

In Hutchinson, a majority of the Chamber accepted this approach. The majority relied on the practice of allowing questions of interpretation of domestic legislation to be resolved by the national authorities. This was enough to satisfy the majority that the law is now sufficiently clear.

There is a positive corollary of this vexed debate. It seems that the courts are working on the basis of a (gradually developing) consensual acceptance that reducibility of sentence is key. These cases also provide an example of judicial dialogue between the domestic and supranational courts, which should assist to cement the ECtHR as an important forum in human rights debates.

However, problems remain. It is doubtful whether this jurisprudence suffices to address the concerns of the Grand Chamber in Vinter. At [126] the Court held that it “must be concerned with the law as it presently stands on the published policies as well as in judicial dicta and as it is applied in practice to whole life prisoners. The fact remains that … the Secretary of State has not altered the terms of his explicitly stated and restrictive policy on when he will exercise his section 30 power. "Should not the published guidance of the executive be required to match the scope of the legal policy set out by the Court of Appeal? It hardly begets legal certainty that these decisions rest with the Secretary of State, who appears to have free rein over what counts as ‘exceptional circumstances’.

In a dissenting opinion, Judge Kalaydjieva questioned the assumption that the Grand Chamber was not fully informed about the scope of the Secretary of State’s discretion, and the manner of its exercise, in reaching its conclusions in Vinter. Her dicta, although cautious, appear to be quite telling: “I do not deem myself competent to determine whether the Court of Appeal expressed an ex tunc trust or an ex nunc hope that, even though to date the Secretary of State for Justice has not amended the content of the Lifers Manual after Vinter, he was, is and always will be “bound to exercise his power … in a manner compatible with Article 3” … [I]n so far as the Court of Appeal’s part in the admirable post-Vinter judicial dialogue said “Repent!”, I wonder whom it meant?”

Perhaps it is relevant that the Chamber’s acceptance of the Court of Appeal’s gloss on the UK rules comes at a time when the ECtHR is particularly vulnerable. The entire debate has been played out in the shadow of political contentions to renegotiate the UK’s relationship with the ECtHR. It is argued that good judicial dialogue and steadying relations between the UK and ECtHR are
valuable. But the ECtHR must be careful not to take concessions where more could be done to ensure adequate protection for human rights, especially where rights as important as liberty may be compromised.

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**Throwing Away The Key – Whole Life Sentences in the Court of Appeal**

*By Natasha Holcroft-Emmess | 1st March 2014*

Flouting the judgment of the European Court of Human Rights (ECtHR) in Vinter v UK [2013] ECHR 66069/09, the UK Court of Appeal has held that whole life sentences do not violate Article 3 ECHR (R v McLoughlin [2014] EWCA Crim 188– see Neil Shah’s post). This post explains why the Court of Appeal decision is wrong and why it matters.

Article 3 ECHR prohibits inhuman and degrading treatment and punishment. The ECtHR held that UK sentencing law permitting whole life orders violates Article 3 because it does not allow for any real possibility of review. As the law currently stands, the only prospect of release for a whole life prisoner is ‘under compassionate grounds in exceptional circumstances’. In reality this means only if such a prisoner is severely physically incapacitated or terminally ill.

Does this fit with the requirement of a review of imprisonment to determine whether it continues to serve a legitimate penological purpose? No. In such circumstances, would allowing a prisoner to die on the outside, rather than behind prison walls, constitute a meaningful prospect of release, sufficient to satisfy the prohibition on inhuman and degrading treatment? No. Does the current UK law, as recently upheld by the Court of Appeal, comport with the basic standards of respect for human dignity which underlie the spirit of the human rights obligations accepted by the UK under the ECHR? No.

For these reasons, the Court of Appeal’s decision to flout the ECtHR jurisprudence on whole life sentences is wrong. It denies minimalist procedural protection for a substantive right of fundamental importance.

To be entirely clear: people still can, and should, be imprisoned for a very long time for very serious crimes. That imprisonment can and, in many cases, will last until the end of such prisoners’ lives. All that Vinter said was that imprisonment must be reviewed after lengthy periods. We cannot throw away the key. To do so constitutes inhuman and degrading treatment. The availability of review
does not deny the seriousness of the crimes which these people committed. All it does is preserve the bare minimum of the basic rights afforded to all human beings.

Some in the media have argued that such decisions, which bring the ECtHR into conflict with the UK politically, actually undermine human rights, because protecting prisoners’ rights discredits the ECtHR’s judgments and gives human rights a ‘bad name’. But these are in fact exactly the cases in which human rights protection is most needed.

UK laws are, and should be, made by a sovereign Parliament. But these laws are instigated and supported by governments and parliamentarians who are keen to please the voting majority. They are therefore susceptible to the views of this majority. The majority often either takes no interest in, or effectively suppresses, the interests of minorities. Prisoners are a minority group which the majority actively dislikes. As a result, their interests are marginalised, and little account is taken of them in the laws which the representatives of our majoritarian democracy enact. Yet, just because these people are subject to the criminal law does not mean that they forfeit the rights which are afforded to everyone by virtue of their humanity. It is well established in domestic UK law that prisoners retain their human rights.

It is in these situations that human rights are most needed. They are not discredited where they protect the interests of unpopular minorities in society. On the contrary, such situations show that human rights are achieving their most difficult and important objective: protecting the basic rights of the marginalised from suppression by the prevailing majority.

That is why getting it right matters. That is why we cannot throw away the key.

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Court of Appeal Affirms Ability to Pass Whole Life Tariffs for Murder
By Neil Shah | 20th February 2014

A specially constituted five-member Court of Appeal has ruled unanimously in R v McLoughlin [2014] EWCA Crim 188 that the imposition of a ‘whole life order’ for murder not does violate Article 3 ECHR. The case is particularly noteworthy given the contrary position reached by the European Court of Human Rights (ECtHR) in Vinter [2013] ECHR 66069/09.
The case concerned appeals brought by three persons convicted of murder and given whole life orders and one reference by the Attorney General under section 36 of the Criminal Justice Act 1988 that a minimum term of 40 years was ‘unduly lenient’. In the latter case the trial judge considered, in light of Vinter, that he was prohibited from passing a whole life order and thus imposed the lighter sentence. One appellant abandoned his appeal and it was confirmed that another had not in fact received a whole life order; as such only the cases of McLoughlin (the AG’s reference) and Newell, two persons convicted of murder for a second time, were determined.

English law mandates that those convicted of murder receive a sentence of life imprisonment. The trial judge sets a minimum term that must be served before the prisoner can be considered for release by the Parole Board; in some cases the judge may determine that the minimum term is the offender’s whole life. The statutory scheme governing such decisions is found in section 269 and schedule 21 of the Criminal Justice Act 2003. Further, section 30 of the Crime (Sentences) Act 1997 gives the Secretary of State the power to release a life prisoner in exceptional circumstances on compassionate grounds.

In Vinter the ECtHR held that for a sentence to be compatible with Article 3 there must be a “prospect of release and a possibility of review” as detention always had to have a legitimate penological purpose and the original justification could shift over time. The Court stated that a review mechanism must exist at the time the sentence is passed and that a life prisoner should know what to do to be considered for future release and not have to serve an indeterminate number of years before being able to complain that his sentence was no longer justifiable. In finding a breach of Article 3 the ECtHR stated that English law lacked clarity and certainty as despite authority indicating that section 30 should be interpreted broadly the Prison Service Order was drafted in extremely restrictive terms (providing, essentially, for release on compassionate grounds only when a prisoner was terminally ill).

The Court of Appeal expressly disagreed with Strasbourg on this point. The fact that the Order had not been changed was of “no consequence” because English law was “clear” as to the possibility of release in exceptional circumstances and the Secretary of State in exercising that power (a decision subject to judicial review) would have a duty to act in a Convention-compliant manner and could not be restricted by the Order. There was therefore no incompatibility between Article 3 and existing English law and courts could continue to hand down whole life orders. In the present case, McLoughlin’s sentence was thus increased to a whole life order and Newell’s appeal was dismissed.

The Court of Appeal’s judgment is certainly a victory for the government, yet it does leave questions unanswered. Thus, what constitutes ‘exceptional circumstances’ has been left open with the Court expressly noting that it was difficult to specify what these might be. Individual offenders may still therefore remain unclear as to what they need to demonstrate and when in order to be considered for compassionate release (both points of issue for Strasbourg). It could of course be argued that it is impossible to specify a ‘when’ at the time of incarceration (notwithstanding Vinter) as the very point of a whole life order is that, at the time of sentencing, it is seen as the only just order. As for the ‘what’ the simplest solution might be to revise the Prison Service Order. In fact it seems nonsensical not to when on the face of it the policy stated therein is not Convention-compliant. Indeed, had the government done this in the first place the need to go back to the Court of Appeal might have been avoided entirely.

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Perpetual Life Sentences, Reformation and the Indian Supreme Court
By Vishwajith Sadananda | 12th April 2014

It is trite to say, or so we hope, that a retributive criminal justice system has no place in a society conceived from the idea that human rights in general, and human dignity in particular, is of paramount importance. As civilized societies dedicated to democracy and constitutionalism, a system of reformatory justice seems but natural.

However, while perhaps indicating a move towards tacit judicial abolition of the death penalty (para 264), the Indian Supreme Court is now moving towards another extreme direction whereby indefinite life imprisonment (LI) is becoming the norm. To effectuate the same, the Supreme Court has been following two different approaches:

1. Explicitly mandating, in cases such as Swamy Shradananda v State of Karnataka Criminal Appeal No.454 of 2006, that remission, except by the Governor or President under their constitutional powers, would not be granted to the convict by the State (though the power to grant remission is the sole prerogative of the Executive).

2. Mandating sentences of convicts under multiple charges to run consecutively, and not concurrently, as was the case in Shankar Kisanrao Khade v State of Maharashtra Criminal Appeal No.362-363 of 2010. To put it simply, if a person has been convicted under three separate charges and given 25 years LI under each charge, after the completion of the first sentence under the first charge, the sentence under the second charge would kick in. As a result, even if the Court does not rule out the option of remission explicitly, it becomes next to impossible to seek the same due to the consecutive nature of the sentences.

This approach seriously undermines the rehabilitative approach that a responsible State ought to pursue. Not only is this approach...
not in consonance with reformative criminal jurisprudence per se, but also contradictory to the approach taken in a number of previous Supreme Court decisions which require the Court to determine whether or not a convict can be reformed and rehabilitated (and which therefore highlight that rehabilitation into society is in fact an important factor).

Furthermore, while reformation of a life convict is theoretically possible inside a prison, the Indian prison scenario leaves a lot to be desired for this to become a reality. The National Human Rights Commission reports that there are at least four deaths per day in Indian prisons, with a total number of 14,231 prisoners dying in police custody from 2001 to 2010. In 2011, 1332 prisoners died in prison. Furthermore, according to a report of the Asian Centre for Human Rights, most of these deaths were directly attributable to police brutality and torture.

Additionally, as disclosed by a recent report of the National Crime Records Bureau, Indian prisons are heavily crowded and far exceed their sanctioned strength. As of 2013, the total prison density in India is estimated to be around 112.1%. These prisons are unhygienic, cramped, lack proper sanitation and have poor ventilation. Prisoners are not given adequate privacy and are not given an opportunity to have a semblance of a dignified existence while incarcerated. Considering the state of the crumbling prison infrastructure, the idea of reformation of a prisoner therefore seems to be a utopian dream.

While it is indeed commendable that the Supreme Court is moving away from the abhorrent death penalty, this alternative approach, which, like the death penalty, pays scant regard to human dignity, simply cannot be countenanced. Indeed, there is an urgent need to strike a balance between adequate punishment that facilitates the reformation and rehabilitation of the convict and the maintenance of human dignity. The Supreme Court simply cannot lose sight of this.

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**Women in Prison: The Particular Importance of Contact With the Outside World**

By Jo Baker | 23rd November 2014

“I felt isolated from the entire world. If I’d stayed any longer I’d have started eating the window bars.” – Inmate, Jordan

Contact with the world outside of prison is vital to the wellbeing of every detained person — but for women this is arguably more important, and more of a challenge.

Such was a key finding in my research with DIGNITY – Danish Institute Against Torture, among women’s prisons and prison communities in five countries, last year. When asked about their greatest hardship or cause for depression, the answers of detained women repeatedly echoed that of this inmate from the Philippines. “The most difficult thing? Leaving my children. I have six. Most of us are mothers and some of us have been here a long time and our husbands left us while we were here. I worry all the time and I can’t think of anything else. I can’t sleep.”

For many such women, their need for contact with family — and their identities as part of these families — are arguably different and much stronger than those of most men, and the stress of not being able to see or find out about their children is all-consuming, and hugely harmful. For those who left children in family environments that were abusive, this situation can be particularly dark.

Meanwhile since women tend to have far less access to financial support or earnings, they rely more heavily on outside help for the basic needs often not met in prison, from nutrition, to baby milk powder and sanitary towels. This affects a range of rights. Our research suggests that often, for example, the women who are most vulnerable to neglect or exploitation in prison are those who do not have help on the outside. “Keep us in prisons near home so that we can have family support,” said one woman in Zambia. “When you don’t [have any support] you are prone to abuse or they don’t really care about you inside.”

Yet women are often less likely to receive visits in prison. This is partly because the stigma of prison can be gendered. Many spoke of pervasive social shame, and of husbands that quickly leave. “When women are in prison it makes a big shame for her family,” an NGO worker told me in Jordan. “They may refuse to visit her and cut all relations with her, particularly those women who have killed.” Thus such women, many of whom have been through years of domestic violence, can find themselves completely cut off from the outside world.

Visiting conditions also play a role. Because women’s prisons are usually scarce, relatives may need to travel a greater distance from their homes, which takes time and money. The mother of one young political prisoner that I met could only afford the three-day journey each way once a year. Visits can also be cold and traumatic, particularly for children… if those children are allowed to visit at all. While in Jordan this involves 10-15 non-contact minutes behind security glass, in one Zambian prison (where visitors simply call their news through two wire fences) children are not allowed to visit. A woman may therefore give birth to a child shortly before...
her arrest, and then not be able to hold or see the child again until she is released. This is surely tantamount to inhuman treatment, for both.

But the good practices found in our study show that there are ways in which prisons can ensure dignity, flexibility and intimacy during visits — and help to hurdle gender barriers too. For example in the Philippines our team found that visitors can spend substantial, dignified free time with inmates in communal areas of the prison. In Albania, where I drew a number of good practices, welfare staff try to mediate between female inmates and their estranged families, and arrange visits by detained mothers to their children’s care homes.

The issue of contact with the outside world is well recognized in international standards, including the Bangkok Rules for women prisoners. Yet when it comes to a thorough understanding of women’s human rights, much more work is required among prison systems, and even UN treaty body reports, to make sure that this understanding is grounded in the realities of the women themselves. It is time for all of us to become champions for the human rights of this long-neglected group.

Jo Baker is a writer and research consultant, with a focus on human rights and gender. She most recently led and produced a five-country research study for DIGNITY - Danish Institute Against Torture (formerly RCT) on conditions for women in detention, which was launched at the Human Rights Council in June 2014. www.jobakeronline.com

**Prisoner Rights at the Forefront of Canadian Debates**

By Ravi Amarnath | 30th January 2015

Over the past month, two major developments have placed the constitutionally protected rights of prisoners front and centre in the Canadian press.

The first of these developments is at the heart of two lawsuits initiated in the Canadian provinces of British Columbia and Ontario, challenging the constitutionality of the Correctional Service Canada’s (“CSC”) practice of subjecting prisoners to solitary confinement.

The practice is defined as the physical and social isolation of a person for 22-24 hours per day, regardless of the intended purpose. According to the British Columbia Civil Liberties Association, one of the organizations involved in the legal proceedings, one in four prisoners have spent time in solitary confinement.

Both lawsuits seek to ban the practice in Canada on the basis that it violates numerous rights under the *Canadian Charter of Rights and Freedoms*. In particular, the petitioners in both suits assert that the practice violates the rights of prisoners to be free from cruel and unusual punishment. To succeed on this front, the petitioners will have to convince their respective courts that the practice of solitary confinement is “so excessive as to outrage standards of decency”.

The practice of solitary confinement gained notoriety in Canada in 2007 after 19-year-old prisoner Ashley Smith took her life
Restricting Receipt of Rehabilitative Resources: The Prisoner Book Ban
By Natasha Holcroft-emmess | 28th March 2014

New prison service rules prohibit prisoners in England and Wales from receiving books and essentials from the outside world. The imposition of a sweeping restriction on family and friends sending such items to their loved ones behind bars is an inordinately oppressive measure. The blanket ban constitutes a disproportionate interference with prisoners’ rights as it unduly impedes access to education and rehabilitative resources.

The new rules, which came into effect in November 2013, amended the Incentives and Earned Privileges Scheme (Prison Service Instruction (PSI) 30/2013). They curtail prisoners’ rights to receive commodities from family and friends. Representatives of the Howard League for Penal Reform have expressed serious concerns about the scope of the provisions and their rational connection to legitimate penological policy.

Prisoners may only receive parcels in exceptional circumstances at the discretion of the prison governor. Exceptional circumstances are narrowly defined along the lines of articles necessary to assist with disability or health and artefacts for religious observance. The sending of birthday presents, underwear and clothing is included in the ban and there is evidence that these restrictions will disproportionately affect female prisoners, who depend on family for additional clothing. But the greatest consternation has been expressed at the prohibition on sending books.
Books are a hugely important resource for prisoners. They provide the means through which prisoners can learn the skills necessary to live within the law outside of prison walls. Access to books promotes literacy and comprehension. Depending on the subject matter, reading also facilitates the development of compassion, social skills and greater societal awareness. These are abilities which many of us take for granted. But for those apparently stuck in a life of crime, they can provide a lifeline to a more peaceful existence.

Rehabilitation is an important objective of, and justification for, incarceration. This has been recognised both nationally and internationally. Prisoners need access to the resources in prison that will prepare them for reintegration into society on release. That is why it is important not to impede prisoners’ access to these valuable resources.

Justice Secretary Chris Grayling has attempted to justify the new measures. He argues that prisoners have prison libraries at their disposal, so access to books is not being restricted. Yet in the current age of austerity, library provision in public institutions is far from a priority. He states that employed prisoners are free to purchase books for themselves if they wish. But for many, the cost of one book would be a full week’s wages. The new approach as a whole sits ill at ease with the government’s professed commitment to encouraging prisoners to read.

If the concern behind the new rules is to prevent contraband from entering prisons undetected, the answer is to instigate better checking procedures before sent items are allowed into prisons. The answer is not to prohibit items from being sent in altogether.

Grayling tries to argue that the policy is part of his ‘rehabilitation revolution’. Of course it is necessary to have a system incentivising good behaviour in prisons. But imposing a blanket ban on sending books and essential items is not a proportionate way to achieve this. It is entirely unclear how this encourages rehabilitation. If an important aim of the criminal justice system is to provide prisoners with the tools they need to re-enter society, then surely limiting access to educational tools and necessities is pernicious to this aim.

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Chapter 5

Security
Security
Chapter 5

Introduction
By Fiona de Londras

Over the past year, contributors to the Oxford Human Rights Hub Blog have addressed both direct (e.g. physical and political impacts on victims) and indirect (e.g. on institutional design, use of weaponry and development of international standards) impacts of insecurity from a rights perspective.

‘Accountability’ is key to ensuring the security state does not infringe on human rights beyond what is necessary and justifiable, however structures of accountability in the counter-terrorist context may not ‘look’ the same as in other contexts. This is largely because security requires secrecy, and accountability in the face of secrecy requires innovation. The UK innovated in this field by establishing the Independent Reviewer of Terrorism Legislation (‘IRTL’), a post now held by David Anderson QC. Writing in March 2014 (‘Independent Review of Terrorism Laws: a Brief Introduction’ p 92), Anderson acknowledged the challenges of securing public faith in a review, much of the information and reasoning underlying which cannot be disclosed. The key, he argued, was independence. However, in the summer of 2014 the UK government proposed abolishing this office and replacing it with a Privacy and Civil Liberties Board. Jessie Blackbourn expressed concerns about this on the blog in August (‘Anti-Terrorism Review Reform: Some Considerations’ p 93); how would the panel be appointed? How would it achieve and maintain independence? In the end, the Government decided against abolishing the IRTL and Anderson continues in the role, however other systems have no such office or process. Writing in June 2014, I argued that the EU should introduce ex post facto review in order to better understand the impact of these measures (‘Accounting for Rights in EU Counter-Terrorism’ p 93).

In January 2014, Michele Porcelluzzi drew readers’ attention to the deficiencies in UN sanctions regimes from a due process perspective (‘The UN Sanctions Regime Against Terrorists: Suggested Changes’ p 94). His novel suggestion is that listing and delisting be taken out of the Security Council and done by the International Criminal Court, where ‘fair trial’ rights could be respected in a manner that recognised the ‘criminal justice’ nature of the sanctions regime. This is a suggestion that might be taken on board by the Working Groups of the High Level Sanctions Review, which he outlined in a second contribution (‘UN Sanctions: Possible Changes?’ p 96).

Domestic security measures continued to cause anxiety. Natasha Holcroft-Emmess wrote on Guardian News and Media Ltd v AB & CD [2014] EWCA Crim (B1) where the Court of Appeal acceded to a government request to have a case heard in camera, but mandated that some parts should be open (swearing in, reading the charges, the prosecution’s opening, the verdicts and sentencing), and permitted a small number of journalists to be present, although they could not report until the trial was concluded (‘Partly Clandestine Criminal Trials Risks Standardising Secrecy’ p 97). Holcroft-Emmess acknowledged that the Court had to tread a fine line between open administration of justice and protection of sensitive information, but this post highlighted the sharpness of this tension. This sharpness results, not least, from concerns that secrecy may frustrate transparency as well as protect security; a concern I addressed in a post on the Miranda [2014] EWHC 255 (Admin) case (‘Managing Secrecy: R (Miranda) v SSHD’ p 98).

Beyond the context of counter-terrorism and surveillance, the blog also covered important developments in security and rights. Kate Stone marked the entry into force of the Arms Trade Treaty (‘Human Rights and the Arms Trade Treaty’ p 106), which requires states to consider the likely human rights consequences of arms trades in advance. Stone raises the important question of whether rights can be effectively protected by regulating, rather than preventing, arms trade, but this may be a field in which pragmatism...
holds significant promise. While tackling trade in conventional arms, the ‘international community’ is also faced with a less conventional form of weaponry: drones. In October 2014, Natalie Cargill welcomed the decision of the Human Rights Committee to address this issue head-on (HRCR 25/22), which offered the opportunity to reiterate the applicability of IHL and IHRL to the use of drones, although the Resolution attracted criticism from some states (“Classic Human Rights Law Territory”: Why the HRC Needs to Talk About Drones’ p 107). Addressing the use of force against ISIS, Michele Porcelluzzi argued (‘Iraq Needs Incisive Measures from the UN Security Council’ p 108) that international action, mandated by a Security Council Resolution, was needed in respect of Northern Iraq. However, Security Council Resolutions are useful not only for mandating military intervention, but also for recognising what Sarah Field calls “our shared vulnerability to hurt and harm of unimaginable form and depth”, referring to SCR 2139 in Syria (‘Dignifying the Most Vulnerable ‘In’ and ‘Through’ Security Council Resolution 2139’ p 109).

What these contributions to the OxHRH Blog over the past year show is that, while the particularities of debates on security and rights might change with context – review, sanctions, arms trading, secrecy, drones etc—the themes with which we are preoccupied are relatively stable. Efforts to ensure security almost necessarily confound us. On the one hand, security is required for the enjoyment of human rights: we know that situations of insecurity, instability, and the quotidian nature of inter-personal violence severely challenge our capacity to enjoy, and states’ capacities to ensure, rights. However, the measures taken in the effort to ensure security themselves pose serious threats to rights. Thus, as the contributions to the blog show, the work of the human rights lawyer and advocate is to critically engage with efforts to understand, ‘provide’, and review ‘security’ in order to minimise the challenging tensions that arise.

Prof Fiona de Londras is Professor of Law and Co-Director of the Durham Human Rights Centre at the University of Durham where she coordinates the FP7-funded, collaborative project SECILE. She has spent the 2014-2015 academic year as a Visiting Fellow at Oxford Human Rights Hub.
Monitoring the activities of the secret state creates a conundrum. To be effective, a monitor needs to read and to know what is secret. But why should the monitor be believed, when the monitor’s reasoning cannot be shared with the public?

That conundrum is most familiar in the context of intelligence oversight, where the Shadow Home Secretary has recently made some interesting proposals for change. But as she indicated, part of the solution may lie in an older tradition: the independent review of the operation (by police, prosecutors, Ministers and others) of the anti-terrorism laws. Such review has been a feature of the landscape in the UK since 1978 and was adopted in Australia in 2010.

Independent review of terrorism legislation is founded, perhaps quaintly, on trust: the appointment of what was described to Parliament in 1984 as “a person whose reputation would lend authority to his conclusions, because some of the information that led him to his conclusions would not be published.”

A second important feature evolved during the tenure of Lord Carlile Q.C., from 2001-2011, as what the Shadow Home Secretary described as a “public-facing form of oversight.” However penetrating a review may be, it can neither inform, reassure nor raise the alarm, unless its conclusions are brought, forcibly if necessary, to the attention of Parliament and the general public. This means meeting with the widest possible range of people, giving evidence to Select Committees and accepting a degree of media exposure.

Neither of these features would be worth anything without genuine independence. The Independent Reviewer must set out neither to torment the Government nor to defend it, but to give an informed and considered view. Though not a judge, he or she must always seek to act (in the words of the judicial oath) without fear or favour, affection or ill-will. Successive Reviewers, each of whom has performed the job on a part-time basis and without hope of advancement from Government, have, in my (perhaps not entirely impartial) opinion, been well-endowed with this quality.

As the current Independent Reviewer of Terrorism Legislation, I have sought to explain the history and functions of the post in a working paper, delivered as a lecture to the Statute Law Society on 24 February 2014. I have also traced some of the ways in which the post may affect the decisions made by Government. Topical case studies demonstrate how it may do so both directly and in conjunction with other channels of influence including, most importantly, Parliament and the courts.

David Anderson QC is the Independent Reviewer of Terrorism Legislation and a barrister at Brick Court Chambers.
Accounting for Rights in EU Counter-Terrorism

By Fiona de Londras | 7th June 2014

In the 12 years after 9/11, the EU introduced 239 counter-terrorist measures, 88 of which were legally binding. In the EU, as elsewhere, designing and implementing counter-terrorism carries with it risks for rights.

While a baseline of security is required in order to enjoy rights per se, ‘countering terrorism’ often infringes on the rights of suspected terrorists and, more broadly, undermines social cohesion and the rule of law. For that reason, it is important that we pay proper attention to rights in the making, implementation and review of counter-terrorism laws and policies.

In spite of this, the pre-legislative process in the European Union Constitutional Treaty (EUCT) is problematic from a rights-based perspective, even where the formal ex ante impact assessment process is employed. This process, undertaken by the Commission, engages with stakeholders to predict the environmental, economic and social impacts of proposed measures and provide an evidence-base for political decision-making.

Social impacts include impacts on rights. Understandably, however, the qualitative analysis of rights impact is not easily assessed alongside the quantitative analysis of economic impact, with more ‘concrete’ data often appearing to receive more analytical weight. Thus, it is not unusual when reading these assessments to notice that the analysis of rights is ‘light touch.’

This might be expected, given that forward-looking analyses are speculative, especially in relation to values that are difficult to quantify. But it points toward a need to afford more weight to rights in these assessments, especially as they can also shape later analyses of the ‘effectiveness’ of measures where such ex post assessment takes place.

We can only ascertain a measure’s actual impact once it is operational. Even at that point, it is important to remember that the impact of EUCT will not be uniform across every member state or social group: the vast majority of implementation is national, and there can be significant variations across the member states.

In spite of this, formal ex post facto review of EU counter-terrorism is remarkably infrequent, even where the measure in question expressly requires it. Of the 88 legally binding minding measures introduced since 2001, 68 required review, only 33 of which have so far taken place on time (ten have not reached their time limit).

The lack of effective and regular ex post facto review of EUCT is highly problematic from a rights-based perspective. The necessity and proportionality of any measure may vary according to changing security and social circumstances and thus requires regular review. Without this, we must rely on the hope that a court will have the opportunity to judicially review a measure to assess its legality, in which assessment is only part of a comprehensive rights-related understanding of the impact of counter-terrorist measures.

The EU is a relative newcomer to counter-terrorism, and although it takes some account of rights, this is not sufficient to ensure EUCT is as rights-compliant as possible. The EU does have the potential to account more fully for rights in its counter-terrorism, in particular by enhancing participation in the life cycle of counter-terrorist law- and policy-making and instigating regular, participatory and evaluative review.

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Anti-Terrorism Review Reform: Some Considerations

By Jessie Blackbourn | 8th August 2014

In mid-July, the UK government announced its intention to abolish the Independent Reviewer of Terrorism Legislation – the office tasked to review the UK’s anti-terrorism laws – and replace it with a new Privacy and Civil Liberties Board. There is some merit in this proposed reform. A panel of reviewers could mitigate some of the problems in the existing system of review. The current Independent Reviewer, David Anderson QC, is, for example, overburdened with the number of laws he is tasked – as an individual – to review. However, if the Privacy and Civil Liberties Board is to improve on these deficiencies, it must be established according to best practices in government oversight.

The government has not yet outlined the structure of the new Board. This is something to which it must give serious consideration. A panel of reviewers presents a number of problems not found in the current system. How many people will sit on the Board? Will
each member have equal weight? What will be the process if the Board cannot agree? Can individual members write dissenting reports? Recommendations reached by consensus could mean compromise and a decline in the quality of the review. However, a system in which the publication of multiple opinions is allowed could have the same result; indecision will offer scope for the government to adopt the reforms it prefers, rather than the ones that may be most necessary.

The government will also need to consider how it appoints the Board. Anderson was appointed by the Home Secretary in a process which he has described as ‘intriguing, if indefensible.’ Since then, he has succeeded in making the appointment process more transparent. Future Independent Reviewers were to be chosen by Ministers in an open, fair and merit-based process from a list of appointable candidates. This should be the minimum appointment procedure for members of the new Board. A more preferable process would be to advertise the position in an open competition. The government also needs to think about the length of term and re-appointment procedures. The Independent Reviewer is appointed for three years, renewable up to a period of ten years. Three years is a very short period of time for new appointees to get aboard such a complex area of law. The government might instead give consideration to establishing a system of rolling appointments for non-renewable five-year periods.

The government will then need to consider the Board’s terms of reference. As it stands, the Board will be required to advise the government on whether anti-terrorism legislation is sufficient to meet the threat and adequately takes account of privacy and liberty concerns. Given recent revelations about the extent to which government agencies have infringed citizens’ right to privacy, it is perhaps understandable that this has been prioritised. However, some of the UK’s anti-terrorism laws, such as those that impose Terrorism Prevention and Investigation Measures on persons only suspected (but not convicted) of terrorist behaviours, pose a far greater challenge to other traditional rights.

The government will also need to think about what powers the Board will require. In order to be meaningful, a review must have full access to all relevant information. The Independent Reviewer currently has no statutory power to access material from the intelligence and security services or the government; however, according to Anderson, it has been granted on trust, based on the establishment of strong relationships between the reviewer and those agencies. Anderson has suggested that for the same access to be granted to the Board, it will need to be ‘backed both by watertight statutory guarantees and by the full institutional cooperation of agencies.’

Finally, the government needs to consider the Board’s reporting requirements. Currently, the government must table the Independent Reviewer’s reports to the parliament on receipt. The government may delay publication of the reports for only enough time to ensure that they contain no information which, if disclosed, might prejudice national security. Whilst disclosure is a legitimate concern, the procedure for determining national security information must be transparent. The government should not have final censorship over the new Board’s reports. Additionally, the government should be required to provide an official response to the Board, particularly where laws are not subject to annual renewal and parliamentary debate.

These are just some of the factors that will need to be considered when the government proposes its new Privacy and Civil Liberties Board. Otherwise, we will be worse off than the current system of independent review.

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The UN Sanctions Regime Against Terrorists: Suggested Changes
By Michele Porcelluzzi | 15th January 2014

The current UN sanctions regime against terrorists does not secure due process rights. Allowing the International Criminal Court to deal with these cases would be a preferable solution, as it would prevent violations of such rights.

Overview

Two years before the 9/11 attacks, the UN Security Council adopted Resolution Resolution 1267 (1999), establishing a sanctions regime which required all states to impose a range of preventive measures, including asset freezing, international travel bans and arms embargoes on individuals and entities designated by the Sanctions Committee as being associated with the Taliban.

In the following years, with numerous Security Council resolutions, these measures were extended to individuals, groups and entities associated with Al-Qaeda, and there developed an "Al-Qaeda Sanctions List." Further, the Security Council established guidelines for blacklisting and delisting.

Any state may request the Al-Qaeda Sanctions Committee to add names to the Al-Qaeda Sanctions List. The Committee oversees states’ implementation of the sanctions measures, maintains the sanction list and considers submissions from states concerning exemptions to asset freezing and travel bans. It makes decisions on listing by consensus of its Members. If consensus cannot be
reached, the matter may be submitted to the Security Council by the member concerned. Finally, a listed person or entity receives a narrative summary of the reason of the listing, which does not include any information that the designating state considers sensitive.

Problems

The sanctions significantly interfere with the fundamental right to freedom of movement, property rights and the right to privacy in all its manifestations. Further, the duration of the sanctions is not determined, so in most cases, it is permanent. The procedure is also entirely political, lacking any judicial control. The Committee is composed of diplomats, rather than independent judges. An individual is not allowed to intervene in the proceedings to prove his innocence and often receives an unduly narrow summary of the decision. There are clear violations of the “fair trial” rights set up by article 14 ICCPR, which depend on the independence of a decision-maker, accessibility and power to grant an effective remedy.

Due to criticism from many commentators, NGOs and UN Member States, in 2009 the Security Council introduced an independent Ombudsperson to assist the Committee in its consideration of delisting requests. The Ombudsperson investigates delisting requests and prepares a “comprehensive report.” This report contains formal recommendations to the Committee on whether to accept or reject a delisting request. If the Ombudsperson recommends against retaining a listing, then that individual or entity is delisted within 60 days, unless the Committee decides unanimously to retain it, or the question is referred to the Security Council.

The Special Rapporteur, in his 2012 report, concluded that “the Al-Qaeda sanctions regime continues to fall short of international minimum standards of due process.” He suggested extending the powers of the Ombudsperson, whose decision must be accepted as final by the Al-Qaeda Sanctions Committee and the Security Council.

Solutions

In order to uphold due process rights, the best solution would be to bring the listing and delisting procedures within the jurisdiction of the International Criminal Court. This would ensure that decisions are made by independent judges on the basis of clear norms, which would set the standard for cooperation with Al-Qaeda. Further, individuals would be able to intervene in both procedures and challenge the evidence put forward by the states. The Court would also provide a clear and complete reason for its decision in each case. Respecting due process rights would also facilitate the implementation of sanctions in the EU. The ECJ would not itself need to undertake a complete review – such in the Kadi II [2013] EUECJ C-584/10 case, as long as the ICC maintained this elevated standard of protection.

Respecting human rights is a necessary condition for fighting terrorism, as violations of these rights will only create an atmosphere of resentment. The existing regime does not respect human rights to the required extent. However, the suggested amendments could hopefully facilitate their protection.

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UN Sanctions: Possible Changes?
By Michele Porcelluzzi | 24th July 2014

In the last 20 years, the UN Security Council has adopted numerous sanctions not involving the use of armed force.

Originally, these sanctions only targeted States and aimed to prevent or punish cross-border attacks, civil wars and terrorism. They have since narrowed to target specific entities or individuals, and the rationale for sanctions has expanded to include the protection of civilians and prevention of human rights atrocities, the discontinuation of the development of unconventional arms and their delivery systems, and the financing conflict through exploitation of natural resources or criminal activities. For example, the Sudanese sanctions regime, established by Resolution 1591 (2005), imposed measures including travel bans and asset freezing on individuals designated by the Committee.

Today, there are 15 sanctions committees, supported by 65 experts working on 11 monitoring teams, groups and panels, at a cost of about $32 million dollars a year.

There are, however, several problems with the existing sanctions regime. First, some sanctions regimes targeting individuals, such as those against terrorists, do not secure due process and human rights. Furthermore, in order to assure effectiveness, it is necessary to develop strategic partnerships with other control mechanisms or regulatory systems. At the moment, the United Nations cooperates with the International Civil Aviation Organization, the International Maritime Organization, INTERPOL and the World Customs Organization. However, there is a notable absence of collaboration between UN sanctions committees and financial and arms embargo regulatory organs, like those established by the European Union or Organization for Security and Co-operation in Europe.

Moreover, new crisis resolution tools dealing with many of these same threats have been developed; these include mediators, international tribunals and sanctions by entities other than the UN. It would therefore be desirable for UN sanctions to be integrated with these new tools in order to become an integral part of a larger strategy.

In June 2013, a High Level sanctions review was initiated, sponsored by the UN Missions of Australia, Finland, Greece and Sweden, in combination with Brown University and the sanctions consulting firm CCI. A similar activity took place in 2006, with the Informal Working Group on General Issues of Sanctions, which resulted in important policy documents for sanctions regimes.

The current sanctions review is being conducted by sanctions practitioners with extensive experience in the service of their Governments, the Secretariat, international organizations or current and former sanctions monitors. Three Working Groups are addressing different issues.
Chapter 5

The first group is dealing with integration and coordination on the implementation of UN sanctions. In particular, it is focusing its attention on opportunities to improve sanctions integration and coordination among the UN entities supporting the Council’s sanctions function, including sanctions committees, expert groups, the Ombudsperson and the Secretariat.

The second Working Group is addressing the possible partnerships and strategies between the UN sanctions regime and other international instruments and institutions dealing with international security, such as international arms control and disarmament mechanisms, international financial and economic regulatory systems and international criminal justice institutions.

The Third Working Group is focusing its attention on UN sanctions, regional organizations and emerging challenges. In particular, it is addressing opportunities to optimize UN sanctions as an effective tool in response to serious and systematic violations of human rights and international humanitarian law, enhancing coordination with regional sanctions and exploring new applications to address evolving threats to international peace and security.

This review of UN sanctions is indispensable and may be very useful if it is conducted periodically, for example, every five years. However, there are two obstacles, which Working Groups may face. First, the operations of the UN sanctions regime and the International Criminal Court often overlap. More coordination between these bodies may therefore be required.

Secondly, the Working Groups need to address the perceived lack of respect for due process rights by the UN sanctions regime. The European Court of Human Rights in Nada and the European Court of Justice in Kadi, as well as some domestic courts, have challenged the regime against terrorists on due process grounds.

Despite these problems, it is hoped that the Working Groups, whose activity will conclude in October 2014, will nonetheless provide a useful and meaningful review of existing sanctions regimes.

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Partially Clandestine Criminal Trials Risk Standardising Secrecy
By Natasha Holcroft-Emmess | 15th June 2014

In the case of Guardian v AB and CD [2014] EWCA Crim (B1), handed down 4 June 2014, the UK Court of Appeal addressed the issue of secrecy in criminal trials on the grounds of national security.

UK Government Ministers requested that a criminal trial be conducted entirely behind closed doors and that the defendants be anonymised. The trial judge acquiesced to the request, but the Court of Appeal overturned this in part. It is submitted that the decision does go some way to preserving the interest in the public administration of justice, but some unease remains, and courts ought to be apprehensive of accepting any in-roads into open justice.

Two defendants are facing multiple criminal charges of (mostly inchoate) terrorism offences. On 19 May 2014, the trial judge, Nicol J, ruled that the entirety of the criminal trial could take place in camera (i.e. in private, to the exclusion of the public and the media) and that the defendants’ identities could be withheld from publication.

The prosecution adduced ministerially-endorsed Certificates setting out reasons in favour of conducting the criminal trials in secret. The justification centred upon preservation of national security. Various representatives of the media appealed the trial judge’s decision to permit the trial to go ahead completely in camera and to censor any publication of the names of the accused.

The Court of Appeal decided that the evidence available to it indicated a significant risk that the administration of justice would be frustrated if the trial were conducted in open court. As a result, the core of the trial could be held in camera. However, some parts of the trial could be conducted in open court, namely: swearing in of the jury, reading of the charges, the judge’s introductory remarks, the prosecution’s opening, the verdicts and (if applicable) sentencing.

The Court of Appeal also decided that a small number of accredited journalists could attend the bulk of the trial (subject to exclusion from discussion of some matters in accordance with the Certificates) on terms of confidentiality until a review at conclusion of the trial.

On the other hand, the Court of Appeal could not countenance conducting part of the trial in secret and anonymising the defendants. The defendants could therefore be named as Erol Incedal and Mounir Rarmoul-Bouhadjar. The reasons for this will be substantiated in forthcoming judgments. An early indication of the court’s approach appears in the introduction, which describes the
Chapter 5

Mass surveillance

Managing Secrecy: R (Miranda) v SSHD

By Fiona de Londras | 19th February 2014

Much has already been written about the implications of R (Miranda) v Secretary of State for the Home Department [2014] EWHC 255 (Admin) for Schedule 7 Terrorism Act 2007. However, leaving that to one side, I want to reflect on the questions about secrecy that Miranda touches on.

Although some have criticised the judgment for equating investigative journalism with terrorism, Laws LJ held that “[t]here is no suggestion that media reporting on terrorism ought per se to be considered equivalent to assisting terrorists.” However, some disclosures made by journalists might have the effect of aiding or assisting terrorists in evading counter-terrorism. That may be an unpopular proposition but it is likely correct, and it raises important questions about where the legitimate lines between secrecy and transparency lie and who gets to decide when they have been crossed.

Secrecy and counter-terrorism go hand in hand. Complete transparency (i.e. disclosure of all activities to the public at large) when it comes to counter-terrorism is neither practicable nor desirable from a security perspective. That is not to say that absolute secrecy is necessary or desirable either. Instead, cases like Miranda should cause us to think about secrecy – and, as a result, transparency – as a layered phenomenon.

1. Broadly drawn and simplistically described, there are at least four layers of secrecy/transparency that we might think about in the counter-terrorist context.
2. Public public: elements of counter-terrorism that are publicly known and deliberated upon, such as legislative frameworks.
3. Public political: elements of counter-terrorism that are not subject to full public disclosure but which are disclosed to the public through the proxy of political actors. Here there is public scrutiny through representative politics but not through full public deliberation.
4. Private political: there is disclosure to some political actors, but that disclosure is not subjected to political scrutiny within traditional parliamentary structures. This might include private security briefings and disclosures to relevant ministers.
5. Agency private: where disclosures happen within the relevant agency or agencies, and there is limited or no political disclosure.

In many cases, all four of these levels coexist. However, in other cases—such as in relation to the disclosures flowing from Edward Snowden’s whistle blowing – there is little or no ‘public public’ or ‘political public’ information. Instead, the existence and detail of the counter-terrorist activity in question are almost completely secret. This poses serious democratic and legitimacy concerns that whistleblowers and journalists try to manage.

Rule of Law as a priceless asset and foundation of the UK’s Constitution. One aspect of the Rule of Law is open justice: trials being held in public and the names of defendants publishable. This fundamental principle of the common law ensures public confidence in the legal system. Justice must not only be done but also seen to be done.

The Court of Appeal decision is agreeable in that it emphasises the need for adequate justification for departures from the principle of open justice. It expressly limits such departures to circumstances of necessity and requires a proportionality analysis to be undertaken. The court’s vigilance concerning the cumulative effects of various in-roads into open justice is encouraging.

But the fundamental tension between the public interest in national security and the public interest in the open administration of justice remains. The case was described as exceptional, and the need for some secrecy was determined as justified on the facts of the case. Although it is ultimately for courts to decide whether to give effect to a Certificate advocating secrecy in the interests of national security, the judges appear to adopt an openly deferential stance to ministerial urging.

It is argued that the courts ought to be especially vigilant of the risks of accepting any intrusions into open justice and fair trial rights, not just the cumulative effect of many. This is an area in which a quantitative assessment of the impact of multiple incursions, although to some extent helpful, risks undermining the cause of open justice by permitting several small in-roads and standardising a certain amount of secrecy.

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Mass Surveillance

Managing Secrecy: R (Miranda) v SSHD

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In essence, the question that Miranda raises is whether journalistic expression that attempts to manage these secrecy concerns through disclosure ought to be protected to the extent of being exempted from laws and structures that are designed to protect
security. Laws LJ was obviously skeptical. At paragraph 58 he wrote, of Greenwald’s account of how disclosure decisions are made:

…the reader is left in the dark as to how it is that “highly experienced journalists and legal experts” … are able to know what may and what may not be published without endangering life or security… [T]he journalist may not understand the intrinsic significance of material in his hands; more particularly, the consequences of revealing this or that fact will depend upon knowledge of the whole “jigsaw” (a term used in the course of argument) of disparate pieces of intelligence, to which [journalists] will not have access…. This passage raises legitimate concerns, but it also implicitly emphasises the importance that we ought to attach to constructing appropriate structures for the management of secrecy. If it is true that journalists – even with legal advice – cannot fully appreciate the security implications of disclosing secret counter-terrorist operations and information, then at the very least, we should be able to expect that we would have transparency under headings 2, 3 and 4 above (i.e. public political, private political and agency private) in respect of all security activities.

Journalism, which creates ‘public public’ transparency, may not always have the capabilities to make the kinds of security judgements necessary to assess whether a particular piece of information ought to be in the public domain, but neither ought we allow security agencies to monopolise both the information that we use to assess threats and the decisions as to disclosure.

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The Legality of Mass Surveillance Operations
By Andrew Wheelhouse | 7th February 2015

A court, which isn’t a court in name, rules on the legality of a government mass surveillance program that may or may not exist. That about sums up the Kafkaesque world inhabited by the UK’s Investigatory Powers Tribunal in Liberty v GCHQ [2014] UKIPTrib 13_77-H.

This claim arose out of the revelations by former National Security Agency (NSA) contractor Edward Snowden and fell into two parts: first, that GCHQ (The UK’s signals intelligence agency) had unlawfully been supplied information obtained through the NSA’s ‘Prism’ program; second, that GCHQ had been running its own unlawful mass surveillance program, named ‘Tempora.’ A variety of civil liberty NGOs alleged that these activities breached the right to privacy under Article 8 of the European Convention on Human Rights (ECHR) and collaterally breached the right to freedom of expression under Article 10 (through the ‘chilling effect’ on organisations that believe their communications are possibly being monitored).

The British government will neither confirm nor deny the existence of Tempora. The hearing therefore proceeded, somewhat
bizarrely, on the basis of ‘alleged factual premises’ for five days, with a one-day closed hearing from which the claimants were excluded so that the Tribunal could consider material deemed too sensitive to be heard in public.

Surveillance and communications interception in the UK is governed by the Regulation of Investigatory Powers Act (RIPA) 2000. Under s.8(4) RIPA, an interception warrant issued by a Minister is required for public authorities to carry out surveillance. Information passed to GCHQ by the NSA is governed by a hodgepodge of other statutory provisions.

The Tribunal considered that compliance with the ECHR essentially boiled down to two questions:
• Are there publically known rules for the interception of communications whose content is sufficiently indicated?
• Are these rules subject to proper oversight?

On the first point they were satisfied that the (classified) arrangements for implementing the statutory framework sufficiently restricted the potential for abuse of the surveillance system. Although these arrangements were not themselves known, this defect was remedied by the statutory bodies that oversee the system, namely the Intelligence and Security Committee of Parliament and the Interception of Communications Commissioner. Their reports are available to the public and indicate enough about the rules governing interception to ensure the programme’s lawfulness.

On the second point, these bodies, combined with the IPT, provide sufficient oversight of the programme to ensure its legality. Accordingly, GCHQ had, in principle, acted lawfully (or would be, hypothetically). Prism and Tempora take us to the bleeding edge of intelligence gathering in the information age, and it is highly debatable whether Article 8 permits the gathering of ‘Big Data’ for storage in vast databases. This will no doubt be tested in the separate challenge to Tempora currently before the ECtHR in Strasbourg.

Especially troubling is the use of closed hearings resulting in judgments that do not tell the whole story. British judges may well rigorously scrutinise the work of the security services, which may well be entirely candid in the evidence they present behind closed doors. We have no idea. But we note the recent abuse of RIPA by police to hack the phone records of journalists and the tendency of those tasked with scrutinising the security services to suddenly change their tune when presented with classified information.

The latter point helps explain the muted public reaction to Tempora. Who cares about GCHQ collecting your Whatsapp messages that they will probably never read when national security is at stake? The public is alarmed by the prospect of ‘lone wolf’ terrorist attacks on British soil, particularly if and when disaffected Britons, currently fighting for IS, return. Bluntly speaking, news of Charlie Hebdo brought crowds out onto the streets. News of Tempora did not.

Secret judicial processes and mass surveillance are an affront to the idea of open justice in a free society. They are also an indictment of a society that has been unable to culturally confront home-grown Islamic extremism, leaving a vacuum filled by the authoritarian application of state power. In the aftermath of Charlie Hebdo, this is changing. In the meantime, we will be forced to endure laws that undermine the very values we claim to fight for.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madlanga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

The Supreme Court of Canada Affirms Privacy as Anonymity
By Sinziana Gutiu | 5th July 2014

This is a critical time for privacy on the Internet. Private entities, from the global, all-knowing Google to a local Internet Service Provider (ISP), retain sensitive and private information about their users. In Canada, privacy advocates are concerned about Bill C-13, the “Cyberbullying Act” and Bill S-4, the Digital Privacy Act, which are currently before Parliament and which can have serious privacy implications for Canadians. The Supreme Court of Canada’s landmark decision in R v. Spencer 2014 SCC 43, which affirms anonymity as a key component of the right to privacy, comes at a much-needed time.

Mr. Spencer accessed and stored child pornography by way of the free peer-to-peer file-sharing program LimeWire. By using publicly available software, the Saskatoon Police Service was able to obtain the Internet Protocol address of the computer but needed more information in order to identify the individual user. Police investigators made a written “law enforcement request” for the subscriber information pursuant to s.7(3)(c.1)(ii) of the Canadian Personal Information Protection and Electronic Documents Act (PIPEDA) to Shaw (the ISP), who complied with the request and released the name, address and telephone number of the customer using the IP address. The police used this information to obtain a search warrant, search Mr. Spencer’s home and seize his computer, which contained hundreds of child pornography images.
The Supreme Court of Canada was faced with a number of questions, including whether, in the circumstances, the police conduct violated Mr. Spencer’s s.8 Charter right to privacy.

The Court looked at the subject matter of the search, the nature of the privacy interest triggered by the search, and whether Mr. Spencer had a reasonable expectation of privacy in the personal information disclosed by Shaw. The Court found that Mr. Spencer’s name, address and telephone number did not simply provide the information of someone who had a contractual relationship with Shaw, but rather, linked information about the identity of an internet subscriber to a particular internet usage, which could reveal intimate details of the lifestyle and personal choices of an individual.

In assessing the nature of the privacy interest, the Court recognized three understandings of informational privacy: privacy as secrecy (e.g., confidentiality of medical information provided by patients), privacy as control (the ability to choose what happens with one’s personal information), and privacy as anonymity (where information provided can be disseminated, but without disclosing the identity of its source).

Deciding whether Mr. Spencer had a reasonable expectation of privacy required the Court to look at the provisions of PIPEDA, the federal legislation that creates a general prohibition on the disclosure of personal information without consent. Section 7(3)(c.1)(ii) contains an exception to the requirement for consent when a government institution, for the purpose of law enforcement, makes a request that identifies “its lawful authority to obtain the information.”

The Court found that it is reasonable for an internet user to expect that a simple request by police would not amount to lawful authority, would not trigger an obligation to disclose personal information and would not defeat PIPEDA’s general prohibition on the disclosure of personal information without consent. The requirement for lawful authority meant that the police could ask Shaw for information but, without a warrant, had no legal authority to compel Shaw to comply with their request.

In conclusion, the Court determined that the police conduct amounted to a “search,” triggering Mr. Spencer’s s.8 Charter right to privacy and that the search was conducted without lawful authority, but the evidence of the electronic files containing child pornography could not be excluded from the record because of the serious nature of Mr. Spencer’s crime, and excluding the evidence would undermine societal interests and put the administration of justice into disrepute.

The decision is a victory for privacy rights. It confirms that Internet users have a reasonable expectation of privacy in their online activities and that anonymity is a critical component of informational privacy. It also clarifies that where privacy statutes require “lawful authority,” organizations are empowered to deny warrantless investigative requests and prioritize their customers’ privacy interests. In an increasingly public internet space, the decision affirms that individuals have the right to preserve their freedom from identification and surveillance.

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There was a disproportionate interference with the right to respect for private life and with the right to the protection of personal data, enshrined in Articles 7 and 8 of the Charter of Fundamental Rights of the European Union respectively.

Based on Article 114 TFEU, Directive 2006/24 lays down an obligation on providers of publicly available electronic communications services or of public communications networks to retain certain data generated or processed by them to make it available for the investigation, detection and prosecution of serious crime, as defined by each Member State in its national law. This Directive applies to all traffic and location data and to related data necessary to identify the subscriber or registered user. Member states had to ensure that service providers retained data concerning fixed network telephones, mobile telephones, Internet access, Internet e-mail and Internet telephones, which are necessary to identify the source, destination, date, time, duration and type of communication, as well as the users' communication equipment and its location, for up to two years. This data could only be provided to the competent national authorities in accordance with the procedures and conditions laid down by national law.

Having established that there was an interference with Articles 7 and 8 of the Charter (pars. 32-37) and that that interference satisfied an objective of general interest insofar as it ‘contribute[s] to the fight against serious crime’ (pars. 41-44), the Court turned its attention to the thorny issue of whether the interference was proportionate. In view of the nature of the rights at issue and the extent and seriousness of the interference with those rights, the Court held that ‘the EU legislature’s discretion is reduced, with the result that review of that discretion should be strict’ (paras. 47-48).

The Court noted, first, that the Directive covered all traffic data concerning all means of electronic communication and all subscribers and registered users, thereby entailing ‘an interference with the fundamental rights of practically the entire European population’ (para. 56). In this connection, it further noted that the Directive did not require any relationship between the data retained and a threat to public security (paras. 58-59).

Secondly, it pointed out that the Directive did not contain any substantive or procedural conditions for access to the data retained by competent national authorities, nor for their subsequent use (paras. 60-62).

Thirdly, the Court noted that no distinction was made on the basis of the potential usefulness of the data retained for attaining the objective pursued or according to the persons concerned (paras. 63-64).

In view of all the above, the Court held that ‘Directive 2006/24 does not lay down clear and precise rules governing the extent of the interference with the fundamental rights enshrined in Articles 7 and 8 of the Charter,’ thereby entailing ‘a wide-ranging and particularly serious interference with those fundamental rights’ (para. 65). The Court further held that ‘Directive 2006/24 does not provide for sufficient safeguards, as required by Article 8 of the Charter, to ensure effective protection of the data retained against the risk of abuse and against any unlawful access and use of that data’ (paras. 66-68).

In view of all these considerations, the Court concluded that the EU legislature had breached the principle of proportionality (para. 69) and ruled the Directive invalid.

From the standpoint of fundamental rights, an academic lawyer would readily notice and welcome the high intensity of review applied and the detailed reasoning provided by the Court in this case. Judicial review could have hardly been more searching. Furthermore, from the standpoint of the EU's competence, respect for fundamental rights, as interpreted by the Court, might sometimes require the Union legislator to harmonise rules in a more detailed manner to limit interference with Charter rights to what is strictly necessary for the attainment of the objective pursued. This presents an interesting juxtaposition between prescribed competence limits and the need to adequately protect fundamental rights when the existence of Union competence is established.

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One May Not Retain Personal Data Forever: The Judgment in Google Spain
By Menelaos Markakis | 29th May 2014

The Court of Justice of the European Union recently held in Google Spain that an individual may, in some cases, request that Google take down personal information from its search results.

The dispute in the main proceedings concerned a decision by the Spanish Data Protection Agency, ordering Google to remove personal data relating to Mr Costeja González from its search results. These concerned an announcement of a real-estate auction connected with the recovery of social security debts, which had appeared on a Spanish newspaper's website upon order of the Ministry of Labour and Social Affairs to attract as many bidders as possible. The announcement was made in 1998, and the attachment proceedings had been fully resolved.
Having established that Directive 95/46 on the protection of individuals with regard to the processing of personal data applies to search engines (paras. 21-41), the Court ruled that the processing of personal data at issue in the main proceedings fell within its territorial scope, even though Google Inc. has its seat in the United States. Relying on the wording of the Directive and on its objective of ‘ensuring effective and complete protection of the fundamental rights and freedoms of natural persons,’ the Court ruled that the establishment of a Spanish subsidiary (Google Spain) with the purpose of selling advertising space on Google to Spanish clients sufficed to bring the processing within the territorial scope of the Directive (paras. 45-60).

In the absence of any other legitimate ground for the processing of these data, Google had to establish that it was ‘necessary for the purposes of the legitimate interests pursued by the controller or by the third party or parties to whom the data are disclosed, except where such interests are overridden by the interests [or] fundamental rights and freedoms of the data subject’ (Article 7(f) Directive). In this connection, the Court noted that the processing of personal data by a search engine ‘is liable to affect significantly the fundamental rights to privacy and to the protection of personal data’ (Articles 7 and 8 of the Charter of Fundamental Rights of the European Union), in that it ‘enables any internet user to obtain … a structured overview of the information relating to that individual that can be found on the internet … and … to establish a more or less detailed profile of him’ (para. 80). It was held that, due to the potential seriousness of that interference, it could not be justified by economic interests (para. 81).

Moreover, a ‘fair balance’ should be sought between the legitimate interest of Internet users in having access to that information, and the fundamental rights of the data subject (para. 81). Whilst the data subject’s rights would override, ‘as a general rule,’ the interest of Internet users, that balance may depend on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information. This interest could vary according to the role played by the data subject in public life (para. 81). Interpreting the data subject’s rights in light of the fundamental rights to privacy and to the protection of personal data, the Court held that he or she ‘may … request that the information in question no longer be made available to the general public by its inclusion in such a list of results’ (para. 97).

Two points are of particular importance. First, the territorial scope of EU data protection legislation has been ruled to be particularly broad. This development is to be welcomed from a data protection perspective. Second, similarly to the data retention case, the Court appears very protective of the right to respect for private life and the right to the protection of personal data. The impugned data had been lawfully processed by the newspaper and were, above all, true. However, an individual may still, in some cases, request that such information be ‘consigned to oblivion,’ without having to establish that such processing ‘causes prejudice’ to him or her (para. 96) or to first request that the original website take it down (paras. 82-88). This seminal judgment marks another step towards the creation of a fully-fledged EU Charter jurisprudence.

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Will Australia Learn from the EU’s Mistakes on Data Retention?
By Fiona de Londras | 9th August 2014

Police officers, anti-terrorism officials and politicians all tell us that we need data retention laws, especially in a time of increased technological sophistication. This week, George Brandis, the Attorney General for Australia, announced that Australia will this year join the states with data retention laws, requiring all telecoms providers to retain metadata for two years.

This decision is striking in the light of recent decisions by EU and national courts finding such laws to be disproportionately intrusive on individual rights. Until April of this year, the EU’s Data Retention Directive required data retention for between 6 and 24 months in all member states. The proposal for data retention laws had bubbled under the surface of EU politics for some years, but it was not until the London and Madrid bombings that it secured sufficient political support, and it was introduced in 2006. It was, however, controversial right from the start, with civil society being highly critical of its ‘catch all’ approach to retention, the discretion it left to national states in terms of implementation and the very long retention periods in some EU member states.

In April 2014, the CJEU struck this law down on the basis that it interfered disproportionately in the rights of those within the EU; while data retention was introduced for legitimate security purposes, the Directive simply went too far. In this, the Court was echoing the findings of a number of national courts across the EU, which had also expressed dissatisfaction with the Directive. The concerns raised by the Court in that case offer cautionary tales for Australia at this time.

Importantly, the Court expressly recognised that the data retention model in the Directive—and the model to be introduced in Australia—constitutes blanket surveillance. Once this law is introduced, the data of every single one of the 23 million Australians who use telecommunications devices would be retained and could then be accessed by the government. This is so whether one has ever done anything to arouse suspicion or not; simply using a phone or the Internet will be enough for one’s data to be retained. This is problematic in itself but also makes clear the importance of ensuring that the state can only access this information for good faith serious criminal investigations with a court order, where a sound case for access has been made out.

The proposed retention period of two years is extremely long in light of available evidence about when data is usually accessed by states. Across the EU, the majority of requests for access to this data took place within six months of its retention. Why, then, is a two-year retention period being proposed? Have there been cases where the security services and police needed, and could not secure, access to such data as long as two years after the communication in question? And will this be the retention period for everyone, or will people with criminal records (for example) have their data retained for longer than people who have never come to the attention of the state? These questions are fundamental to the proportionality of the law itself.

Metadata can help to make states more secure; however, the mass collection of such data can also make citizens less secure. Telecommunications companies are not necessarily fully equipped to secure the data it holds from accidental release or, indeed, from malicious attacks by hackers and criminal entities. Furthermore, metadata can reveal deeply personal details about our individual lives. Australian politicians and civil society must ask themselves whether, in a country without a comprehensive bill of constitutional rights, this is a step they are prepared to take.

Governments are notoriously reluctant to provide hard facts to back up their plans for new anti-terrorism laws. However, when a government proposes introducing a law the likes of which have been struck down on human rights grounds in numerous states, evidence of its necessity must be demanded. So too must the government prove that the law being proposed contains safeguards showing Australia has learned from the mistakes of other countries. Blanket surveillance hands enormous power to the government. It must show it is prepared to exercise it only within strictly drawn limits.

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Respect for Private Life under Article 8 and Covert Filming – Süderman v Sweden
By Melina Padron | 7th January 2014

The Grand Chamber of the European Court of Human Rights (“GC”) found Sweden had breached its obligations under Article 8 of the European Convention on Human Rights (“ECHR”) for failing to have in place laws protecting the applicant from being filmed without consent.

The case was brought by Ms Süderman, who in 2002 (at age 14) discovered that her stepfather had hidden a recording camera in the bathroom in an attempt to film her naked. The video was quickly destroyed by her mother.

The stepfather was prosecuted for sexual molestation but acquitted by the Swedish appeal court on the grounds that the conduct
lacked an essential element, namely the intention that Ms Söderman find out about the recording. The appeal court noted that Swedish law did not prohibit the filming of individuals without their consent and further, that in theory, his conduct may have constituted attempted child pornography. However, it declined to consider this given the absence of such charges.

Ms Söderman brought a civil claim for compensation in conjunction with the criminal prosecution, but as a result of the acquittal, this claim was dismissed.

She made an application under Article 8 (right to respect for private life) of the ECHR arguing Sweden had failed to provide her with civil or criminal remedies against her stepfather’s secret filming, violating her personal integrity.

The Chamber decided by a majority that there had not been a breach of Article 8.

It found that although the crime of sexual molestation did not cover such acts as the one carried out by the stepfather, the crime of attempted child pornography, in theory, could. It also found that other civil remedies were available to Ms Söderman and that it was her choice to join her civil claim to the criminal prosecution. None of these factors amounted to “significant flaws” in Swedish legislation.

The GC overturned the decision of the Chamber and held that there had been a breach of Article 8.

Following the case of M.C. v Bulgaria (Application No 39272/98), the GC noted that the “significant flaws” test had been incorrectly applied by the Chamber as it relates to the assessment of shortcomings in investigations. Instead, the correct test involved considering the adequacy of Sweden’s legal framework in providing protection to Ms Söderman against the acts of her stepfather.

The GC heard submissions on whether the secret filming in this case could have constituted attempted child pornography and was not convinced it could have. It found that this provision did not intend to criminalise all pictures of naked children.

The GC considered that the provision on sexual molestation, which in 2002 contained the requirement of intention or recklessness on the part of the offender that the victim find out, had not protected Ms Söderman against the lack of respect for her private life.

Finally, no other provision of Swedish criminal law at the time could have protected her rights under Article 8.

As regards her claim for compensation, the GC was not persuaded that she would have succeeded in pursuing other civil claims said to have been available to her.

This gap in protection left by the absence of both criminal and civil remedies in this case led the GC to conclude that Swedish law in force at the time did not adequately protect Ms Söderman’s Article 8 rights. However, the Court recognised that the State had a margin of appreciation on how to afford such protection, and it needed not be solely by the enacting of criminal offences.

The facts of this case are very specific, but this judgment is nevertheless of wide implication. It is bound to send chills up and down the spines of the UK press, especially the tabloids. Whilst it can provide further momentum for those who advocate stronger ethical
The most obvious significance of this treaty for human rights law is the requirement at the heart of the treaty for exporting states to make certain assessments relating to the likely consequences of an arms transfer before authorising it to go ahead. This requirement includes a duty to consider the likelihood that the arms in question could be used to commit or facilitate a serious violation of international humanitarian or human rights law. If the exporting State identifies an ‘overriding’ risk of such consequences, it must not authorise the export. However, before refusing, it must consider whether there are measures that could be undertaken to mitigate the risk, including ‘jointly developed programmes’ involving the importing and exporting States. This would include programmes aimed at promoting and protecting human rights in the recipient State.

When assessing the likely human rights impact of the proposed transfer, States parties must also take into account the risk that the arms will be used to commit or facilitate serious acts of gender-based violence or violence against women and children. Whilst it is difficult to see what this adds to the above provisions in strict legal terms, it acknowledges the egregious harm that small arms in particular inflict upon women and children, particularly in conflict zones, and the targeting of women and children as a ‘military’ strategy. In this way the ATT reflects a growing global recognition that violence against women is a distinct and profoundly troubling human rights issue that must be specifically addressed. Ratification and implementation of the ATT has been cited as a desirable measure by CEDAW in its General Recommendation No. 30 on women in conflict prevention, conflict and post-conflict situations.
A US drone strike killed two suspected militants in northwest Pakistan last Saturday, in an attack which marks the seventh this past week, and the sixteenth this year. These latest strikes interrupt a six-month hiatus in drone strikes in Pakistan and follow the first discussion at the Human Rights Council of the use of armed drones. In an unprecedented step, HRC resolution 25/22 called for an expert panel to discuss the use of armed drones, and while some member states objected, there is increasing consensus around the decision to ‘officially’ consider drone use as a human rights issue.

The panel was held on 22 September 2014 and opened with a series of interventions objecting to HRC as an inappropriate forum to discuss drones. The Council should not – according to the UK delegation – take up weapons “on a thematic basis,” or – according to the US delegation – address the “law of armed conflict.” Drone use, however, is very much a “Council issue,” as was demonstrated in discussions about the legal frameworks applicable to the use of armed drones, the human rights impact of drone strikes and the human rights requirement for transparency and accountability.

The Legal Framework Applicable to Armed Drones

Even in times of armed conflict, a state’s international humanitarian law obligations are always complemented by its international human rights law obligations. Flavia Pansieri, Deputy High Commissioner for Human Rights, reflected that “discussions of armed drones have largely focused on the question of whether their use of compatible with the rules and principles of international humanitarian law, which is applicable in situations of active hostilities in the context of an armed conflict. But international human rights law applies at all times, including in situations of armed conflict.”

Many legal questions have arisen when a person participates directly in hostilities from the territory of a non-belligerent State, or moves into such territory after taking part in an ongoing armed conflict (such has been the case with Pakistan). The ICRC delegate at the panel noted in this scenario international humanitarian law (IHL) would not be applicable, meaning that such an individual should not be considered a lawful target under IHL, as “advising otherwise would mean that the whole world is potentially a battlefield and that a person moving around the globe could be lawfully targeted under IHL in the territories of States not party to any armed conflict.”

The Human Rights Impact of Drone Strikes

Drone strikes have a grave and widespread impact on the lives of individuals and their communities and have compromised the enjoyment of individual rights, including rights to peaceful assembly, education, health, freedom of association and freedom of religion, among others. In addition to loss of life, armed drones create an atmosphere of fear in affected communities, and this fear interrupts education, religious and cultural practices and the enjoyment of basic human rights and fundamental freedoms.

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Iraq Needs Incisive Measures from the UN Security Council
By Michele Porcelluzzi | 30th August 2014

The current US military operations in Northern Iraq, resisting troops belonging to the Islamic State of Iraq and Syria (ISIS), may be evaluated as compatible with international law. However, despite this, UN Security Council measures are still needed.

According to Article 2 (4) of the UN Charter and customary international law, the use of force is legal only in cases of self-defense, or on the authorization of the Security Council acting under Chapter VII, with respect to threats to peace, breaches of the peace, and acts of aggression.

In recent weeks, ISIS troops have attacked cities in the North of Iraq, committing gross violations of human rights. In order to repel them, the US is currently carrying out targeted military operations. These have a dual aim: to protect American people and facilities inside of Iraq and to help save thousands of Iraqi civilians, such as those besieged on Mount Sinjar. Further, the EU is providing military support to beleaguered Kurds in northern Iraq.
In a letter issued on August 8, President Obama justified these military operations to Congress as “necessary to protect American personnel in Iraq by stopping the current advance on Erbil by [ISIS].” However, the existence of the right to use force in order to protect nationals is undoubtedly controversial.

Further, the military operations in north Iraq are not classifiable as “humanitarian intervention.” Typically, a humanitarian intervention, like that in Kosovo in 1999, is conducted by a State or a group of States against another State, which is committing gross violations of its citizens’ human rights. At present, the legality of a “humanitarian intervention” is one of the most controversial issues in international law. In this case, ISIS – and not the Republic of Iraq – is committing atrocities against Iraqi citizens. Therefore, this cannot a “humanitarian intervention” as currently understood.

The self-defense argument is the most persuasive. ISIS is attacking a sovereign State, the Republic of Iraq. According to article 51 of the UN Charter, the State has an inherent right of individual or collective self defense. In compliance with international customary law, there are three requirements that have to be satisfied: first, there must be an actual or imminent armed attack against a State; second, the attack must attain a minimum scale; finally, the armed response must be necessary and proportionate. In this case, the US military operations in Iraqi territory have been authorized by the local government in order to combat the illegal aggression of ISIS and to prevent gross violations of human rights. It is therefore clearly a case of collective self defense allowed by the UN Charter, though the use of force must, of course, be both proportionate to repel the attack and not excessive.

On August 15, the UN Security Council adopted Resolution 2170 (2014), which condemned “gross, systematic and widespread abuse” of human rights by ISIS and Al-Nusra Front. Further, it called on Member States to take national measures to prevent fighters from travelling from their territories to join the groups, and it named individuals related to ISIS who would be subject to travel restrictions, asset freezes and other measures targeted at Al-Qaida affiliates.

However, this Resolution appears insufficient to stop the attacks of ISIS, as it establishes sanctions only for six individuals and does not authorize the use of force. In contrast, the US military intervention is incisive – as a result of this intervention, Iraqi troops have retaken Mosul dam from ISIS militants – but unilateral. It is only the United States that decides when and where bombarding occurs, with no plan agreed with any other State or International Organizations.

Iraq now needs incisive and multilateral measures, established by the UN, capable of stopping ISIS. The lives of thousands of Iraqi citizens are at risk. Can the world stand by and watch?

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Dignifying the Most Vulnerable ‘In’ and ‘Through’ Security Council Resolution 2139
By Sarah M. Field | 19th March 2014

Conflict – perhaps more than anything else – illuminates our shared vulnerability to hurt and harm of unimaginable form and depth. The legal protection of rights was born of such suffered injustice, as articulated in the UN Charter. To an extent then, it may be viewed as juristic response to our embodied vulnerability. Therein lies one of the enduring paradoxes of international human rights law; the most vulnerable frequently have the least access to justice.

Consider the hundreds of thousands besieged in Syria: over a thousand days since the conflict began, rights violations cascade-violations of the rights to life, freedom from hunger and of movement layer upon violations of the rights to legal remedies, to take part in public affairs and the rights to freedom of expression and association, amongst others. And, the sole possibility of redress is conditional on one of the most precarious of all political processes – decision-making towards peace agreements.

Geneva II presented hope. The Communiqués of Geneva I and the London 11 both required ensuring the right to humanitarian assistance as a part of more substantive negotiations. As the two-staged process stalled to a fracturing halt on the 15th February, hope transferred to the Security Council. The decision to adopt Resolution 2139 – demanding the parties to the conflict respect and ensure respect for applicable international law – presented a breakthrough. However, the imperative for the resolution, the process of its adoption and the substance of the resolution, including the missing (negotiated-out) provisions, illuminates, under harsh light, the inadequacies of international law. Of course, the multifarious instruments of international human rights and humanitarian law include vital – dignity affirming – devices. If the Syrian State had implemented the past recommendations of the Human Rights Committee, might the conflict have been averted? And if the parties to the conflict had heeded the guidance of the guardian of international humanitarian law, might the hurt and harm have been lessened? Of course, the operative word here is – if.

The international community steps into the breach ‘in’ and ‘through’ the Charter bodies. For the people living under siege, these are also vital spaces for their rights to be seized, shaped and expressed. General and Syria-specific recommendations and decisions...
provide a basis for advocacy and redress now and into the future, including, for example, the decision by the Human Rights Council to establish an Independent International Commission of Inquiry.

However, the form and process of decision-making (including rules) also may be viewed as concurrently creating vulnerability in the form of exclusion. For example, whereas the Syrian State was represented within the Security Council, those made vulnerable by the forces of the State were unrepresented; they were dependent on the international community seizing, shaping and expressing their rights. This is also a process by (in)action: whether or not their rights are secured is dependent on political agreement about the facts and the response – specifically among the five veto-wielding members.

The vulnerability effects of the latter are obvious and graphically illustrated by the resolution: the demands on the parties to the conflict to respect and ensure respect for international law are not matched by decisions to secure the right to humanitarian assistance of the people of Syria. However the form and process also create vulnerability in a more subtle way by subverting the position of the right-holder – reframing bearers of rights to objects of international protection. De jure, the people under siege remain ‘equal in dignity and rights.’ De facto (without representation and effective remedies), they are dependent on a precarious collision of legal, political and principled imperatives for redress. Viewed in this way, neither the process nor the outcomes dignify the people of Syria.

Though deeply inadequate, the resolution is nonetheless a vital dignity-affirming agreement. First, it states that international law matters, rights matter. Second, it illumines the potentialities of law into the future, connecting violations to international crimes, establishing a monitoring and reporting mechanism and expressing an intention for further action upon non-compliance. Third, it re-affirms the import of a rights-based political solution: the full participation of the people of Syria ‘in’ and ‘through’ the peace trajectory. Countering the inaction, then, is the fact of agreement by a divided Security Council. Geneva II stalled; the right to veto looms over future Security Council decisions with foreboding bleakness; the question of how to secure the rights of the most vulnerable remains – reducing us all.

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Introduction
By Dr Alecia Johns

The global political landscape now includes more electoral democracies than ever before. Notwithstanding this broad-based increase in popular sovereignty, as the posts in this chapter outline, there are still many issues which continue to affect the extent and quality of democracy enjoyed by citizens in a number of jurisdictions.

First, even though the right to vote represents the bedrock of democratic governance, its status in a number of polities remains less than fundamental. For example, in India, the world’s largest democracy, the right has been deemed by the Supreme Court as merely ‘statutory’ as opposed to ‘constitutional’. Vishwajith Sada highlights the extent to which this categorisation inadequately safeguards the right to vote and is out of touch with India’s international obligations (‘The Not-so-paramount Right to Vote’ p 116). Similarly, Ruvi Ziegler laments the extent to which the UK Supreme Court has provided ‘flimsy protection’ of the right to vote within the UK constitutional order (‘The worrisome casual approach to (dis)enfranchisement’ p 117).

The classification and status given to the right to vote is not only of symbolic significance; it also colours the way in which decisions are made regarding who should receive this right and bases on which it may be denied. One recurring issue in this area is that of prisoner disenfranchisement. Ziegler explores this issue within the context of the UK’s non-compliance with the 2005 European Court of Human Right’s decision in Hirst (no. 2) [2005] ECHR 681, which held that the country’s blanket disenfranchisement of all prisoners violated Article 3, Protocol 1 of the European Convention on Human Rights (‘UK v ECtHR: The Prisoner Voting Saga Continues’ p 118). Prisoner disenfranchisement also remains a central problem in the United States where over six million Americans are currently disqualified. In the US, these laws disproportionately affect African Americans, with some states denying the right to vote even after the individual has completed his sentence.

Another central issue pertaining to voting rights turns on the extent to which states often predicate political participation on some degree of nexus to the state. This is often expressed in the form of citizenship and/or residency requirements for voting and standing for office. However, with increased levels of migration in a globalised and inter-connected world, some of these traditional indices of ‘closeness’ have been increasingly challenged. For example, Nikolaos Sitaropoulos stridently argues that non-citizen migrants who are permanently residing in EU member states, ought to be given the rights to vote and stand for office at the local level (‘Migrants’ Voting at the Local Level is a Human Right’ p 119). Quite similarly, Ziegler challenges the legitimacy of residency requirements, which serve to exclude UK expatriates who may still have a stake in local elections, in his post on the qualifications for voting in the Scottish independence referendum (‘Where Have all the Expatriates Gone?’ p 120).

While the formal conferment of the right to vote remains a necessary ingredient for successful democracy, it is by no means sufficient for that end. A great deal also turns on the substantive fairness of the electoral process, as well as the more general societal commitment to transparency, equality and the rule of law. As one anonymous post from Papua New Guinea highlights, corruption and unchecked power can serve to greatly undermine the free expression of the people’s will (‘Is an Obsession with Foreign Investment Eroding Democracy in Papua New Guinea?’ p 125). The second half of the posts within this chapter address these important substantive issues as they have arisen in a number of jurisdictions.

Dan Chirwa’s post illustrates the extent to which an inefficient and politically partial electoral commission greatly compromised the fairness of Malawi’s 2014 general elections (‘Malawi’s Electoral Fiasco’ p 121). Therefore, even if the right to vote is widely conferred to most citizens (and permanent residents), this means little if the rules and procedures surrounding the electoral process result in manifest unfairness. Rules regarding the participation of candidates and the funding of their campaigns are of particular significance in this sphere. Oliver Windridge highlights the landmark decision of the African Court of Human and People’s Rights where the Court held that Tanzania’s prohibition of independent candidacies was in breach of various articles of the African Charter of Human and People’s Rights, the International Covenant on Civil and Political Rights and the Universal Declaration of Human Rights (‘A Watershed Case for African Human Rights: Mtikila and others v Tanzania’ p 122). The Court highlighted the importance of the rights to freely associate and to participate in government, without having to belong to any given political party.

Rules regarding campaign finance also affect the citizen’s ability to meaningfully seek political office and to engage in public debate. In my post within this chapter, I briefly explored the extent to which the abolition of certain contribution limits in the United States, could serve to deepen existing inequalities in influence enjoyed by wealthy donors (‘McCutcheon v FEC: The Harvest of Pernicious Seeds’ p 123). Claire Overman and Matthew Tyler then go on to take a closer look at the potential effects of removing these contribution limits in their post on the US Supreme Court’s decision in McCutcheon v Federal Election Commission 572 U.S. __(2014) (‘Contribution Caps and the First Amendment’ p 124).

As noted above, in order for democracy to be truly meaningful, it must be taken to include not only thin conceptions of ‘procedural democracy’ but also matters of ‘substantive democracy’ such as civil liberties, equality and a commitment to the rule of law. In conceiving of ‘democratic rights’ it is therefore important to note that these go well beyond the rights to vote and stand for office. As the posts within this chapter have highlighted, the full enjoyment of democracy is invariably intertwined with issues concerning migrants’ rights, criminal justice, associational rights and freedom of expression. This brief collection therefore serves to shed light
on some of the recent developments in these areas, with a wide jurisdictional coverage inclusive of the United States, the United Kingdom, India, Malawi, Tanzania, the EU and Papua New Guinea.

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Democracy & Voting
Chapter 6

The Not-so-Paramount Right to Vote
By Vishwajith Sadananda | 14th March 2014

Last week, the Election Commission of India announced the time frame for the general elections to constitute the 16th Lok Sabha ('House of the People') of the Parliament of India. Widely considered to be an election comprising of the highest number of voters in the world, it follows that the nature of the right to vote in India should be analyzed.

Back in September 2013, while dealing with the question of whether a citizen is entitled to cast a negative vote in an election, thereby rejecting the candidates in contention, the Supreme Court also dealt with the status of the right to vote ('the NOTA judgment'). The Court sought to clarify the confusion caused by observations it made in its previous decisions in Kuldip Nayar (Writ Petition (civil) 217 of 2004), Association for Democratic Reforms (Civil Appeal No.7178 OF 2001) and PUCL (Writ Petition (civil) 196 of 2001) wherein, apparently, different positions were taken as to the nature of the right to vote. While reconciling the aforementioned decisions, it held that the right to elect is sourced from the Representation of the People Act, 1951 and hence merely a statutory right, neither a fundamental nor constitutional right.

The initial confusion might have arisen from the fact that though all three decisions follow a similar trajectory in understanding the meaning of elections and voting, a holistic reading of the three decisions led to a nebulous understanding as to the nature of the right to vote itself. In Association for Democratic Reforms, in the context of the right of the voter to get information on the background of the candidate, the Court was of the opinion that the voter's right to speech and expression would include casting of votes (Para. 46). Similarly, in PUCL, the Court was of the opinion that the freedom of voting by expressing a preference for a candidate is nothing but a freedom of expressing oneself (Para. 95). Even in the NOTA judgment, the Court equated the act of voting with freedom of speech and expression (Para. 21).

However, the Supreme Court, in the NOTA judgment, added that though the right to vote per se is a pure and simple statutory right (following Kuldip Nayar [Para. 151.1]), the way this right is exercised, being a form of expression, would fall within the ambit of the fundamental right to speech and expression. It is this distinction that highlights the Court's logical inconsistency. By holding that the way the right is exercised is a fundamental right, while claiming that the right per se is a statutory one, the Court has essentially made a fundamental right dependent on a statutory one. To take it to its logical conclusion, the expression of political will would then depend not on higher constitutional principles, but the whims and fancies of the legislature vested with the power of amending
and repealing statutes.

Furthermore, the Court, in all these decisions, has consistently ignored the purport of Articles 325 and 326 of the Indian Constitution. Both these provisions deal with the right to vote and the necessary qualifications required to vote in the elections for either the Lok Sabha or the State Assemblies. Therefore, even if, for the sake of argument, a case for voting being considered a fundamental right cannot be countenanced, there is definitely merit in claiming that the right to vote, at the least, is a constitutional right.

India is a party to both the UDHR as well as the ICCPR, instruments that highlight the paramount nature of the right to vote for proper and effective actualization of one’s socio-political voice. However, by refusing to hold that voting per se is a fundamental right, and instead holding that the way an apparent statutory right is exercised is a fundamental right, the Court has not only shown highly questionable logic, but more importantly, has also lost an opportunity to raise the right to vote to a higher pedestal, in tune with India’s constitutional as well international obligations. Considering India’s disparate socio-political voices as well as the fact that universal suffrage in India is not truly universal, it is absolutely pertinent that the right to vote, an important tool to hold together the edifice of democracy, is solidified and given a higher protection.

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The Worrisome Casual Approach to (Dis)enfranchisement
By Reuven (Ruvi) Ziegler | 24th February 2014


Lord Phillips highlighted the UK’s 8.5 year breach of its binding international obligation to abide by the Grand Chamber’s Hirst (No. 2) [2005] ECHR 681 judgment and amend section 3 of the Representation of the People Act 1983, which currently disenfranchises all serving prisoners in all types of elections, including this May’s European Parliament and local elections.

Reflecting on his tenure as a member of the Joint Committee on the Draft Voting Eligibility (Prisoners) Bill, Lord Phillips contended that, in the course of deliberations, it became apparent (to him) that ‘the question of whether some prisoners should get to vote was of comparatively minor significance.’ Describing the Committee’s recommendations to amend UK legislation so that all prisoners serving sentences of 12 months or fewer should be entitled to vote, he opined: ‘would it really be earth shaking to give some short term prisoners the right to vote, which most of them would not bother to exercise?’ This blog addresses this seemingly casual approach to (dis)enfranchisement.

In a speech delivered at Georgetown University the day before Lord Phillips’ lecture, U.S. Attorney General Eric Holder stressed the fundamentality of the right to vote in the light of vestiges of racially motivated disenfranchisement legislation in some American states. Holder’s call was echoed by a New York Times editorial, which noted that over six million Americans, more than two percent of the otherwise eligible voting population, is currently disenfranchised. Fortunately, the number of disenfranchised persons in England and Wales is far lower (65,963 on 30 September 2013); nonetheless, ‘the vote of each and every citizen is a badge of dignity and of personhood.’

The fundamental nature of an individual prisoner’s right to vote does not depend on its exercise by all right-holders; its significance lies in the knowledge and awareness that one is a right-holder. Indeed, the claim that prisoners are not interested in voting is reminiscent of arguments made in the nineteenth century against the extension of suffrage to women. In Sauvé (no. 2) v Canada 2002 SCC 68, the Canadian Supreme Court quashed legislation disenfranchising prisoners serving sentences of over two years. While justifying disenfranchisement, Justice Gonthier’s powerful dissent acknowledged that ‘being temporarily disenfranchised is clearly a significant measure, which is part of the reason why it carries such great symbolic weight.’

Even if serving prisoners are indeed less likely to vote than the general population (data from Israel suggests otherwise), prisoners will have probably developed their disinterest or disillusionment with the political system before entering prison. Rather than lead one to dismiss the significance of voting for prisoners, low turnout should mobilise political elites to assume responsibility for furthering civic engagement. Indeed, ‘the right to elect legislators in a free and unimpaired fashion is a bedrock of the political system.’

The Scottish Independence Referendum (Franchise) Act gives rise to several franchise-based legal challenges, inter alia, the exclusion in section 3 of all serving prisoners from participation in the 18 September 2014 referendum. The provision has recently withstood judicial review in the Court of Session Outer House’s judgment in Moohan, Gibson, and Gillon [2013] CSOH 199. Lord
Glennie’s judgment relied, *inter alia*, on the ECtHR ruling in McLean and Cole v. UK (Application nos.12626/13 and 2522/12), which interpreted Article 3 of Protocol 1 to the ECHR (A3PI) to be inapplicable to the exclusion of UK prisoners from participation in the ‘Alternative Vote’ referendum. A3PI refers to ‘free elections…which will ensure the free expression of the opinion of the people in the choice of the legislature.’

Notably, however, the ECtHR has never considered a claim about denial of voting rights in an independence referendum, which arguably concerns ‘the choice of the legislature’ in the sense of which parliament is to enjoy sovereign authority in Scotland in the post-referendum era. If and when the Court of Session judgment reaches Strasbourg, a ‘living instrument’ interpretation of A3P1 may plausibly ensue.

Elsewhere, I have made the case for letting prisoners vote; I have also lamented the flimsy protection that the recent Supreme Court judgment in Chester and McGeoch [2013] UKSC 63 provides for the right to vote in the UK constitutional order. It is high time to start taking the right to vote seriously.

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**UK vs ECtHR: The Prisoner Voting Saga Continues**

*By Reuven (Ruvi) Ziegler | 14th August 2014*

On 12 August 2014, the Fourth Section Chamber of the European Court of Human Rights in Firth and others [2014] ECHR 874 held yet again the UK’s blanket disenfranchisement of prisoners, in accordance with Section 3 of the Representation of the People Act 1983, to be a violation of Article 3 of the First Protocol to the ECHR.

The case concerned prisoners in Scottish prisons denied the right to vote in elections to the European Parliament (EP) held on 4 June 2009. Indeed, this outcome was to be expected in view of the Grand Chamber judgments in Hirst (No. 2) [2005] ECHR 681 and Scoppola (no. 3) [2012] ECHR 868. Notably, in EP elections, the UK’s disenfranchisement practices also affect the right to vote of EU nationals serving sentences in UK prisons (an issue which deserves jurisprudential attention).

I have previously critiqued the casual approach to the disenfranchisement of prisoners in the UK, manifested in the scant public
attention given to the rejection of a legal challenge to the blanket disenfranchisement of prisoners in the 18 September Scottish Independence Referendum (by the outer and inner houses of the Scottish Court of Session and, on 24 July 2014, by the UK Supreme Court, with reasons to be given at a later date). In this instance, the Scottish government has not even attempted to justify the disenfranchisement of all prisoners, including prisoners that will be released before 24 March 2016, when an independent Scotland is to be declared following a YES vote (according to the ‘Scotland’s Future’ White Paper). Instead, the government is relying on a literal (rather than purposive) reading of the A3P1 stipulation, which refers to the ‘choice of the legislature’ to rule out its applicability to referendums (see the explanatory notes of the Scottish Independence Referendum (Franchise) Act). This is both disappointing and revealing because it manifests an unprincipled approach to determining the franchise for the most fundamental of choices in an independence referendum.

The UK Supreme Court in Chester and McGeoch [2013] UKSC 63 refrained from addressing the ramifications of the UK’s continuous breach of the rule of law. In contrast, the Parliamentary Committee on the Draft Voting Eligibility (Prisoners) Bill, unequivocally asserted in its 18 December 2013 report, at [229], that ‘the United Kingdom is under a binding international law obligation to comply with the Hirst judgment…it would be completely unprecedented for any state that has ratified the European Convention on Human Rights to enact legislation in defiance of a binding ruling of the European Court of Human Rights.’

Since no amending legislation was included in the June 2014 Queen’s speech, it now looks highly likely that the May 2015 general election will be held in continuous and defiant breach of the UK’s international obligations. While, as the parliamentary committee submitted, the UK has a ‘long tradition of respect for and attachment to the rule of law,’ the almost nine-year refusal to comply with the 2005 ruling of the Grand Chamber in Hirst (no. 2) has tarnished its record. It is a sad testament to the current standing of the ECHR in the UK public discourse that none of the main political parties (nor indeed any of the main figures in any party) seem to mind.

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**Migrants’ Voting at the Local Level is a Human Right**

By Nikolaos Sitaropoulos | 12th July 2014

According to a recent study by the Bundeszentrale fur politische Bildung, only 15 of the 28 EU member states allow categories of resident migrants (‘third country nationals’) to participate in local elections. Four of these states only allow migrants to vote but not to stand for election. The results of the latest European Parliament elections, which were characterised by a boost of extreme, anti-migrant parties, have made it even more difficult to publicly debate issues relating to migrants’ human rights, including voting, even if these rights are enshrined in European law.

States’ reluctance to recognise migrants’ voting rights in their host countries is exemplified in the 1990 International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families, which only provides for migrants’ rights to participate in public affairs, vote and run for office in their state of origin.

However, the Convention on the Participation of Foreigners in Public Life at Local Level, drawn up in the Council of Europe in 1992, expressly provides for, *inter alia*, migrants’ rights to vote and stand for election at the local level. The basic prerequisite set by Article 6 of this treaty is migrants’ lawful and habitual residence in the host state for five years preceding the election. To date, this treaty, in force since 1997, has been ratified by only eight member states (though five other states have signed but not ratified it). It is difficult to comprehend European states’ cautionousness *vis-à-vis* this convention, given that it is a flexible treaty. For example, it allows contracting states to be bound, if they wish, by only the first of the three chapters (entitled, ‘ Freedoms of expression, assembly and association’), which corresponds to classic freedoms that were long ago enshrined in international and European human rights treaties. Also, two of the contracting states, Albania and Italy, have opted out of the third chapter, which concerns the rights to vote and to stand for election in local authority elections.

Migrants’ effective integration into European host states is not really possible if they are excluded from the most important process of a state’s democracy, that is, elections. A recent report on migrants’ integration in Europe by the Parliamentary Assembly of the Council of Europe (PACE) actually stressed that ‘most immigrants want to vote, want more diversity in politics and would be ready to vote to back this up.’ In a subsequent resolution, PACE reiterated its earlier recommendation that member states ‘ensure that migrants have a say in the democratic process by granting them, in particular, the right to vote at [the] local level.’

Despite these debates and recommendations, migrants’ rights to vote and to stand for election, at least at the local level, have not yet attained a high profile and recognition in many European states. Arguably, this is due to the fact that established methods of evaluating migrant integration in Europe tend to place democratic participation behind participation in the labour market and education in terms of importance.

In a 2011 communication by the European Commission on the European agenda for the integration of non-EU nationals, migrants’
democratic participation appeared as a completely peripheral issue. This position is also reflected in developments in certain European states. In Malta, for example, the country’s president reportedly stated last month that allowing migrants to vote in local elections would be ‘jumping the gun.’ In Greece, in February 2013, the supreme administrative court found unconstitutional a 2010 law that had provided, *inter alia*, for migrants’ rights to vote and stand for election at the local level.

Political and institutional actors in Europe should do their utmost to counter the current trend of viewing migrants who live, work and contribute to the development of ageing European societies as a threat. Migrants’ voting rights are not just an indicator of but also a prerequisite to their integration therein. Without voting rights, migrants cannot influence and fully participate in the democratic societies in which they live nor effectively exercise their other human rights.

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**Where Have All The Expatriates Gone?**

**By Reuven (Ruvi) Ziegler | 11th March 2014**

Participants in the 18 September 2014 Scottish independence referendum will be asked whether Scotland should become an independent country. The UK Chancellor of the Exchequer’s pronouncement that Scotland will not be able to keep the pound, and the EU Commission President’s observation that ‘it would be extremely difficult, if not impossible’ for Scotland to join the EU (following Crawford and Boyle’s paper on, *inter alia*, the likely conditions for Scottish accession) have received great attention. Conversely, the question who will and should participate in the referendum, determined by the Scottish Independence Referendum (Franchise) Act, has hardly been debated. I have previously considered some challenges arising from the decision to impose a blanket ban on electoral participation of prisoners in Scottish jails. Here, I wish to draw attention to the disenfranchisement of United Kingdom citizens, formerly resident in Scotland, pursuant to Section 2 of the Act.

All democratic states set eligibility criteria for participation in elections of their institutions of government. Broadly speaking, these criteria fall into two categories: individual competence and membership of the state’s political community. The latter criterion is manifested by ubiquitous exclusion of non-citizen residents from national (and often also sub- or supra-national) elections. Concurrently, some states impose residency requirements, which disqualify their expatriates during part or all of their period of
absence.

Elsewhere, I critiqued the reasoning employed by the European Court of Human Rights in its Shindler [2013] ECHR 423 judgment regarding the disenfranchisement of UK expatriates from participation in UK parliamentary elections after fifteen years of residence abroad, pursuant to the Representation of the People Act 1985. Crucially, eligibility for participation in the forthcoming referendum does not mirror these criteria but, rather, those employed to determine eligibility for local government elections. Hence, Scottish expatriates who have left Scotland in the last fifteen years are eligible to vote in UK parliamentary elections wherever they currently reside, but will be excluded from the referendum.

The ECtHR jurisprudence and the EU Commission’s recommendation address, in the main, electoral processes that affect the governance of an existing political unit to which expatriates qua citizens retain the internationally recognised right to return. In such circumstances, it is assumed that most of the state’s citizens reside therein and that the geographical boundaries of the state are not affected. Independence referenda are different: they may lead to the creation of successor State(s), with ensuing ramifications for citizenship-contingent privileges of expatriates. I argue that putative ab initio citizens of a putative State (pursuant to internationally accepted criteria) are significant stakeholders in a transformative referendum that may bring that putative State into being. Hence, the rationales for external voting in routine electoral processes apply fortiori to a transformative referendum in light of its fundamental nature and its long-term impact.

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Malawi’s Electoral Fiasco
By Danwood M Chirwa | 20th July 2014

Close to midnight on 30 May 2014, Prof Peter Mutharika was declared the winner of the fifth presidential elections in Malawi since 1994. This electoral contest was unusual in Malawi’s democratic era in at least two respects.

Firstly, the Electoral Commission took eight days and had to wait until the last hour of that period to declare the results. Secondly, the declaration of the winner turned on the outcome of a court application pertaining to the interpretation of the power of the Electoral Commission to audit the electoral results and, if necessary, to recount the votes, and the power of the courts to allow the declaration of the winner to be made, subject to the outcome of that court application. Crucially, eligibility for participation in the forthcoming referendum does not mirror these criteria but, rather, those employed to determine eligibility for local government elections. Hence, Scottish expatriates who have left Scotland in the last fifteen years are eligible to vote in UK parliamentary elections wherever they currently reside, but will be excluded from the referendum.

The growing constitutional crisis could be decomposed into the following: firstly, it related to the integrity of the electoral process in so far as respect for whatever outcome the commission would sanction was concerned; secondly, the crisis related to the absence of constitutional and other legal mechanisms regulating the conduct of government in the context of disputed electoral results, as the Malawian Constitution has very tenuous transitional provisions.

The consolidated court case took a day to be heard, and the judge was left with a few hours to consider the arguments. The ruling focussed on two issues. The first was whether the Electoral Commission had the power to embark on a vote recounting exercise before declaring the final national results and without obtaining a court order. There was little to be said for the view that the Commission did not have such power, given the broad constitutional powers that the Commission is entrusted with.

The holding that the Electoral Commission had the power to conduct a vote recount suggested that, on the second issue, the court would decide in favour of an extension of time. It did not. Here, the issue was whether the Commission could, by a court order, be allowed more time than the eight-day statutory period to consider all complaints pertaining to the results of the elections. The court held that the electoral statute was clear that the results had to be declared within that period.
In one sense, this judgment came across as a mockery to justice, as it appeared to give with one hand and take with another. It held that the Commission had the power to conduct a vote recount but also that the Commission could not conduct the vote recount because time had run out. Assuming that the results were fraudulent, the court was, in effect, allowing a statute to be used as an instrument for perpetrating fraud.

The fundamental question the judge eschewed was whether a statutory provision which imposes a duty on a constitutional body to fulfill its constitutional duties within a period that is unreasonable in a particular set of circumstances could be considered to be valid. There is merit in requiring the Commission to declare results within eight days. However, it is not impossible to imagine a situation in which the Commission may justifiably need more time to ensure free and fair elections.

Overall, this electoral fiasco underlined the importance of an independent, impartial and competent commission. To date, the appointment process for the commissioners of the Commission remains highly political, dominated by the incumbent president. More significantly, this disputed electoral process regrettably obscured the fundamental gains that Malawi has made since embracing democracy in 1994.

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A Watershed Case for African Human Rights: Mtikila and Others v. Tanzania
By Oliver Windridge | 17th February 2015

Mtikila and others v. Tanzania was a watershed case heard before the African Court on Human and Peoples’ Rights. The Court rendered its judgment on 14 June 2013, with a further ruling on reparations on 13 June 2014. The case concerns three applicants: two Tanzanian NGOs, the Tanganyika Law Society and Human Rights Centre and Reverend Christopher R. Mtikila. The Applicant’s cases were broadly the same—that current Tanzanian election laws prohibiting independent candidates from running for public office are in breach of various articles of the African Charter on Human and Peoples’ Rights, the International Convention of Civil and Political Rights, the Universal Declaration on Human Rights and the rule of law.

The case is a watershed moment for African human rights, as it is the first case considered by the Court on its merits. It is also significant that the Court found in favour of the applicants. In addition, the Court’s subsequent Reparations Ruling was the first time the Court considered the issue of compensation and reparations.

In 1992, amendments to the Tanzanian Constitution required all candidates for presidential, parliamentary and local government elections to be members of and sponsored by a political party, effectively banning independent candidates from running for public office. Mtikila spent the next 18 years pursuing cases through the Tanzanian domestic courts to have the ban overturned.

On 14 June 2013, the Court delivered the Judgement and unanimously found that Tanzania’s ban on independent candidates had violated Mtikila’s Article 10 (free association) and Article 13(1) (right to participate freely in government) Charter rights and, by majority, that the same ban violated Mtikila’s Article 2 (right to enjoy rights in the Charter) and Article 3 (equality before the law) Charter rights. In the Judgement, recalling its power to make orders of compensation or reparation, the Court noted that Mtikila had reserved his right to elaborate on his claim for compensation or reparation but had not done so. The Court therefore did not make a finding on the issue but did call upon Mtikila, if he so wished, to exercise this right.

On 13 June 2014, following written submissions from Mtikila and Tanzania, the Court considered the issue of compensation and costs and rendered its Reparations Ruling. The Court found that despite having the power to make orders for compensation or reparation, Mtikila had failed to provide adequate evidence of the losses and expenses claimed and therefore rejected his claims.

The Court also noted that Tanzania continued to maintain that the Judgement was wrong. The Court expressed its ‘concern’ at this position, especially since it was compounded by Tanzania’s failure to report to the Court on the measures it is taking to comply with the Judgement. The Court ordered Tanzania to report to the Court within six months from the date of the ruling on the implementation of the Judgment (around January 2015).

This case contains many firsts – it is the first case to be considered on its merits, the first finding in favour of the applicant and the first matter to consider the issue of compensation and reparations. Achievement in this case must be put in context of the restrictive rules on direct access for individuals and NGOs to the Court, meaning only seven African Union member states currently allow their citizens direct access to the Court.

However, through this case the Court demonstrated that once a case is admissible, the Court is willing to consider it in detail and is unafraid to find in favour of the applicant. The Court’s clear position on its power to award damages should be also be welcomed. Of most concern going forward in the new era of compliance is Tanzania’s apparent unwillingness to acknowledge its requirement
to comply with the Judgement. Clearly, in view of Tanzania’s responses so far, the issue of compliance should be of serious concern to the Court, and changes to Tanzania’s electoral laws appear a while off.

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McCutcheon v FEC: The Harvest of Pernicious Seeds
By Alecia Johns | 20th April 2014

The US Supreme Court very recently handed down its decision in McCutcheon v Federal Election Commission 572 U.S. ___ (2014), undoubtedly the most important campaign finance ruling since its controversial 2010 judgment in Citizens United 58 U. S. ____ (2010).

In a 5-4 decision, the Court ruled to abolish aggregate contribution limits, which restricted how much an individual donor may contribute in total to all candidates or committees within a given election cycle. However, the Court left intact base limits, which restrict the amount a donor may contribute to a single candidate or committee. Therefore, provided that contributions to single candidates and committees respect the requisite base limits, an individual donor may potentially contribute millions in aggregate support for a particular party.

Not surprisingly, many have decried the decision as exacerbating the already unequal influence and power possessed by wealthy donors. In a powerful dissent, Breyer J lamented that the decision ‘eviscerates our Nation’s campaign finance laws, leaving a remnant incapable of dealing with the grave problems of democratic legitimacy that those laws were intended to resolve.’
On April 2, 2014, the United States Supreme Court struck down aggregate campaign contribution limits in federal elections in their ruling on McCutcheon v. Federal Election Commission. While it will likely be years before the ramifications of McCutcheon are fully understood, the media’s reaction to the decision has generally been negative, with predictions of increased influence by the wealthiest Americans – especially in favour of business-friendly Republican candidates. Moreover, many have found the Court’s association of political free speech with spending to be troubling, especially as it could potentially undermine the influence of the least well-off.

There are, however, reasons to believe that the decision’s marginal effect – the changes in the political landscape from the status quo—may be less drastic than they have been portrayed. In 2012, only 646 people reached the federal aggregate spending cap. And, in any case, it is possible that political donors with money to spare may choose to use super political action committees, rather than direct contributions to gain political influence. These super PACs are organizations that can collect and spend unlimited amounts of money from individuals but which must operate completely independently from political campaigns.

It has been suggested that the judgment’s ruling that levelling political influence did not fall within the ambit of the First Amendment is troubling, as it effectively marginalises the right to political expression of the less well-off. However, UC San Diego political scientist Gary Jacobson has argued that because political incumbents already have much of the visibility that money buys, spending and contribution caps may actually hurt challengers, who get much higher marginal returns on campaign spending.

The plurality’s highly contested decision is partly grounded on two premises, drawn in great measure from the Court’s previous rulings in Buckley v Valeo 424 U.S. 1 (1976) and Citizens United. As long as these two premises remain intact, future attempts to uphold campaign finance regulations will prove equally Sisyphean in nature:

[1] The relative equalisation of political speech and influence among citizens is not deemed to be a legitimate state interest

In Buckley the Court held that: ‘The concept that the government may restrict the speech of some elements in our society in order to enhance the relative voice of others is wholly foreign to the First Amendment.’ Following Buckley, the Court in McCutcheon noted that Congress may not seek to regulate contributions in an attempt to restrict the political participation of some in order to enhance the relative influence of others. The only legitimate state interest was therefore held to be the prevention of corruption.

By deeming any equalisation rationale an impermissible state objective, the Court ignores the First Amendment rights of those whose voices are drowned out in the wake of the undue influence exerted by wealthy donors. The dissent sought to take the rights of such persons into consideration by arguing, quite circuitously, that the state interest in anti-corruption is itself rooted in the First Amendment, given the public interest in collective speech. This argument was, of course, rejected by the plurality. The fact is, until the equalisation of influence is explicitly deemed a legitimate state interest, the Court remains at liberty to further the First Amendment interests of wealthy donors, without taking into account the corresponding, diminishing effect on the political influence of those less fortunate.

[2] The narrow definition of corruption as limited to quid pro quo and excluding general influence and access

In limiting the State’s objective to the prevention of corruption, following Citizens United, the Court further circumscribed the kind of corruption which the State may seek to prevent: quid pro quo agreements, defined as the exchange of an official act for money. The Court held that this is to be distinguished from the permissible ‘general influence and access’ which a donor may receive on account of his contribution. The Court therefore held that the main mischief to be prevented was the contribution of large amounts of money to individual candidates. On the other hand, the broad-based support of a political party, by giving within the base limit to a large number of its candidates, was remarkably held not to possess a potentially corrupting influence. The dissent objected to this narrow definition of corruption, noting that in the Court’s previous rulings (with the exception of Citizens United), corruption was understood not only as quid pro quo agreements, but also as undue influence on an officeholder’s judgement.

The plurality’s untenably narrow definition of corruption paves the way for future successful challenges to the constitutionality of other campaign finance regulations. This is underscored when one considers the Court’s holding that, in drawing the admittedly vague line between general influence and quid pro quo, the Court will ‘err on the side of protecting political speech rather than suppressing it.’ However, the irony is that, in its rejection of the equalisation rationale, the Court’s approach to ‘protecting political speech,’ invariably suppresses the voices of those unable to match the financial resources of wealthy, well-connected donors.

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that the re-election rate of incumbents in the U.S. House and Senate in 2012 was 90%, despite abysmally low approval ratings, opening up challengers to a broader national base of big-spending political contributors may allow for more electoral competition. The argument that spending caps necessarily ensure that an individual’s First Amendment right is protected, regardless of means, is not therefore self-evident.

Further, the participation of Americans in political spending has already been very narrow – only one half of one per cent of Americans gave more than $200 to political campaigns in 2012. In this regard, it is clear that, whilst campaign contributions per se constitute the type of activity that falls within the scope of the First Amendment, they are not necessarily a core example of the type of expression that this right normally engages. That being said, candidates’ donor bases appear to comprise an array of Americans, and campaign donations do follow certain political lines: in 2012, 57% of President Obama’s donors contributed less than $200, although only 24% of Mitt Romney’s donors contributed under $200. It would therefore be wrong to suggest that there is no connection whatsoever between political influence and means.

Finally, many potential big donors may chose to stay out of the political arena to avoid jeopardizing their business with public discontent. Indeed, the recent ouster of Brendan Eich, the CEO of Mozilla who came under public scrutiny after his contribution to an anti-same sex marriage campaign surfaced, may scare away big would-be political donors. This again serves to undermine the argument that the Court’s decision in McCutcheon will have the negative effect on First Amendment rights, as some fear.

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Is An Obsession With Foreign Investment Eroding Democracy in Papua New Guinea?  
By M P | 29th September 2014

Often described as ‘an island of gold floating on a sea of oil,’ Papua New Guinea (PNG) is one of the top ten resource-dependent economies in the world. But robust economic growth rates have not led to any decrease in PNG’s poverty rate over the last 20 years.

Although the benefits of economic growth are not reaching the vast majority of the population, Prime Minister Peter O’Neill has repeatedly cited the need to create a stable political environment to boost foreign investor confidence. Since ascending to power, O’Neill has endlessly promoted ‘political stability’ to justify a daunting array of anti-democratic measures which cynics perceive as a thinly veiled attempt to prolong his own leadership.
First, he has amended the Constitution to extend the period, during which any vote of no confidence against the Prime Minister is prohibited, from 30 months previously to now a total of 43 months out of the 60-month (five-year) term between elections. A second change has been to reduce the minimum number of parliamentary sitting days to just 40 days per year and to increase the number of MPs who must sponsor any motion for a vote of no confidence. A further proposed constitutional amendment would require that, in the event of a vote of no confidence against a Prime Minister, the subsequent Prime Minister must be a member of the same political party as the outgoing Prime Minister.

Further measures include sacking the Treasurer and Attorney-General, as well as Ministers for Petroleum & Resources, Higher Education and Industrial Relations, all within the last three months. Although such action could be perceived as undermining political stability, the reason given in each case was the need for stability. In the case of the Treasurer, his sacking followed his opposition to a proposed loan that would raise national debt to a level he felt to be irresponsibly high. In response, O’Neill appointed himself Acting Treasurer and unilaterally approved the loan. The Ombudsman has since referred O’Neill to the Public Prosecutor for alleged misconduct in bypassing proper parliamentary processes for approving the loan. The Attorney-General was sacked for opposing O’Neill’s proposed Constitutional amendment relating to votes of no confidence. Just days earlier, O’Neill had commended the Attorney-General as one of the best-performing Ministers.

More worryingly, O’Neill has also disbanded the anti-corruption Task Force he had himself set up. This occurred immediately after it recommended police action on evidence that O’Neill had improperly authorised approximately USD30 million in payments to a law firm. O’Neill further sacked the Police Commissioner and Deputy Commissioner who signed the arrest warrant against him. The National Court recently granted a permanent stay against the disbandment of the Task Force.

O’Neill’s fixation on political stability is all the more curious given that he took power in controversial circumstances, which precipitated a constitutional crisis. The Supreme Court ruled in re Reference to Constitution section 19(1) by East Sepik Provincial Executive [2011] PGSC 41 that O’Neill had failed to meet constitutional requirements when claiming the Prime Ministership. In response to this decision, O’Neill imperilled the separation of powers by increasing parliamentary power to remove members of the judiciary. However, he repealed this legislation after a public outcry and the resolution of the constitutional crisis at the 2012 election.

In any event, O’Neill now enjoys unprecedented support on the floor of Parliament, and the Opposition retains only three seats out of the total 111. Several former Opposition members have crossed the floor since the election, stating that it was necessary because O’Neill made it difficult for opposition MPs to access funds for their constituencies.

By punishing any traces of dissent within the ranks of government, dismissing senior officers exercising independent oversight of prime ministerial action and removing any effective voice of Opposition on the floor of Parliament, O’Neill has seriously curtailed the public’s right to information, which could properly influence their vote. In the words of Article 25 of the International Covenant on Civil and Political Rights, each of these measures appears to be an ‘unreasonable restriction’ on the right to ‘free expression of the will of the electors.’ Adhering to human rights principles of transparency and accountability is particularly crucial in a young and fragile democracy seeking to strengthen the rule of law.

Foreign investors have responded to this ongoing corrosion of democracy by continuing to call for ‘stability’ – no doubt music to the Prime Minister’s ears, but a setback for the country’s adherence to human rights.

The author of this piece wishes to remain anonymous, but can be contacted through our site (oxfordhumanrightshub@law.ox.ac.uk)
Chapter 7

Expression, Association & Assembly
Introduction
By Gautam Bhatia

The numerous political and social upheavals that have convulsed the globe over the last few years have ensured that the freedom of speech, assembly and association remain at the forefront of international legal and political discourse. Speech, assembly, and association may be compendiously clubbed together under the title of "expressive rights" – i.e., they are rights (or freedoms) that enable broad and egalitarian participation within the democratic public sphere. They are often found next to each other in bills of rights (for instance, the Constitution of India), or even as part of the same right (the United States Bill of Rights) and – as Courts have often recognised – they often speak to the same concerns.

A number of contributions that make up this chapter focus on State repression of expressive rights. In their pieces, spanning four continents, Mathias Cheung (‘The Violence Must Stop – Abuse of Police Power in Hong Kong’s Democracy Protests p 133), Ezequiel Vasquez-Ger (‘Why the US Needs a Magnitsky Act for Venezuela’ p 134), Malu Halasa (‘Repression of Nonviolent Activism in Syria’ p 139), and Solomon Tekle Abegaz (‘The Right to Peaceful Protest in Ethiopia’ p 136) highlight the curtailment of protests and demonstrations by executive power, ostensibly in violation of constitutional norms. Juana Kweitel (‘Right to Protest: Developments at the Inter-American and UN Systems’, p 137) adds a transnational gloss to this, reflecting upon efforts at Inter-American and UN forums to strengthen (or even reinvent) the legal mechanisms for effectively protecting the right to protest.

Often, however, it is not police action, but the law itself, enacted by a competent legislature, which adversely affects expressive rights. This gives constitutional courts an opportunity to examine the question from the perspective of their respective bill of rights. A good example is Prof. Judy Fudge’s piece (‘Constitutional Protection for the Right to Strike in Canada’ p 131). It highlights the Canadian Supreme Court’s understanding of the interconnections between free speech and freedom of association as expressive rights. The Canadian Supreme Court struck down a provincial legislation that designated all public sector workers as “essential”, and prohibited them from striking, by holding the law to be too broad and invasive of expressive rights. Mathias Cheung’s post (‘A Human Rights Defence of Hong Kong’s Occupy Central’ p 132) extends the analysis to Hong Kong’s “occupy” demonstrations, by questioning the invocation of public order to stifle free assembly. Andrew Wheelhouse (‘Constitutional Court of South Africa: Blunting the Impact of Electoral Law on the Freedom of Expression’, p 140) does the same in the context of the South African Constitutional Court’s refusal to apply ordinary defamation law in order to curtail election speech. What unites both these pieces is an argument for rigorous judicial review, and the placement of a high burden upon the government to justify how its restrictions are necessary and proportionate in order to achieve its stated goals (protection of public health and safety in the Canadian case, that of public order in Hong Kong, and that of free and fair elections in South Africa).

While expressive and associational rights can be curtailed by direct restrictions, they are equally undermined by indirect ones as well. Heather McRobie’s piece (‘Egyptian Human Rights Groups Face Difficult Choices after Al-Sisi’s Ultimatum’ p 138) discusses the Mubarak-era law in Egypt that requires NGOs to “register” with the government. While registration does not quell speech by prohibition or penal sanction, it opens up (potentially) politically unpopular organizations to surveillance and scrutiny, and undoubtedly casts a chilling effect upon their functioning. The link between expressive rights, anonymity and the chilling effect has been recognised worldwide (the American Supreme Court decision in NAACP vs Alabama 357 U.S. 449 (1958) remains the locus classicus).

In examining the scope of State law that might curtail expressive rights, it is also important to note that in divided, stratified and unequal societies, the unfettered exercise of expressive rights by some might lead to the inability of others to exercise their rights to speech, assembly and association. This is the focus of Dr Liz Curran’s piece (‘Racial Discrimination Act and Free Speech – Carte Blanche or Fair and Reasonable?’ p 141), which chronicles moves by the present Australian government to narrow and limit the hate speech provisions in Australia’s Racial Discrimination Act. Curran highlights a basic concern – that racist speech can serve to endorse and entrench existing inequalities, and the result will be that ‘People will hide away, people will cover, people will be afraid. Is this not also a threat to the free speech?’

With protests against repressive regimes showing no signs of abating, ongoing clashes between proponents of unfettered speech and advocates of multicultural respect, and continuing issues surrounding global labour in light of the worldwide recession, it is clear that issues pertaining to expressive rights will continue to be on the table in the times to come.

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In a momentous decision, released on 30 January 2015, the Supreme Court of Canada ruled that the right to strike is protected by the Canadian Charter of Rights and Freedom's guarantee of freedom of association.

Writing for the majority (5:2), Justice Abella asserted:

'The conclusion that the right to strike is an essential part of a meaningful collective bargaining process in our system of labour relations is supported by history, by jurisprudence, and by Canada's international obligations... The right to strike is not merely derivative of collective bargaining, it is an indispensable component of that right. It seems to me to be the time to give this conclusion constitutional benediction' (Para. 3).

Justice Abella began her decision by referring to the Court's jurisprudence since the Alberta Reference, where a majority of the Court held that neither the right to collective bargaining nor to strike were protected by the Charter, remarking that 'clearly the arc bends increasingly towards workplace justice' (Para. 1).

The crucial issue in Saskatchewan Federation of Labour v. Saskatchewan 2015 SCC 4 was the constitutionality of provincial legislation that unilaterally designated public sector workers as essential and prohibited them from striking. The legislation did not provide a process for an independent tribunal to review whether or not the work performed by the designated workers was, in fact, necessary to prevent danger to life, health and safety. Nor did it provide a meaningful process for resolving collective bargaining disputes that went to impasse.

Following closely on the heals of Mounted Police Association of Ontario v. Canada 2015 SCC 1, in which the Supreme Court of Canada made it clear that the test of whether or not the constitutionally protected right to bargain collectively had been violated was substantial interference, the question the Court had to resolve in the Saskatchewan case was whether or not strike action was an essential part of collective bargaining. Deploying the approach adopted in Health Services 2007 SCC 27, which established that collective bargaining was protected under freedom of association in the Charter, the Court referred to the history of labour relations and collective bargaining law in Canada, canvassed the gamut of international and comparative law regarding the status of the right to strike and reviewed its own jurisprudence to conclude that the right to strike was a constitutionally protected component of collective bargaining. Recognising that protecting health and safety was a legitimate and pressing objective, Justice Abella nonetheless held that the provincial government had failed to establish that the means that it adopted to achieve this goal were ‘minimally impairing’ of the constitutional right.
More remarkable than the actual result were Justice Abella’s sources, which ranged from the European Court of Human Right’s path-breaking decision in Demir and Baykara [2008] ECHR 1345, through international human and labour rights, to Anatole France’s ‘aphoristic fallacy’: ‘The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread’ (Para. 56). Unlike Fraser 2011 SCC 20, where the majority responded point by point to the opinion of Justice Rothstein, on this occasion Justice Abella did not let his cantankerous dissent, which extolled the deferential approach taken in the Alberta Reference and alluded to the employer-led controversy over the status of the right to strike at the International Labour Organization, set the agenda.

Public sector workers in Canada have obtained some protection from the Charter against governments trampling on their rights. However, the same cannot be said for their counterparts in the private sector. In the Saskatchewan case, the Court held that changes to collective bargaining legislation that made it more difficult for employees to secure a certified bargaining representative, which is what gives workers in Canada the right to resort to protected strike activity, did ‘not substantially interfere with the freedom to freely create or join association’ (Para. 100). What the constitutional protection of the right to strike means for workers, such as the agricultural workers in Fraser, who have no statutory protection from dismissal or retaliation when they exercise their ‘right’ to strike, is not clear. As yet, the most vulnerable workers have found the Charter’s protection elusive.

Professor Judy Fudge, France-ILO Chair/Fellow, IEA Nantes, Professor, Kent Law School

A Human Rights Defence of Hong Kong’s Occupy Central
By Mathias Cheung | 16th August 2014

With the Hong Kong Government set on introducing an undemocratic electoral reform in the coming months, Professor Benny Tai has proposed to organise a peaceful assembly, ‘Occupy Central with Love and Peace.’ It has been condemned and denounced as an affront to the rule of law.

The background to this saga is the Hong Kong Government’s proposed electoral reforms. With the imprimatur of Beijing in 2007, the Government now plans to introduce universal suffrage for Chief Executive (head of government) elections, but candidates must be nominated by an accountable nominating committee. This carries the imminent risk that ‘undesirable’ candidates will be screened out, contrary to Article 26 of the Basic Law and Article 25 of the International Covenant on Civil and Political Rights (‘ICCPR’). Occupy Central is a response to this undemocratic move, but is seen as an act of civil disobedience due to possible contravention of the Public Order Ordinance.

The Government has gone all out in undermining the legitimacy of Occupy Central. Chief Executive C. Y. Leung has threatened to crack down on the movement, condemning it as illegal. The Secretary for Security has claimed that the movement violates the ‘rule of law,’ as have officials in Beijing.

Simultaneously, a pro-Beijing Alliance has launched an anti-Occupy Central signature campaign in the name of rejecting ‘violent’ and ‘unlawful’ activities. With Government officials and police officers signing, it seeks to turn this into a game of numbers, claiming an overwhelming 1.1 million signatures in opposition to the 792,808 supporters of Occupy’s earlier civil referendum.

The argument based on the rule of law is seriously under-assessed. The rule of law is not the sum total of the effective application of all enacted rules of law. If so, Nazi Germany would be a paradigm. There is a difference between the Government’s ‘rule by law’ mentality and genuine ‘rule of law.’ A democratic society upholds ‘the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens… basic human rights’ (see Lord Griffiths in R v Horseferry Road Magistrates Court, ex parte Bennett [1993] UKHL 10).

In the case of Occupy Central, the rule of law entails the protection of the constitutional freedom of expression and peaceful assembly enshrined in Article 27 of the Basic Law from Government crackdown. Article 11 of the Basic Law provides that ‘no law enacted by the legislature…shall contravene [the Basic Law].’ If subordinate statutory law (like the Public Order Ordinance) poses an absolute bar on Occupy Central and prompts the arrest of participants, it disproportionately restricts the overriding constitutional right to peaceful assembly. The enforcement action may be unlawful and unconstitutional.

Therefore, it is by no means clear that the statutory restrictions are lawful, nor that a peaceful assembly in public space (without any trespass on private property) on the pivotal issue of democracy, is by definition unlawful. Indeed, the Human Rights Committee’s Concluding Observations in 2013 expressed concerns over ‘the application in practice of certain terms contained in the Public Order Ordinance, inter alia, “disorder in public places” or “unlawful assembly,” which may facilitate excessive restriction to Articles 19 and 21 of the ICCPR, and “the increasing number of arrests of, and prosecutions against, demonstrators.”’

General Comment No. 34 makes it clear that public order ‘may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.’ As the ECtHR put it in Kuznetov v Russia Application no. 10877/04,
‘in a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly.’

The signature campaign will not prevail, for it is precisely when a minority voice is being subdued that the law must step in to protect fundamental rights. The rule of law, properly understood, does not provide an argument against Occupy Central, but one in favour of protecting it to a proportionate extent. The current House of Commons Inquiry into the implementation of the Sino-British Joint Declaration ought to focus on the protection of rights and freedoms in Hong Kong as precipitated by Occupy Central.

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The Violence Must Stop – Abuse of Police Power in Hong Kong’s Democracy Protests

By Mathias Cheung | 30th September 2014

In ruling out genuine choice in all future Chief Executive elections in Hong Kong, the Government has done violence to democracy. Now, the Government is doing violence to peaceful protesters in dispersing them.

In defiance of the undemocratic decision by Beijing on 31 August, pan-democrats have vowed to launch the Occupy Central with Love and Peace movement. Students took to the frontlines last week by organising a classroom boycott that culminated in a peaceful assembly outside the Government Headquarters. Occupy Central officially began as the crowds surged and the police started cracking down on the protesters.

I have written earlier that the rule of law ought to protect such peaceful assemblies. Sadly, as tens of thousands assemble peacefully on the streets of various districts, riot police have been deployed to disperse the crowds violently. They have decided to fight peace with violence by unlawfully employing:

- pepper spray;
- tear gas;
- baton charges; and
- arrest and unreasonable detention without charge.
Appalling scenes and footage of police violence have been spawned across social media. Even the elderly were not spared, being pepper-sprayed at point blank range. Have they forgotten that ‘measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest’ (Austin v UK [2012] ECHR 459 [68])?

The police’s conduct is a blatant violation of international human rights law. The peaceful protesters enjoy the fundamental right to life and right of peaceful assembly, protected by Articles 6 and 21 of the International Covenant of Civil and Political Rights as incorporated by the Basic Law. Article 2 of the UN Code of Conduct for Law Enforcement Officials requires the police to protect human rights, and under Article 3 they ‘may use force only when strictly necessary.’

Unlike the riots of 1967, it is simply unnecessary, disproportionate and unlawful to repeatedly use pepper spray and tear gas to restrict the rights of peaceful, unarmed protesters. Principle 13 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that ‘in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force.’ Indeed, the State has a ‘duty to facilitate peaceful assemblies,’ with ‘a presumption against limitations on assemblies’ (Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns [119]).

As emphasised in Amnesty International’s Understanding Policing at p.131, ‘non-lethal’ riot control devices ‘can result in serious injury and even death.’ The UN Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekagya, has rightly criticised ‘violent means to disperse peaceful protesters,’ as ‘this conduct violates the Government’s responsibility to protect civil society actors.’

The violence must stop. The acquiescence of the international community must also stop. As the Director of Amnesty International Hong Kong rightly pointed out, we are looking at ‘a violation of international law.’ The UN Human Rights Committee must act. Meanwhile, let every police officer know this: ‘obedience to superior orders shall be no defence’ (Principle 26 of the Basic Principles). The real law-breaker is the one who attacks peaceful citizens, and it is in times like these that the law must protect the people from abuse.

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Why the U.S. Needs a Magnitsky Act for Venezuela
By Ezequiel Vázquez-Ger | 29th March 2014

It has been a month since the Venezuelan people took to the streets to protest against the precarious situation in which the country is currently living. According to the UN Human Development Index, the murder rate in the country is the fifth highest in the world; annual inflation rates are currently over 50 percent. Furthermore, Transparency International has ranked Venezuela as the most corrupt country in the region, and Freedom House ranked the country 168th (out of a total of 196) in its 2013 Global Press Freedom Rankings. In its 2014 Human Rights Report, Human Right Watch asserted that the Venezuelan ‘judiciary has largely ceased to function as an independent branch of government.’

What began as peaceful demonstrations led by young students turned into an unmanageable situation, marked by the deaths of at least twenty-four people, the arbitrary detention of hundreds of students, the arrest of one of the opposition leaders, Leopoldo López, and a series of human rights violations of a magnitude never before seen in the country.

The U.S. Government’s response to this situation has been adequate, but it would be improved if the political willingness to implement human rights principle-based actions were in place. Both President Obama and the State Department have condemned what is happening and have urged the Venezuelan government to release every arrested student. But statements are not enough. What the Venezuelan people need from the international community, and especially from the U.S. (where wealthy Venezuelans often spend their time and money), are concrete sanctions. But instead of pursing sanctions that would affect the whole country, such as oil sanctions, the U.S. should start by imposing individually-targeted sanctions against the specific individuals within the government who are responsible for the assassination of protesters, media censorship and human rights violations. The precedent for this kind of sanctions already exists in the form of the ‘Sergei Magnitsky Rule of Law Accountability Act’ (the ‘Magnitsky Act’).

Sergei Magnitsky was a Russian lawyer who was arrested by Russian authorities in 2008 while he was investigating a corruption case. Magnitsky died in prison after being detained and tortured for 358 days. However, his death did not go unpunished. In December 2012, the U.S. Congress passed the Magnitsky Act, a law that required the White House to revoke the visas and freeze the assets of the Russian public officials involved in his death. The premise of the law is that many of the human rights violations occurring in the world involve money, and that money often ends up in bank accounts, properties and businesses in the U.S.

During the last fourteen years, soaring oil prices and a lack of strong institutions in Venezuela led to shockingly high levels of corruption. Many of the Venezuelan officials who have benefited from this corruption are also frequent travellers to the U.S. and
own properties on U.S. soil. Several of Venezuela’s top rulers include people identified as ‘drug kingpins’ by the U.S. Treasury Department. Many other Venezuelan public officials are being investigated by the U.S Justice Department for fraud, money laundering and corruption.

A thorough investigation of the murders and human rights violations that have occurred in Venezuela in recent weeks would likely reveal that many of the military and police officials with direct responsibility for what has happened probably also possess U.S. visas, bank accounts and properties. By targeting these individuals and blocking them from enjoying their illicitly-gained assets, the U.S. would be in a unique position to effectively combat human rights violations in Venezuela.

Fortunately, the U.S. Congress is already promoting these kinds of efforts. At some point over the next few days, the Senate will vote on a bill introduced by Senators Rubio and Menéndez, which, among other things, urges the President to immediately impose targeted sanctions, including visa bans and asset freezes, against individuals involved in planning, facilitating or perpetrating gross human rights violations in Venezuela.

Human rights concerns are universal and should not be limited to the internal affairs of any country. If the U.S. can take steps to prevent the violations in Venezuela from continuing, such as through a Magnitsky-style law, it has a responsibility to act.

Ezequiel Vázquez-Ger is an economist and political analyst based in Washington DC, with expertise in human rights and anti-corruption advocacy campaigns.

The Criminalization of Protests: Repression and Human Rights Abuses in Venezuela
By Manuel Casas | 15th April 2014

In Venezuela, anti-government protests are being brutally repressed; many demonstrators have been jailed, with some believed to have been tortured.

On February 12, 2014, university students opposed to the current government carried out a rally in Caracas. This date was purposely chosen for the rally because February 12th is Youth Day in Venezuela. Youth Day commemorates a battle in the struggle for independence where, due to lack of regular soldiers, university students were forced to join the fray. Even though they were outnumbered, they achieved victory.

The rally – set to finish at the Prosecutor General’s office – sought, amongst other things, the freedom of several students who had
been jailed for protesting in the western Venezuelan state of Táchira. The protesters who attended the rally were repressed with the usual mix of tear gas, rubber bullets and water cannons. This sort of reaction is common in Venezuela. However, what followed is not: members of Sebin, the Venezuelan Intelligence Service, opened fire and killed two people, Juan Montoya, a member of the government’s paramilitary forces, known as colectivos, and Bassil Dacosta, a student.

Since the events of February 12th of this year, the government has de facto criminalized protesting – a right established in the Venezuelan Constitution. The following are the most alarming of the steps the government has taken to do so.

First, protests have been repressed with live ammunition and excessive force, in general, both by official security forces and by paramilitary colectivos. This has resulted in a death toll of 39 and more than 600 injured. Tear gas and water cannons are now considered ‘mild,’ as beatings, seizures and detentions have become customary.

Second, over 2200 protestors have been detained, and there have been several cases of reported abuse and torture of detainees. One detainee claims to have been sodomized with a rifle barrel, and many state that they suffered electric shocks to their testicles or were beaten with batons wrapped in foam (in order to avoid visible bruising).

There are also political prisoners amongst those incarcerated, most notably, Leopoldo López, leader of the Venezuelan opposition party, Voluntad Popular, and democratically-elected mayors Enzo Scarano and Daniel Ceballos (the mayor of San Cristobal, the capital of Táchira State, where the protests began). Furthermore, Maria Corina Machado, a congresswoman, has been stripped of her seat in Congress and threatened with prosecution for ‘partaking in and promoting the violent actions generated by fascist sectors.’ The high politicization of the Venezuelan courts renders the prospects of obtaining justice dim.

Third, there have been severe violations of freedom of expression: NTN24, a Colombian cable channel, was swiftly forced off the air following its extensive coverage of the rally on February 12th (it was the only news outlet with programming available in Venezuela to do so). The government also threatened to expel CNN journalists, cancelling their license, only to reinstate it shortly afterwards. The Journalist’s Union has reported more than 150 cases of attacks against journalists, including physical assaults, detention and theft of equipment, such as cameras, since the February 12th rally.

Fourth, high-ranking government officials have used hate speech. The President, Ministers and state Governors have continually used aggressive and hate-inducing language when referring to protestors, claiming that they are fascists, ‘heirs of Hitler,’ and that they have no love for the motherland. On March 5th, the President called for the colectivos to defend the country, inviting them to ‘put out any flame that arises.’ Previously, Carabobo State Governor Francisco Ameliach tweeted to the colectivos to await the order for the ‘fulminating counter-attack.’ Needless to say, these statements have resulted in the loss of life.

In sum, the high levels of violence used to repress generally peaceful protests, paired with the widespread detention of protestors, demonstrate that the Venezuelan government is attempting to criminalize the right to protest and is committing grave human rights violations in the process.

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The right to peaceful protest in Ethiopia
By Solomon Tekle Abegaz | 25th May 2014

Ethiopia is currently witnessing a wave of peaceful demonstrations from political parties, student groups and others. One such set of demonstrations took place between the 25th and 29th of April. Oromo students at Ambo University of the Oromia Regional State were opposing the ‘Integrated Master Plan of Addis Ababa’ (a plan to expand the city to some parts of the Oromia Regional State).

The dark side of the story is the reaction towards this movement from the ruling party (EPRDF). More than 30 people have been killed during the protests, with several others wounded and incarcerated. It is unacceptable for life to be claimed in this way when people exercise their fundamental rights and freedoms. The demonstrations and the response from the government reveal the need to enforce domestic and international human rights norms applicable to Ethiopia.

Article 30(1) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) guarantees to ‘everyone the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition.’ The only limitation is that the right cannot be used for purposes of defamation or violation of laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity. Furthermore, Ethiopia is a state party to numerous global and regional human rights conventions that guarantee freedom of assembly and expression.
Regarding the accountability of law enforcement officials, the Human Rights Committee urged states to take all necessary measures to prevent any excessive use of force by the police, urging that rules and regulations governing the use of weapons by the police and security forces be in conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated. On the other hand, article 74 of the Criminal Code of Ethiopia 2004 provides for a legal basis on which enforcement officials can be held liable for enforcement of superior orders when such orders constitute a crime 'such as in cases of homicide, arson or any other grave crime against persons, or national security or property, essential public interests or international law.'

In addition, there are judicial and quasi-judicial mechanisms to protect citizens from violation of human rights by enforcement officials. Article 37(1) of the FDRE Constitution guarantees to everyone ‘the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.’ Furthermore, the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 imposes a duty on the Ethiopian Human Rights Commission to undertake investigation, upon complaint or its own initiation, in respect of human rights violations.

Despite the protection of the right to peaceful demonstration and accountability mechanisms for violations, Ethiopian students, members of opposition groups, journalists and others seeking to express their rights to freedom of assembly, expression or association are frequently killed, mistreated or detained arbitrarily. Credible human rights activists and independent human rights reports underscore that Ethiopian security forces used excessive force to disperse peaceful and unarmed demonstrators. This potentially constitutes a blatant violation of human rights laws and norms, which the country is obliged to respect and protect.

A culture of tolerance of different opinions is necessary to prevent such violations of human rights. Security forces should use only non-lethal equipment, rather than firearms, during peaceful protests. The Ethiopian government should assume responsibility for the unlawful conduct of security officers. To strengthen accountability mechanisms, the country should review its legislation in the light of international standards on the use of force by enforcement officers, in particular, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990. It is important that prosecutions be initiated each time security forces kill peaceful demonstrators. Courts, in turn, must play their role in penalising those responsible and awarding damages to victims or their families.

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Right to Protest: Developments at the Inter-American and UN Systems
By Juana Kweitel | 7th May 2014

On Friday, 28 March 2014, there was a thematic hearing about the repression of social protests in Brazil at the Organization of American States (OAS)’s Inter-American Commission on Human Rights (IACHR), and the UN Human Rights Council (HRC) adopted a resolution on the same issue. The IACHR is a non-political body, whereas the HRC is a political one. However, both processes left the impression that human rights mechanisms need to be reinvented.
During the hearing, two hundred cases of police abuse, perpetrated since June 2013 in Brazil, were presented to the IACHR in Washington D.C., including cases of aggression, illegal detention, beatings, mutilations and other rights violations at public protests. Brazilian NGOs decided to approach the IACHR because the Brazilian government refused to engage with them on the issue. These organizations also decided to hold a thematic hearing rather than present an individual case to the IACHR because cases take much longer than is acceptable (e.g. the Brazilian NGO, Conectas, submitted a case in 2009, but it still has not received a response).

Representatives of the Brazilian government focused their statements on three points of little relevance to the topic, namely: the existence of a torture prevention mechanism, new rules for police handling of fatalities and the provisions of the Brazilian Constitution that recognize, in theory, the right to protest. Despite the severity of the violations NGOs presented, the IACHR did not push the Brazilian government to give concrete answers directly related to the issues at hand nor to answer all questions asked.

A few minutes after the hearing, the HRC in Geneva voted on the adoption of a resolution on social protests put forth by Switzerland, Costa Rica and Turkey. The resulting text fell short of NGOs’ expectations in terms of human rights protections. The resolution made no progress on a number of requests from civil society, such as a ban on state agents’ use of lethal weapons during demonstrations. Moreover, the text does not explicitly recognize that an act of violence during a protest does not exempt the state from guaranteeing full respect of the demonstrators’ rights. A group of countries led by South Africa and joined by India, China and Russia presented a series of amendments to the resolution that would have further weakened it. These amendments would have permitted, for example, that protests be considered a threat to national security. Thankfully, however, the amendments were not included in the final resolution.

At the moment, the repression of social protests in several countries is resulting in serious human rights violations. A progressive norm coming from the highest international human rights body, the UN Human Rights Council, is desperately needed. But yet again, the results have generated great frustration among civil society.

At the end of the day, several questions remain unanswered: How should we go about making these mechanisms more effective? How do we bring them closer to the people who are going to be affected by their operation? How can we use these mechanisms and, at the same time, be able to criticize them without being perceived as ‘against human rights?’ What are the main improvements that are needed?

A debate on these issues is desperately needed and should not be postponed. The prevailing feeling is that innovation will come from greater citizen participation, both virtually and physically, to make human rights an issue of major concern for all people, not just for human rights defenders.

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Egyptian Human Rights Groups Face Difficult Choices After Al-Sisi’s Ultimatum
By Heather McRobie | 21st January 2015

A Mubarak-era law stating that human rights groups must register with the government has been utilised by President al-Sisi’s administration to encourage compliance with the administration by human rights organisations based in Egypt. Issued with an ultimatum by the government in November 2014 to either re-register or face a crackdown, Egyptian human rights organisations are facing difficult questions about their future under the al-Sisi government.

A Mubarak-era law from 2002 requiring non-governmental organisations to register with the government was invoked by al-Sisi during a public statement in November, which asserted that human rights groups and other civil society groups must re-register with the government or face a potential crackdown on their activities. For their part, Egyptian human rights groups, such as the prominent Egyptian Initiative for Personal Rights, have claimed that the law is ‘restrictive’ and an attempt by the government to prevent them from being able to undertake their research and advocacy work to their best ability.

On December 21st, 2014, the Egyptian Initiative for Personal Rights, a widely-respected advocacy and research human rights organisation founded in 2002, issued a statement outlining that its board of trustees had voted to register, after the government ultimatum warning that organisations that failed to do so would face prosecution. The statement explained that the organisation has chosen to attempt to continue working under the restrictive law and, according to the Associated Press, ‘test what freedom the law allows.’

While the ultimatum deadline passed without arrests, after Egyptian officials claimed that nine foreign human rights organisations and eight Egyptian human rights organisations had opted to submit their applications to register, not all Egyptian human
rights groups feel able to continue working in Egypt after the ultimatum. The Cairo Institute for Human Rights Studies, another prominent human rights organisation that was crucial in documenting human rights abuses under Mubarak, has opted to move its headquarters to Tunisia, rather than face the potential further scrutiny and hindrance to its work registering might entail.

There are concerns from human rights groups that new restrictions will, in reality, constrain their ability to function effectively, such as the 2014 revision to Article 78 of the penal code that imposes a life sentence on anyone who receives foreign funding with the aim of ‘hurting national security,’ a nebulous statement reminiscent of the charges against the three Al Jazeera journalists currently in jail in Egypt for the charge of ‘threatening national security’ through their work as journalists.

The recent ultimatum issued by the Egyptian government towards human rights organisations and other civil society organisations is part of the wider landscape of laws and decrees by the al-Sisi government aimed at restricting and closely monitoring the conduct of human rights organisations. In the summer of 2014, Human Rights Watch released a report, *All According to Plan*, which documented state and army involvement in the Rabaa al-Adawiya Square massacre in which, it estimated, between 800 and 1,100 people were killed on July 14th and July 15th 2013. Members of Human Rights Watch arriving in Egypt in order to present their findings shortly before the publication of the *All According to Plan* report were detained upon arrival for twelve hours and denied entry into Egypt.

Sarah Leah Whitson, the Middle East and North Africa director of Human Right Watch, has claimed that under al-Sisi’s government, it is now ‘business as usual,’ with Mubarak-era restrictions on human rights organisations revived. The al-Sisi government has been clamping down on both Islamist groups and secular organizations, such as the April 6th Youth Movement, who were crucial in organising the 2011 revolution that overthrew authoritarian President Hosni Mubarak. The 2014 anti-protest law, that curtailed freedom of assembly, was widely criticised by Egyptian human rights groups for impinging on Egyptian’s human rights. Yet, as the new restrictive measures against human rights organisations indicate, while human rights may be being corroded under al-Sisi, human rights organisations themselves are also caught in the crossfire.

*Heather McRobie is an Editor of the OxHRH Blog. She is a final year DPhil student in Socio-Legal Studies and a member of Wolfson College, University of Oxford.*

**Repression of Nonviolent Activism in Syria**

By Malu Halasa | 9th June 2014

These days, nonviolent activists in Syria find themselves targeted on one side by the Syrian regime, and on the other, by extremist Islamic fronts. Their opposition to narrow interpretations of their country’s future – as either a continuing dictatorship or an equally brutal Sharia-state – has given these supposed foes common cause in attacking them.
On 9 December 2013, masked gunmen entered the office of the Violations Documentation Centre in the Damascus suburb of Douma. They kidnapped renowned Syrian human rights lawyer Razan Zaitouneh, one of the most credible voices of the Syrian revolution. Sought by the regime for her activities, she was forced into hiding. But that did not stop her from working. In a 2012 essay, she describes the process of verifying Syria’s dead in Culture in Defiance, p. 22: “Experts of death documentation… do not cry. … We don’t stop wondering whether we, who are documenting death through the screens of our devices, or those…documenting death with their fingers and eyes – will someday return to be “natural” creatures? Or has death already added us to its kingdom at the end?” Following her kidnapping, Syria’s death toll rose from 150,000 to 162,000 in less than two months.

Razan’s husband Wael Hamida, former political detainee Samira al-Khalil and poet Nazem al-Hamadi were abducted along with Zaitouneh. Initially, it was thought that the gunmen were allied to the regime. However al-Khalil’s husband, the Syrian dissident author Yassin al-Haj Saleh identified them as belonging to Jaysh al-Islam (Army of Islam), a Saudi-backed group. Neither Zaitouneh nor her colleagues have been heard from since. Kidnappings by the Islamic fronts of foreign journalists and Syrian media workers are not new. Among many others, the photographer Ziad Homsi was held by ISIS in al-Raqqa for over a month before his release. In Zaitouneh’s last video blog before her disappearance, she describes the more than two-year imprisonment and torture in detention of Mazen Darwish, the director of the Syria Centre for Media and Free Expression. In a letter smuggled out of Damascus Central Prison, and using the word ‘discipline’ as a euphemism, Darwish writes with compassion: “To the security personnel who carried out the responsibility for disciplining me for ten months, and especially for those who disciplined me in the first days of Eid al-Adha, I feel sorry for all of us.”

Both Darwish and Zaitouneh have been influential in the LCC, an activist-run network of Local Coordinating Committees operating in Syrian towns and cities, which organised Syrian citizen journalists. Since the beginning of the uprising, more than 300,000 films and documentary reports from Syria have been posted over the Internet. But many contributors were dispirited after the 2012 chemical attacks in East Ghouta and Douma failed to budge the international community into action. Their numbers decreased. The journalists, photographers and filmmakers who remain active inside and outside the country continue the work of Zaitouneh and Darwish. As they amass and verify evidence for a war crimes tribunal on Syria, it seems they are guaranteeing themselves future persecution – by both Baathists and Islamists.

Malu Halasa is an editor and writer in London. She is coauthor of “Syria Speaks: Art and Culture from the Frontline” and editor of “Culture in Defiance: Continuing Traditions of Satire, Art and the Struggle for Freedom in Syria.”

Constitutional Court of South Africa: Blunting the Impact of Electoral Law on Freedom of Expression
By Andrew Wheelhouse | 24th February 2015

The Constitutional Court of South Africa has undertaken a robust defence of freedom of expression at the time of an election, following litigation between the governing party and the official opposition in Democratic Alliance v African National Congress and Another [2015] ZACC 1.
The case arose out of the scandal surrounding the use of public funds to build ‘improvements’ around the homestead of President Jacob Zuma in Nkandla, KwaZulu-Natal. A report by the Public Protector (a constitutionally mandated public administration ombudsman) published in March 2014 was highly critical of the expenditure. The next day, with the general election only a few months away, the Democratic Alliance (DA) sent a text message to over 1.5 million voters in Gauteng province, which said:

‘The Nkandla report shows how Zuma stole your money to build his R246m [around £15m] home. Vote DA on 7 May to beat corruption. Together for change.’

It was alleged by the African National Congress (ANC) that the DA had published false information with the intention of influencing an election contrary to s.89(2) of the Electoral Act or had published false or defamatory allegations contrary to Item 9(1) of the Electoral Code. The DA argued that the message was fair comment based on a genuinely and honestly held view of the Nkandla Report. The High Court found in favour of the DA, but the Electoral Court ruled for the ANC on the basis that the message was indeed false.

The Constitutional Court found for the DA by a majority of 7-3. The main confrontation concerned whether the allegations constituted fact or comment. Zondo J, writing for the minority, advocated an analysis founded in defamation law. The ‘ordinary reasonable man’ would understand the text as an allegation of fact that President Zuma has stolen taxpayers’ money. This was false, as it was not what the Nkandla Report found.

This approach was unpalatable to the majority, though, for varying reasons. The main judgment rejected the importation of defamation law concepts in favour of a straightforward exercise in statutory interpretation. S.89(2) imposes criminal liability and so should be construed narrowly, especially given the limitations it imposes on freedom of expression (s.16 of the constitution), which are vital to the exercise of political rights (section 19). Accordingly, the provisions only prohibit the assertion of false statements of fact designed to subvert the electoral process (for example, that a particular candidate has died, etc.). They are not designed to criminalise comment, and the text message was clearly comment based on an interpretation of the Nkandla Report.

The joint concurring opinion argued that the fact/comment dichotomy is illusory, and rather, a spectrum exists. The closer the resemblance of a statement to fact rather than opinion, the more intense the court’s scrutiny will be. The statutory prohibition is restricted to ‘false information’ of a factual nature. The text message had attributes of both fact and comment, but the appeal should be allowed because the President’s conduct could fit into one of the meanings of the word ‘stole.’

Eschewing an analysis based on defamation law was sensible. Electoral law is designed to guarantee that elections are free and fair, not defend the reputations of candidates. The majority correctly found that whatever the intricacies of the fact/comment dichotomy/spectrum debate, the issues had to be resolved in favour of the defendant. All that was sought in this case was a retraction and an apology, but in other cases the result of an election may well hang in the balance. A court should hesitate to overturn or pre-empt the verdict of the electorate for what amounts to sharp practice, rather than an interference with the electoral process.

It is worth reflecting on this as we near the UK General Election in May. Following the 2010 election, the Divisional Court upheld the voiding of the result in Oldham East and Saddleworth in R(Woolas) v Parliamentary Election Court [2012] QB 1 under the equivalent English legislation, s.106 of the Representation of the People Act 1983. Phil Woolas’ campaign was puerile stuff and his absence from the current parliament was no great loss, but we should be wary of permitting judges to rule on the substantive content of election campaigns.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madlanga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

Racial Discrimination Act and Free Speech – Carte Blanche or Fair and Reasonable – Where are Human Rights in all This?
By Liz Curran | 27th February 2015

Professor George Williams has noted ‘the fact that freedom of speech receives no general protection in Australian law is not of itself an argument for introducing such protection.’ Unlike in the United Kingdom, Canada, the United States and New Zealand, there is no such right at a national level in Australia. There is a limited right to freedom of political communication in the context of voting, which is circumscribed, but acknowledged by the High Court of Australia.

Anyone listening to recent debate and statements by political leaders and right wing commentators in Australia would think that, as in the United States, there is a right to free speech engrained in Australian laws. The Attorney General, George Brandis, has made recent moves to amend the Racial Discrimination Act (the ‘RDA’) because there is a claim that the current sections 18C and
D of the RDA, which prohibit offensive behaviour (including speech) based on racial hatred, limit free speech. After public outcry and an overwhelming number of submissions raising concerns about the suggested changes in 2014, the proposed amendments were taken off the table. However, the recent terror attacks in Paris have been used as a vehicle to call for its resurrection by the conservative right.

I have long been an advocate for human rights. This includes free speech, but I, like Professor Williams, believe all human rights need protection, not one right in isolation and to the exclusion of other rights. Williams notes ‘It would be preferable to protect the right (of free speech) as part of a more comprehensive scheme of rights protection.’ In Victoria and the Australian Capital Territory, both with State and Territory human rights legislation, I have seen this framework open up participatory and more democratic dialogues between decision-makers and community members like never before with a consequent balancing and consideration of people’s human rights. This has been especially the case for people I have assisted who have a disability or are in need of critical health services.

It is important to understand the context behind the current moves to reduce the protections against racially motivated hate speech protected by the RDA. Firstly, it is important to note that these provisions in the RDA are a critical measure in Australia in view of the ongoing disadvantage of and discrimination against Indigenous Australians. A recent report demonstrates how this part of the Australian community remains staggeringly disadvantaged in comparison to the non-indigenous population.

The Prime Minister in 2013 undertook to amend the RDA to repeal section 18C, after a controversial media commentator, Andrew Bolt, lost a case in the Federal Court of Australia for a publication in which he referred to ‘fair skinned Aboriginal people.’ Justice Bromberg found Bolt’s articles would have offended a reasonable member of the Aboriginal community, that he had not written them in good faith and that there were factual errors. Mr Bolt railed against the court’s finding. Attorney General Brandis, famous for his claim there is ‘a right to be a bigot’ announced proposals to amend the current section 18C, which makes it an offence to ‘offend, insult, humiliate or intimidate’ a person.

Under the Brandis proposals, almost any racist speech will be allowed. This is because the exposure Bill includes a wide exemption for comments ‘made in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.’ Professor Simon Rice highlights that ‘[t]he proposed exception is not limited. It allows race-based conduct in public discussion (by, for example, columnists, bloggers and public officials) that is unreasonable, in bad faith, dishonest, inaccurate or irrational, even if it could intimidate or incite hatred. In public discussion, absolutely nothing is prohibited by the proposed law.’

Public outrage at proposed amendments led to a departmental inquiry, which took submissions in 2014. As a result of the overwhelming submissions, the amendment was taken off the table. However, in reaction to the ‘Je suis Charlie campaign,’ we have again seen the exponents of the amendments use the ‘right to free speech in Australia’ to clamour for the repeal of section 18C. As noted in an open letter I wrote as Co-Convener of the Human Rights Working Group to the Prime Minister and the submission to the departmental Inquiry in 2014, ‘The insensitivity to the impact of unwarranted racist attacks is troubling. People will hide away, people will cower, people will be afraid. Is this not also a threat to the free speech?’

Dr Liz Curran, Senior Lecturer, Australian National University College of Law.
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Chapter 8

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Introduction
By Julie Maher

How a state treats its religious minorities is often a strong indicator of the general level of tolerance and respect for individual freedoms within that state. From the collection of posts on freedom of religion in this chapter we can see that the diversity in the debates surrounding protection of freedom of religion to a large extent maps onto the distinct responses which a state may take towards the religious diversity in its population. This chapter is divided into three distinct sections: the first considering the protection of freedom of religion as an aspect of international human rights law; the second focusing on protection of freedom of religion under the European Convention on Human Rights; and the last section looking towards North America and some of the recent additions to domestic Canadian jurisprudence on freedom of religion.

In recent years the debate in Britain has focused on issues such as the extent to which there should be accommodation of religious belief within the workplace and the challenges inherent to religiously motivated expression that conflicts with non-discrimination norms. In the context of recent domestic debates, some commentators have decried the ‘persecution’ of Christians in Britain. The contributions of Jon Yorke (‘Meriam Ibrahim is Freed: Weaving together Law, Politics and Civil Society’ p 147), Stephanie Berry (‘International Law and the Denial of Minority Status to Indian Muslims’ p 147), and Shantanu Dey (‘Translating Questions Of Religion Conversions to Issues of Human Rights: The Proposed Ban on Religious Conversions in a Secular Indian State’ p 149) in the first part of this chapter serve as a timely reminder of the wider context of freedom of religion and the extreme challenges faced by religious minorities across the globe. Indeed, in countries where international human rights standards have little impact, alternative approaches may be required. Nazilla Ghanea’s post explores how appeals for tolerance based on religion, cultural traditions, and domestic history, can be more effective by looking at the effect of an Islamic cleric’s gesture towards the persecuted Bahá’í community in Iran (‘Using faith to reinforce human rights of Bahá’ís in Iran’ p 150).

The trends and case law from the ECHR contracting states, discussed in the second section of this chapter, illustrate how the mere fact that a country defines itself as secular rather than as aligned with a particular religious tradition is no certain indication of a greater extent of religious freedom. This chapter includes contributions focusing on the limitation of religious practice within two oft-cited examples of secular states within the Convention system, Turkey and France. The second section of the chapter focuses on one of the most anticipated ECHR judgments in recent years. Following the enactment in France in 2010 of legislation restricting the wearing of the burqa (or voile intégral, as it is typified in French debates) commentators and academics alike questioned how Strasbourg might react, with many predicting an end to the ECHR’s past latitude towards French secularism. Such assumptions ultimately proved incorrect, with the SAS judgement serving to further complicate the Court’s case law on the appropriate limits of State action under Article 9. Three contributions in this chapter, Lucy Vickers’ (‘Conform or be confined: S.A.S. v France’ p 151), Frances Raday’s (‘Comments on SAS v France’ p 152), and my own (‘SAS v France in Context: the margin of appreciation doctrine and protection of minorities’ p 154), probe the reasoning and ramifications of the Grand Chamber’s judgment.

The chapter closes with a consideration of two cases from Canada which illustrate the difficulties in determining the appropriate limitations of religious freedom according to domestic human rights standards. Ravi Amarnath (‘Clash of Rights at Centre of Canadian Law School Controversy’ p 155) and Stephanie Tsang (‘Navigating the Troubled Waters of Religious Accommodation’ p 157) both consider how religious freedom can be balanced against protection from gender discrimination and sexual orientation discrimination. The challenge of aligning society’s dual commitment to non-discrimination and protection of religious freedom will undoubtedly continue to prove controversial within our own domestic debate. Accordingly, it is certainly worthwhile to consider how Canadian courts have responded to such clashes of rights within their jurisprudence.

Dr Julie Maher is a barrister in Ireland.
Meriam Ibrahim is Freed: Weaving together Law, Politics and Civil Society
By Jon Yorke | 5th August 2014

On 22 June 2014, the Court of Appeal, Khartoum North and Sharg-el-nil Criminal Circuit, quashed the 11 May Al-Haj Yousif Criminal Court sentence of 100 lashes and the death penalty for Meriam Ibrahim for the crimes of sexual immorality and apostasy from Islam.

Following her release from prison on 23 June, Meriam, her husband, Daniel Wadi, and their two children sought refuge in the US Embassy in Khartoum. On 24 June, she obtained an official visa, and the family attempted to fly to the United States but were detained by the National Intelligence Security Services at Khartoum airport. Meriam was charged with falsifying a South Sudan emergency travel document. If convicted she faced a prison sentence of up to seven years.

The global media campaign intensified against this apparent grave injustice. On twitter and facebook, ‘#savemeriam’ and ‘#freemeriam’ were ‘trending.’ There were many ‘Free Meriam’ campaigns initiated, including by Amnesty International and Emily Clarke’s Change.org petition, which both gained over 1 million signatures.

This significant civil society pressure helped strengthen political diplomacy. Many individual governments spoke out against the initial sentence and her re-arrest. For example, Mark Simmonds, Parliamentary Under Secretary of State for Foreign and Commonwealth Affairs, called for Sudan to respect Meriam’s human rights. Then the FCO and the British Embassy in Khartoum closely monitored the situation and provided advice to Meriam’s lawyers.

In the United Nations, Rupert Colville, the spokesperson for the UN High Commissioner for Human Rights, voiced the UN’s, ‘deep concern about the situation of Meriam Ibrahim.’ In the EU, following the EU Presidency’s of the Parliament, Council and Commission, expressed their ‘deepest dismay,’ at Meriam’s inhumane treatment, the EU’s European External Action Service raised Meriam’s plight in the UN Human Rights Council. The European Parliament then adopted a resolution on the case on 17 July.

During the bilateral and multilateral initiatives, Lapo Pistelli, the Italian Deputy Foreign Minister visited the region, and it is now clear that the Italian government performed a very significant role in the subsequent quashing of the charges, the family obtaining new visas and flying out of Khartoum late on Wednesday 23 July. Their plane landed at Rome’s Ciampino airport on Thursday 24 July, and the Ibrahim-Wadi family had a meeting with Pope Francis at his Santa Marta residence.

Lapo Pistelli told Vatican Radio’s Susy Hodges, that the dialogue with the political authorities in Khartoum had been very fair and that President al-Bashir had stated Sudan had to ‘rethink the Constitution and the Penal Code, and it is highly likely that the issue of apostasy will be modified and deleted.’

Susy Hodges asked, ‘Presumably…we have to thank the international outcry that broke out after the death sentence?’ Pistelli answered, ‘Yes…the international attention given by the media has helped all the efforts of the international community or the American government or the Italian government, to be successful.’

On 1 August, Meriam and her family arrived in New Hampshire to begin a new life, and whilst welcoming her on a brief stopover in Philadelphia, Mayor Michael Nutter described her as a “world freedom fighter.”

This human rights success story cannot be attributed to one forum of power or one single discourse. It is the weaving together of legal activism, political diplomacy and a unified civil society voice.

The global support for Meriam’s lawyers, the personal safety of the family provided by the US Embassy, the regional, and governmental diplomacy, with the important role of Italy, all came together to ensure that further gross human rights violations did not befall the Ibrahim-Wadi family in Sudan.

Dr Jon Yorke is a Reader in Law and Director of the BCU Centre for American Legal Studies, at the School of Law, Birmingham City University.

International Law and the Denial of Minority Status to Indian Muslims
By Stephanie Berry | 3rd July 2014

On 27th May, the Indian Minister of Minority Affairs, Najma Heptullah, declared that ‘Muslims are not minorities, Parsis are,’ the suggestion being that Muslims are too large in number to constitute a minority. Yet out of a population of 1.2 billion people, Indian Muslims, at approximately 138 million, clearly constitute a numerical minority. While India is a secular state, 80 percent of the population is Hindu. Furthermore, the newly-elected ruling party, the Bharatiya Janata Party (BJP), is pro-Hindu and was involved in the campaign to demolish the Babri mosque in the 1980s-90s. Consequently, the suggestion that Indian Muslims are not able to
benefit from the protections available to minority communities has the potential to impact their ability to preserve their identity.

Although the Indian Constitution provides for freedom of religion, the suggestion that Muslims are not a minority excludes this group from the additional protections it affords to minorities. Notably, Section 30 of the Indian Constitution recognises that ‘[a]ll minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.’ Furthermore, Section 29, entitled, ‘Protection of the Interests of Minorities,’ focuses on the conservation of minority languages, scripts and cultures. As Islam is recognised to be a ‘way of life,’ akin to a culture with a distinct language, Section 29 is also relevant to the preservation of the Indian Muslim minority identity.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) (acceded to by India in 1979) establishes that persons belonging to religious, linguistic and ethnic minorities have the right to preserve their minority identity. The 2006 Sachar Committee Report, commissioned by the Indian government, noted that ‘[m]arkers of Muslim Identity . . . have very often been a target for ridiculing the community as well as of looking upon them with suspicion.’ Furthermore, the demolition of the Babri mosque in the 1990s and subsequent intercommunal violence highlight the significant barriers that Indian Muslims face to the preservation of their identity.

Socio-economic disadvantage related to minority identity also has the potential to negatively impact the preservation of that identity. Thus, Article 2.2 of the UN Declaration on Minorities recognises that measures must also be taken to overcome socio-economic disadvantage. The Sachar Report revealed that Indian Muslims are predominantly poor and suffer from disadvantage in education, health and employment. The poor economic situation of India's Muslims, coupled with social stigma, has the potential to significantly impact the ability of this community to preserve its minority identity. The suggestion that Indian Muslims are not a minority overlooks not only the fact that they constitute a numerical minority but also their disadvantaged position within society.

The significance of the exclusion of Muslims from the protections afforded to minorities is most acute with respect to Muslim Dalits, who suffer from intersectional discrimination. Muslim Dalits are discriminated against on the basis of both their religious identity and their ethnic identity, as members of the Scheduled Castes (the most socially disadvantaged Castes in India). The UN Special Rapporteur on Religion and Belief and the Committee on the Elimination of Racial Discrimination have noted with concern that, upon conversion to Islam, Muslims Dalits are excluded from affirmative action programmes targeting the Scheduled Castes. Additionally, although Dalits convert to Islam in order to escape caste-based discrimination associated with Hinduism, ‘the previous caste status and related social bias . . . often remain at the social level.’ Thus, the discrimination suffered by this community is magnified.
The exclusion of Indian Muslims from minority group status and the accompanying rights protections has the potential to exacerbate the difficulties faced by this community and, thus, conflict with India’s obligations under both the ICCPR and the International Convention for the Elimination of All Forms of Racial Discrimination. While the suggestion that Indian Muslims are not a minority is motivated by the size of the community, the fact that they are large in number does not impact their ability to preserve their identity and should not deprive them of minority status. The election of a pro-Hindu party in a country that has witnessed religiously-motivated violence underscores the need for measures to protect the identity of Indian Muslims.

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Translating Questions Of Religion Conversions to Issues of Human Rights: The Proposed Ban on Religious Conversions in a Secular Indian State

By Shantanu Dey | 30th January 2015

In recent months, the political focus in India has shifted towards the sensitive issue of ‘forced religious conversions,’ known as, ‘Ghar Wapsi’ (Homecoming Ceremony). The conversions of 200 Muslims in Agra and Christians in Gujarat to Hinduism, thought to have been forcefully carried out by radical Hindu groups, have sparked controversy and generated disruption in the Indian Parliament.

To combat such conversions, the Central Government in India has proposed a contentious national anti-conversion law to ban and criminalise religious conversions initiated by force, inducement or fraud, prescribing a monetary penalty, along with imprisonment of up to two years. Despite its secular appearances, serious questions remain as to whether, paradoxically, the proposal serves to bolster the country’s powerful Bharatiya Janata Party and its Hindu ideology at the cost of freedom of religion.

The ambiguous words ‘force, inducement or fraud,’ currently used in anti-conversion legislation of five other Indian States, have meant the statutory definition of forced religious conversions includes inducements in the form of promises, economic benefits and free education/health services. The proposed legislation seeks to draw from the state-level laws, curiously referred to as ‘Freedom of Religion Laws,’ which require religious converts to provide a month-notice to the district administration of conversions.

It is important to set the proposed law against the social and economic backdrop of religious conversions in India. The root cause of conversion has always been the pursuit of opportunities to protect human dignity and to battle against societal discrimination by the socio-economically defenceless classes of a particular religious group. The proposed law amounts to the criminalization of religion as means of ‘capability-building,’ encroaching on individual choice and misunderstanding the virtue of religious diversity, which underlies the constitutional text. The enjoyment of religious freedom by minority groups remains an ongoing issue in India, as discussed in the US State Department’s 2013 Report.

The political discourse, which blurs the line between voluntary and forced conversions, has demonstrated insensitivity to the international principles enshrined within the International Covenant on Civil and Political Rights (ICCPR) and the Universal Declaration of Human Rights (UDHR), to which India is a signatory. Article 18 of the UDHR explicitly grants an individual the freedom to change his religion or belief, and freedom, either alone or in community with others, and in public or private.

Such a right to conversion can also be found within the ICCPR framework under Article 18(1), articulating the freedom to adopt a religion of one’s choice, as supplemented by the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief, which also endorses such expansive understanding of freedom of religion. That said, it must be recognized that Article 18(2) of the ICCPR explicitly prohibits coerced conversions.

If enacted, the Indian Parliament’s anti-conversion proposal is fated to reach the Supreme Court. Article 25 of the Constitution of India guarantees the fundamental right to ‘freely profess, practice and propagate religion.’ The ‘freedom to convert’ has often been argued to be a subset of ‘freedom of conscience’ guaranteed under Article 25, suggesting that the resultant widening of powers granted to the government to dictate citizens’ choice in the realm of faith and religion is tantamount to violation of such freedom.

However, the limited ambit of the right has been stated by the Supreme Court of India in Rev Stanislaus v State of Madhya Pradesh, where it held that the ‘right to propagate does not include right to convert’, meaning state-level anti-conversion statutes were upheld. In order to democratically manage religious differences in a secular society like India, the ‘Lemon Test,’ laid down by the US Supreme Court in Lemon v Kurtzman, which held that ‘a statute must guard against excessive state-religion entanglement,’ ought to be the approach for reviewing the proposed anti-conversion law.

Rev Stanislaus came at a time when judicial activism was still in its emerging phase. Whether the Supreme Court will engage further with the national and international rights mentioned here against the social and economic context of religious conversions in
contemporary India may yet be seen.

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Using Faith to Reinforce Human Rights of Bahá’ís in Iran
By Nazila Ghanea | 20th May 2014

An Islamic cleric’s gesture to the persecuted Bahá’í community in Iran shows that in countries where universal human rights standards have little local resonance, appeals for tolerance based on religion, cultural traditions and domestic history can help break the deadlock.

Veteran human rights activist Larry Cox suggested that religion offers the human rights movement hope for renewal, greater legitimacy and impact. This begs some important questions, however: which religion, whose religion, which human rights and in what part of the world?

Greater engagement of religions with human rights requires domestication and rootedness, rather than a shallow application of universal standards. Appeals for tolerance and equality are communicated best when based on a people’s accepted cultural and intellectual traditions. This is most urgent in cases of longstanding persecution of particular religious communities by government or social groups.

The persecution of the Bahá’ís in Iran is one such case. With over 300,000 followers, the Bahá’ís are Iran’s largest non-Muslim religious minority. However, they have no legal protection or recognition as a minority because unlike Jews, Zoroastrians and Christians, the Iranian constitution does not recognize their faith. For decades, they have been arbitrarily detained, executed, refused education and livelihood. Hundreds were killed after the 1979 revolution. More than 130 Bahá’ís are currently in prison on false charges. Seven former religious leaders are serving 20-year jail terms. A 35-year-long history of intolerance has become systematized and institutionalized into a far-reaching pattern of serious, government-instigated and government-perpetuated violations.

At first glance, the case of Iran’s Bahá’ís seems to support the notion that religion should be kept, at best, to the fringes of rights discussions. Greater pragmatism, however, suggests otherwise. Since political and religious leaders in Iran have attempted to base 170 years of anti-Bahá’í sentiment on religious foundations, then the appeal to universal standards of human rights alone will not sufficiently realize respectful coexistence. While universal standards have merit, they may have insufficient resonance. In Iran, and elsewhere, the best access may prove to be the human rights appeal through dominant sacred texts and values.
Recent statements by Shia clerics favoring coexistence with the Bahá’ís offer room for hope. Ayatollah Masoumi-Tehrani is no stranger to calling for religious co-existence in Iran. Recently, however, he included a call to respect Iran’s Bahá’ís. In a statement released on 7 April 2014, Masoumi-Tehrani recalled that Iran’s history includes periods in which ‘different religions and denominations, with manifold beliefs and practices, enjoyed social interaction and tolerant coexistence.’ He bemoaned the loss of that tradition, noting the devastating undermining of ‘the right to be human,’ the right to life, and human dignity. He described Iran’s current social reality as one of ‘religious apartheid.’

As a gift to the Bahá’ís, Masoumi-Tehrani prepared calligraphic works of art, choosing a symbol of the Bahá’í Faith known as the Greatest Name – a representation of the conceptual relationship between God, His prophets and the world of creation – and a verse from the Bahá’í Holy writings. The fact that he chose the symbol and texts of the recipient and persecuted religious community, the Bahá’ís, goes some way towards underscoring his generosity.

This gesture’s intent is best captured by the Ayatollah’s own words: ‘I present this precious symbol – and expression of sympathy and care from me and on behalf of all my open-minded fellow citizens who respect others for their humanity and not for their religion or way of worship – to all the Bahá’ís of the world, particularly to the Bahá’ís of Iran who have suffered in manifold ways as a result of blind religious prejudice.’ Such religiously meaningful gestures serve to complement human rights efforts and offer a hope for greater legitimacy and impact.

Admittedly, the wide-ranging rights violations in Iran – for the Bahá’ís, and for all – call for much more than a few gestures by a handful of maverick religious leaders. However, these appeals play a significant role in undermining Iran’s longstanding tendency to legitimize religiously motivated attacks on human rights. They foster a new tradition of inclusion to battle the ruling tradition of impunity. They may also prove a necessary precursor to the improvement of human rights in deeply religious, but also highly polarized, countries such as Iran.

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Conform or be confined: S.A.S. v France
By Lucy Vickers | 8th July 2014

The European Court of Human Rights ruled on 1st July that France’s ban on face coverings, known as the burqa-ban, does not breach the European Convention on Human Rights. The ban criminalises anyone wearing clothing designed to conceal the face in public.

Although not limited to the burqa, the legislative history of the provision makes very clear that this is its main target. It follows the well-known debate on the wearing of headscarves and other religious symbols in public employment and schools. Thus far, this debate has concluded in favour of allowing restrictions to religious dress, for example for teachers (Dahlab v Switzerland) and students (Sahin and Karaduman v Turkey), although the restrictions have been disallowed when they have been applied disproportionately (Eweida et al v UK), or applied in public spaces more generally (Ahmet Arslan and Others).

What makes the French burqa-ban different is that it criminalises the manifestation of religion, which is highly symbolic, even if the penalty is small. It also applies to veiling at all times in public. There is no potential for opting out: even if the veil wearer is welcome in some venues, she cannot get there without entering the public space. She is effectively confined unless she conforms. These factors might lead one to expect a decision that the ban was unduly restrictive of religious freedom.

Indeed, the judgment builds a strong case against the ban. First, it considers relevant international law and practice, and concludes that a ban on the burqa in public would breach human rights standards and would be alien to European values. Second, the Court reviews the situation in other European states and finds almost universal consensus against bans in public spaces. Third, the court considered the legitimate aims that have been used previously to justify ban on religious symbols and shows how the ban is unnecessary to achieve most of them. It finds that the aim of public safety does not require a ban on the burqa in all public spaces.

It is not necessary to uphold gender equality; nor is it necessary for human dignity. The Court also notes that small numbers of women wear the veil and that criminalisation in itself is serious and may ingrain negative stereotypes. These arguments are made so fully that it seems an almost inevitable conclusion that the ban will be found to breach Article 9 of the ECHR, protecting freedom of religion.

However, the court identified one final legitimate the aim: ‘respect for the minimum requirements of life in society’ referred to as
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Professor Frances Raday Comments on SAS v France
By Frances Raday | 19th July 2014

In the Grand Chamber judgment in the case of S.A.S. v. France, the European Court of Human Rights held, by a majority, that Law no. 2010-1192 of 11 October 2010, which made it illegal for anyone to conceal their face in public places, did not violate the European Convention of Human Rights.

The Court directed its inquiry to verifying whether the ban was necessary in a democratic society for protecting the rights and freedoms of others. The French Government had listed three values in that connection: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in society (or of ‘living together’).

While dismissing the arguments relating to the first two of those values, the Court accepted that a veil concealing the face in public places must surely be one of the weakest of legitimate aims identified by the court. The dissenting judges label it ‘far-fetched’ and ‘vague,’ and even the majority of the court concede that it is a ‘flexible’ notion, which therefore needs careful examination to ensure its necessity. Yet despite its own recognition of its weakness, the court accepted it as legitimate and decided that, given the wide margin of appreciation applicable in religious freedom cases, the ban was proportionate. This conclusion is disappointing, particularly the reliance on the nebulous concept of ‘living together,’ an aim which could equally be met by promoting a ‘live and let live’ attitude, and which moreover could lead to bans on anything that makes the majority feel uncomfortable.

The final decision thus seems something of a let-down, coming as it does after such a careful and well evidenced demolition of the standard arguments in favour of banning the veil.

Towards the end of the judgment, the Court acknowledges the need to exercise restraint in reviewing policies that have been agreed through democratic processes; and recent political changes in Europe towards Euro-scepticism (addressed to the EU but which may well have a spill-over effect on the Council of Europe) may go some way to explain its timid approach.

It remains a pity that, in the final analysis, the Court did not pay much regard to its own findings. Nonetheless, the decision has some positive aspects. The Court clearly dismisses some of the traditional arguments for burqa-bans based on public safety and gender equality. Moreover, the majority judgement and two thorough dissents provide a rich source of material for those wishing to challenge wholesale bans in future.

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raised a barrier against others which could undermine the notion of ‘living together’ and therefore could be regarded as necessary for protecting the rights and freedoms of others in a democratic society. The dissenting opinion pointed out that the very general concept of living together does not fall directly under any of the rights and freedoms guaranteed by the Convention and that, moreover, the blanket ban could be interpreted as selective pluralism and restricted tolerance.

The dissenting opinion has been widely endorsed by civil society organisations. Indeed ‘unease’ when encountering the ‘other’ can scarcely be considered a good stand-alone ground for restricting a minority’s cultural practices. It is a good ground only where the unease arises from the violation of human rights by the minority practice, and, in the present case, the unease arises from the practice’s depersonalisation of women. The community has a valid interest in negating the message to all women that they are required to be self-effacing in order not to be immodest, and in preventing, as I have called it elsewhere, the shadow effect of gendered modesty.

It is my aim to question the ease with which the aim of securing gender equality and women’s dignity by banning the burqa was unanimously dismissed by members of the Court and indeed, similarly rejected by constitutional instances in Spain and the Netherlands and by civil society organisations, such as Amnesty International and the Open Society Initiative. All these have emphasized the intersectional discrimination that a ban on full-face veiling creates for Moslem women who wish to wear the full-face veil and the violation of their constitutional freedom of choice. However, the discriminatory impact of giving license to the full-face veil on women’s autonomy and freedom of choice has not been satisfactorily considered.

Islam – like the other monotheistic religions – although requiring both men and women to be modest, imposes on women the burden of maintaining modesty codes. Modesty in the monotheisms is gendered and is designed to preserve patriarchal control of women’s sexuality, the family and the public space. Full-face covering is regarded as a modesty dictate by some followers of Islam, although it is not expressly required in the Quran. It is at the extreme end of the spectrum of gendered modesty mechanisms and is integrally related to a patriarchal regime, which submits women to men’s power. The cost to the wearer is the negation of the opportunity to move freely and interact fully with others in the public space; the health cost of being prevented from receiving full medical care from male doctors; the impossibility of participating in any occupation that requires facial communication; and the restriction of mobility by loss of field of vision. Moslem feminist activists have called this not a form of dress but a canvas prison.

The Court does not doubt that gender equality might rightly justify an interference with the exercise of certain rights and freedoms. In this, the Court echoes the caveat of international human rights instances that freedom of religion and conscience cannot justify discrimination against women. However, the Court takes the view that a State Party cannot invoke gender equality to ban a practice that is defended by women unless it was understood that individuals could be protected on that basis from the exercise of their own fundamental rights. Here the Court has failed to acknowledge that harmful traditional practices such as female genital mutilation and discriminatory religious practices such as polygamy are regarded under international law as violations of women’s human rights, which should be prohibited, whether or not there are women who defend them.

Nor is the consent argument empirically persuasive. For every woman in a liberal democracy who chooses the burkah there are other women who are compelled to wear the burkah in the context of family or community patriarchal control. The cases in which girls flee from family homes in immigrant communities in Western liberal democracies in order to avoid being sent abroad for female genital mutilation or forced marriage provides evidence of the ongoing force of religious patriarchy.

Furthermore, globally, many millions of the women who wear burkhas do not choose to wear them but are forced to wear them in regimes where modesty police will impose corporal punishment for their failure to do so. The choice of a handful of women in democratic countries to wear the burkah is perhaps an ethnic and religious identification symbol but it is also a symbol of identification with women’s oppression. The justified fear of human rights protagonists that criticism of Moslem religious practices in Europe is an instrumentalist weapon of ethnic hatred should be addressed but cannot justify condoning practices harmful to women.

Full-face covering depersonalizes women in social interaction and is harmful for their freedom of expression and freedom of movement and, often, for their access to healthcare. In a democratic society it is necessary to protect the rights and freedoms of women, including by providing effective regulatory frameworks to protect them against harmful practices. The legitimacy of the French Law should have been considered in this context.

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Professor Raday writes in her academic capacity, and not in the framework of her work as a mandate holder of the HRC.
SAS v France in Context: the Margin of Appreciation Doctrine and Protection of Minorities
By Julie Maher | 18th July 2014

In SAS v France the Grand Chamber of the European Court of Human Rights (ECtHR) found that a French law prohibiting the concealment of the face in public places did not violate the European Convention on Human Rights (ECHR). The findings in the case have been detailed elsewhere. This post asks how the judgment in SAS fits with the Court’s other Article 9 case law and highlights some of the issues raised by the judgment.

It might have been supposed that the ECtHR would view the October 2010 law as violating the Convention, given its previous ruling in Arslan v Turkey, in which a violation of Article 9 arose from the conviction of 127 members of a religious group for wearing religious dress in the streets. The Court emphasised the distinction between such restrictions operating in public areas open to all and restrictions in schools or other public establishments, where religious neutrality was key, suggesting that a blanket ban in all public spaces would likely violate Article 9. Moreover, as the ECtHR itself acknowledges in SAS, ‘a large number of actors, both international and national, in the field of fundamental rights protection have found a blanket ban to be disproportionate’ (para 147).

However, it nonetheless finds the ban proportionate and goes to some lengths to distinguish Arslan. It stresses that, though both cases involve a ban on wearing religious dress in public places, SAS ‘differs significantly … [as] the full-face Islamic veil has the particularity of entirely concealing the face…’ (para 136). This appears a relatively thin basis on which to reconcile its findings with the earlier case. It also appears at odds with the Chamber’s findings in Eweida and others that a far narrower rule, prohibiting the wearing of religious symbols by British Airways employees, was in violation of Article 9.

The Grand Chamber highlights that the law did not expressly target religious dress (para 151). Such emphasis on ostensible neutrality is unconvincing, given the legislative history of the ban and its impact on a highly specific class of persons; the Court notes its concern at Islamophobic comments in debates on the law (paras 148-149). Nonetheless, the Court attributes significant weight to the fact that the law was ‘not expressly based on the religious connotation of the clothing in question but solely on the fact that it conceals the face’ (para 151). This, in the Grand Chamber’s view, is sufficient to distinguish the 2010 law from the restrictions in Arslan. However, it is obvious that the law is aimed at targeting religious persons and one religious group in particular.

There are certainly positives to take away from the judgment. In line with the Court’s more recent case law, it is careful to acknowledge the harm that restrictions on dress can cause to religious individuals, in contrast with much of its previous case law on restrictions on the headscarf (paras 149 and 152). The Grand Chamber makes an effort to recognise the divergent meanings attributable to religious dress, abandoning the one-dimensional approach in some of its previous case law on Muslim dress (such as Sahin v Turkey and Dahlab v Switzerland). As Lucy Vickers’ post highlights, the Court at times actually makes a strong case against the ban, rejecting justifications of a blanket ban by reference to public safety, gender equality, or human dignity.

It is increasingly difficult to reconcile the varying elements of the Court’s Article 9 case law because of the degree to which deference to states’ choices of church-state models plays a role. In SAS the Court acknowledges the risk of abuse resulting from the flexibility of the aim of ‘living together.’ However, this statement of intent is contradicted by its subsequent acceptance that a wide margin of appreciation should apply (para 155).
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Clash of Rights at Centre of Canadian Law School Controversy
By Ravi Amarnath | 28th October 2014

The debate over whether to recognise a proposed law school in Canada has pitted fundamental freedoms against one another.

Trinity Western University (TWU) is a private, Christian university located in the Canadian province of British Columbia. TWU requires its students, faculty and administrators to sign and abide by the terms of a Community Covenant, which includes a provision to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman.’ Individuals who breach the Community Covenant are subject to potential sanction.

In December 2013 TWU received government approval from the province of British Columbia to administer a three-year undergraduate law program, starting in 2016. The Community Covenant has made the decision controversial, as same sex marriage is legal in Canada.

A number of provincial law societies across Canada have decided not to accredit – or in other words, recognize – the proposed law school. An individual cannot practice law in a particular province in Canada unless his or her law degree is accredited by that province’s law society.

Notably, last April, law society leaders in Canada’s largest province, Ontario, voted against the accreditation of TWU’s proposed law school. In June, the leaders of Nova Scotia’s law society resolved not to accredit the law school unless TWU either ‘exempts law students from signing the Community Covenant’ or ‘amends the Covenant for law students in a way that ceases to discriminate.’ TWU has started legal proceedings in each province reviewing these decisions.

Two Canadian provinces, New Brunswick and British Columbia, originally resolved to accredit the TWU’s proposed law school but have since reversed their decisions. Leaders from the Law Society of New Brunswick resolved in September not to recognize TWU graduates, while the Law Society of British Columbia is holding a binding referendum with the province’s lawyers to decide the issue, the results of which are expected to be released on October 30.

Opponents of the proposed law school assert that the Community Covenant offends the equality guarantee in the Canadian Charter of Rights and Freedoms, while proponents note that the Charter also protects the freedom of conscience and religion as well as freedom of association.

The Canadian Charter does not directly apply to TWU’s policies, however, as TWU is privately administered, and the Charter only applies to the actions of government institutions.

British Columbia’s Human Rights Code, which applies to TWU, prevents employers or individuals who provide services available to the public from discriminating on the basis of either religion or sexual orientation. However, section 41 of the Code also permits organizations like TWU to grant preference to members of an ‘identifiable group or class of persons’ if the organization ‘is not operated for profit’ and has ‘as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons’ characterized by a number of grounds, including religion.

This is not the first case in which TWU’s Community Covenant has caused controversy. In the 1990s, the British Columbia College of Teachers (BCCT) refused to approve TWU’s application to assume full responsibility for a teaching education program. The College stated ‘the proposed program follows discriminatory practices which are contrary to the public interest and public policy.’

The Supreme Court of Canada eventually determined that this decision was incorrect and held TWU could administer a teaching education program. In resolving the competing values in the decision, the majority stated that ‘[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of [British Columbia], the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.’

A factor that could be determinative in the present dispute is the standard of review by which the courts review individual law

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society decisions to not accredit TWU’s proposed law school. While the Supreme Court of Canada reviewed the BCCT decision on a standard of ‘correctness,’ in recent years the Court has mandated courts to apply a more deferential standard of ‘reasonableness’ when reviewing decisions made by administrative bodies, such as a law society.

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Law Society of Canadian Province Nova Scotia is Found to Have Overstepped its Mandate, Violating Religious Freedoms

By Ravi Amarnath | 10th February 2015

The first of a series of decisions that will shape how the balance is to be struck between Canada’s constitutionally protected rights of equality and freedom of religion has held that the latter cannot be unduly interfered with by a private institution.

Recently, a judge of the Supreme Court of Nova Scotia held that the Nova Scotia Barristers’ Society (NSBS), an organization which regulates the legal profession in the Canadian province of Nova Scotia, overstepped its jurisdiction when it decided not to admit students from Trinity Western University (TWU) to the bar.

TWU is a private, Christian university located in the Canadian province of British Columbia. It requires its students, faculty and administrators to sign and abide by the terms of a Community Covenant (the Covenant), which includes a provision to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman.’ Individuals who breach the Covenant are subject to potential sanction.

In December 2013, TWU received approval from the government of British Columbia to administer a three-year undergraduate law program starting in 2016 (a decision that has since been revoked and is under review). The provision of the Covenant that regulates intimacy has made the proposed law school controversial, since same sex marriage is legal in Canada.

The Canadian Charter of Rights and Freedoms does not apply to TWU’s policies because it is a private university, and the Charter only applies to the actions of government institutions.

Moreover, section 41 of British Columbia’s Human Rights Code law permits private, religious institutions to grant preference to members of an ‘identifiable group or class of persons’ if the organization ‘is not operated for profit’ and has ‘as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons.’

In April 2014, the leaders of the NSBS resolved not to accredit graduates from TWU unless the school ‘exempts law students from signing the Community Covenant’ or ‘amends the Community Covenant for law students in a way that ceases to discriminate.’ The decision effectively prohibited future TWU graduates from meeting their requirements for entry into the legal profession in Nova Scotia, barring a change in the school’s policies.

The NSBS subsequently amended the definition of ‘law degree’ in its Regulations, allowing its leaders to deny entry to students who attend institutions which ‘unlawfully [discriminate] in its law student admissions or enrollment policies or requirements on grounds prohibited by either or both the Charter of Rights and freedoms or the Nova Scotia Human Rights Act.’

In a lengthy decision, Justice Jamie Campbell held the NSBS overstepped its statutory mandate to ‘uphold and protect the public interest in the practice of law’ and ‘regulate the practice of law’ by trying to regulate TWU itself.

The judge further explained that the ‘public interest in the practice of law does not extend to how law schools function. Neither the degree of moral outrage directed toward the policy, nor the extent to which it is deemed to be in the public interest to attack it, change that’ (para 176).

At the conclusion of the judgment, Justice Campbell addressed the clash of rights at the heart of the matter, stating: ‘The discomfiting truth is that religions with views that many Canadians find incomprehensible or offensive abound in a liberal and multicultural society. The law protects them and must carve out a place not only where they can exist but flourish’ (para 271).

The NSBS has not determined whether it will appeal the decision. In the meantime, legal proceedings continue in the Canadian provinces of Ontario, and British Columbia, where the respective law societies have outright refused to recognize TWU graduates
A male student, enrolled on an online course, requested permission from his professor to be excused from participating in group work with female students in person, citing his undisclosed religious belief as his reason for seeking accommodation. His professor rejected his request essentially on the grounds of gender equality. However, following the professor’s consultation with the Centre for Human Rights and the program dean at the university, the dean ordered the professor to accommodate the student. The professor has continued to refuse to comply with the order, stating:

‘My main concern was that for religious beliefs, we also can justify not interacting with Jews, blacks, gays, you name it. And if this were allowed to go through, then all these other absurd demands could be made.’

Many believe that the university had taken political correctness to the extreme.

The fact that this case has not invited much international media attention could be due to the fact that the student did not pursue his case any further. But this is yet another example being added to the troubled waters of religious accommodation across Western democracies.

The European Court of Human Rights has famously captured the right to religion as ‘one of the most vital elements that go to
make up the identity of believers and their conception of life.” But the idea that an individual may cite her religious convictions in order to be treated as an exception to the norm has resulted in frustrated responses. Only a month ago, disbelief followed Marks & Spencer’s decision to endorse a policy, now withdrawn, which allowed Muslim members of staff to refuse to sell customers alcohol at their counter. Of course, religious claimants who have felt unfairly treated have also resorted to the courts, as in the well-known European Court of Human Rights case of Eweida & Others v UK, where pitting the right to religion against the rights of others led to mixed results.

The Professor’s comment captures the fear of the religious ‘trump card’ over the rights of others, which would result in room for continuing misogyny, racism and homophobia. Whilst many may reject the view that religion should be a trump card, is it time to take a step further and establish a hierarchy of rights? The Canadian Supreme Court has explicitly maintained that there is no hierarchy of rights under the Canadian Charter of Rights and Freedoms. There could be a pragmatic argument in favour of a hierarchy the sake of clarity: whilst religious freedom is to be protected, a bright line is drawn so that accommodation simply cannot be given at the expense of, for example, gender equality. If the default is that religion tends to become a trump card, steps should be taken so that it is given an appropriate place.

On the other hand, such a move could reduce the right to religion (particularly the right to manifest one’s religion) to close to nothing, as often the most obvious religious manifestations are the very ones that sit uncomfortably against secular ideas of, for example, gender equality. To have such a hierarchy would make religious accommodation meaningless. Another hesitation is that a rigid ranking of rights may leave little room for the nuances found in each case. In particular, one interesting detail in the York University scenario is that the student would have had a certain expectation that his online course meant that he was not going to meet any other students in person. The question is whether this makes a difference at all, and if so, how.

The idea of religious accommodation remains frustratingly complex, as at its core is a demand to clarify the purpose and practice of human rights. If a certain conception of human rights is protection against the tyranny of the majority, then there must be room for those who do not conform to the norm. It is as palatable as many ideas in the abstract – but in practice, we continue to navigate these troubled waters.

Stephanie Tsang read for the BCL in 2012-2013. She is currently studying for the Bar Professional Training Course in London.

Religious Anti-Gay Refusal – Valuing Dissent Without Making it Lawful
By Davina Cooper | 22nd July 2014

According to Supreme Court judge, Lady Hale, the law has yet to find the right balance between accommodating people’s beliefs and avoiding anti-gay discrimination.
Her remarks, made during a lecture at the Law Society of Ireland, take a position common amongst judges, politicians, activists and scholars seeking to find a midway point between privileging beliefs and privileging non-discrimination. But in suggesting a compromise that gives some religious folk the right to conscientiously object, another, quite different, settlement is ignored. This is one that rejects a legal entitlement to discriminate, while recognising that resistance and dissent within workplaces, including government ones, can be valuable.

Christian claims to be allowed to lawfully discriminate against lesbians and gay men have emerged globally. In the UK, the best known case is that of Islington registrar Lillian Ladele who took her case as far as the European Court of Human Rights arguing for the right to refuse to perform, or even register, lesbian and gay civil partnerships. Other British cases have involved guesthouse owners, marriage guidance counsellors, adoption providers and foster parents — arguing that their deeply held Christian beliefs should protect them from the reach of (gay) equality law.

While many secular liberals applaud the court judgments, which have almost unanimously refused to exempt religious objectors from treating lesbians and gay men equally, more radical perspectives have been mixed. For some, the concerns of ‘homonormativity’ – of mainstream middle-class life underlying many gay rights claims – generate indifference. Others see conservative Christians as rightfully entitled to express deeply held views without penalty, even if this means refusing to do what they’re told. Indeed, the demand on state employees and others to comply with their employers’ instructions seems hard to recognise as the rallying cry of a progressive state, even if equality is involved.

But does this mean anti-gay refusal should be accommodated, particularly once we bear in mind that equality law not only protects religious beliefs but ‘philosophical’ ones as well? Lady Hale may wish to see more recognition of religious beliefs and conscience, but exemptions here will also apply to ‘philosophical’-based objections. This means secular conservatives and radicals can also, at least theoretically, try to argue that their deeply held beliefs include a principled rejection to providing services that support gay liberal life.

My argument isn’t for religious beliefs to be given more weight than ‘philosophical’ ones. Rather, since contemporary British anti-discrimination law is minimising the distinction, we need to ask how belief-based refusals, in general, to provide gay people with a service should be regarded.

Many argue it’s absurd for British law to legislate gay equality and then provide an exception for those whose objections are grounded in belief – what other reasons for demanding an exception are likely to be articulated? But – and this is key – state law’s refusal to accommodate discrimination isn’t the final word. If we adopt a legal pluralist perspective, multiple legal and normative orders can be found co-existing within the same social space. This means the religious laws animating conservative Christian refusal occupy and confront secular state law from a shared terrain.

Should state law then ‘recognise’ religious law, in the sense of treating it as a legitimate basis for equality exemptions? Conventionally, such recognition is seen as deference to religious authority. But we can also see it as asserting a mono-legal mindset in which state law takes upon itself the authority (and responsibility) for establishing the terms and provisions for law-animating action. Creating a situation where state law is the only law in town, enormous pressure is placed on the state’s legal infrastructure to recognise religious refusal – since if state law doesn’t, who or what can?

There is an alternative. State law can refuse to accommodate religious motivations for discriminatory action. At the same time, we – a wider public – can stand back from state law to recognise that other, competing, legal and normative orders also shape what people do. Public bodies, such as local councils, become some of the sites where these conflicts are played out.

Conflict between people over their views and beliefs isn’t always productive. It can make public action impossible, exacerbate exclusionary and hostile organisational cultures, and generally make people dread going to work. At the same time, political, judicial and managerial demands that workers do what they’re told, or face charges of insubordination, treat workers like machines, and – at considerable cost – disregard the vibrant political character of workplace struggles. The challenge is to find institutional ways of supporting conflict, involving other modes of performance. Where can we look for examples of how to do dissent and disagreement in constructive, stimulating, even pleasurable, ways?

Dr Davina Cooper is Professor of Law & Political Theory, University of Kent.

**Conscientious Objection to Military Service in International Human Rights Law**

**By Ozgur Cinar | 30th January 2014**

Conscientious objection to military service is a means of resisting war and military service for reasons of conscience based on profound religious, ethical, moral, philosophical, humanitarian, or similar convictions. It generally concerns the exemption of people from fulfilling legal obligations that would necessitate a violation of their conscience, religion, or belief. The phenomenon of
Conscientious objection appears in diverse forms and covers a wide variety of societal issues from nonpayment of tax for military expenses to the performance of abortions. However, conscientious objection is more commonly associated with refusal to perform military service.

According to Moskos and Chambers, conscientious objection in the military context is a fundamental part of an individual’s relationship with the State: it calls into question the obligation to defend the nation, which is considered to be one of the most important duties of the citizen. When conscientious objectors refuse to perform such a duty they, in fact, experience a conflict in their relationship with the State, a conflict between the beliefs of the objector and the duties laid down in positive law. By making a declaration, the objector consciously avoids performing obligations in the name of a superior command originating from conscience.

Conscientious objection also exposes the limits of what a state can demand of its citizens where that demand may oppose individual conscience. This situation leads to the dilemma of whether a state can intentionally violate an individual’s conscience and has attracted considerable controversy. It has been examined from historical, sociological, and political perspectives, as well as from an activist viewpoint. This subject has also excited interest in international human rights law.

My recent book on conscientious objection is composed of five chapters. Part I is divided into three chapters, of which the first chapter explores the concept of conscience with a view to understanding the meaning and potential scope of the right to conscientious objection from a legal perspective. The evolution of the concept of conscientious objection is expounded in the second chapter. In the light of the first chapter, this chapter shows that the secularization of conscience has played an important role in the concept of conscientious objection. An attempt is made in the third chapter to define various types of conscientious objectors in the light of the evolution of conscientious objection. A legal analysis of different forms of conscientious objection is conducted; current debates on how these different forms should be interpreted at national and international levels, and whether they are officially recognised is also addressed.

Part II investigates the right to conscientious objection in international human rights law as a legitimate exercise of freedom of thought, conscience, and religion. This part is divided into two chapters dealing with the content and scope of the right to conscientious objection at both the international and regional level. United Nations mechanisms are examined at the international level in chapter 4; at the regional level, the European and Inter-American mechanisms are analysed in chapter 5.

The conclusion summarizes the current international standards on the right to conscientious objection to military service. Conscientious objection is now accepted as a legitimate expression of freedom of thought, conscience and religion. Present international law standards suggest that alternative service should be of a purely civilian nature and should be in the public interest and not be, in any way, of a punitive or deterrent nature.

Özgür H. Çınar is Guest Editor, Religion and Human Rights and Senior Associate Member, Seesox, St Antony’s College, University of Oxford, UK.
Freedom of Religion and Belief in Turkey
By Ozgur Cinar | 10th January 2014

One of the fundamental values of a democratic society is the freedom of thought, conscience and religion. From this freedom derive the concepts of pluralism, tolerance and open-mindedness, hallmarks of a democratic society. In its religious dimension, it is a vital element of the identity of believers and their conception of life, but it is also a precious asset for those with no religiously held beliefs such as atheists, agnostics and sceptics.

The freedom of thought, conscience and religion is recognised by the key international human rights documents such as Article 18 of both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, Article 9 of the European Convention of Human Rights, Article 10 of the Charter of Fundamental Rights of the European Union. The Republic of Turkey (hereafter ‘Turkey’) acknowledges this freedom, in principle, through international treaty commitments, but its implementation has been inconsistent.

Turkey is a candidate to accede to the European Union (EU). The Development and Justice Party (Adalet ve Kalkınma Partisi – AKP) came to power in 2002, promising to introduce freedoms, and in its eleven years in government has made some important legal changes in conformity with the political criteria of the EU, but various restrictions connected to the freedom of thought, conscience and religion remain unaddressed. For instance, religious minority groups, such as Christians, Jews and Alevis (adherents of a sect of Islam) have important limitations on their religious and community life and though, initially, concessions aimed at incorporating these minorities were made, they now seem to have abated. Moreover, there is still compulsory religious education in schools and no recognition of conscientious objection to military service.

The particular problems of Turkey today can be better understood by a brief look at its history. When the Republic of Turkey was established on the remnants of the Ottoman Empire, a secular state system based on the notion of the nation-state replaced the existing Ottoman system of ‘millets’ (confessional communities). While the rights of non-Muslims were safeguarded in the Treaty of Lausanne (1923), signed during the founding of the Republic, in practice we can see that they have encountered difficulties as regards the exercise of these rights.

Obstacles to the freedom of religion and belief in Turkey increased during the 28 February Process (military intervention). Hence, efforts were made to reshape society in the name of ‘combating reaction.’ While during this process there was a constriction of political and civil rights, we can also see pledges made to take steps in order not to become isolated from the EU.

In its 2012 report, the United States Commission on International Religious Freedom included Turkey amongst countries where the most severe violations of religious freedoms occur, pinpointing the most serious problem as state interferences in the inner dimension of religious freedom (or forum internum). We also come across these unfavourable assessments in reports by the United Nations Special Rapporteur on Freedom of Religion or Belief and in EU progress reports.

In a special issue (Religion and Human Rights 8 (2013)), we endeavoured to comprehend developments in the acknowledgement of the right to freedom of religion and belief in Turkey, a country that describes itself in its constitution as a democratic and secular state. Our focus was restricted to the most topical and urgent issues.

In her article, Rossella Bolletti tried to find a way through the legal, political and social obstacles to a satisfactory solution regarding the question of headscarves.

Mine Yıldırım discussed the legal difficulties faced by non-Muslims and Alevis as regards places of worship.

Özgür H. Çınar addressed the question of the compulsory religious education/instruction given in Turkish schools, which has been the subject of criticism on account of its Sunni Islamic bias.

In the last article, Hasan Sayım Vural detailed discussions by constitutional law scholars regarding the right to freedom of religion and belief in Turkey and endeavoured to find answers to the question of how domestic judicial mechanisms interpret this freedom.

Jeroen Temperman is Editor-in-Chief, Religion and Human Rights.

Özgür H. Çınar is Guest Editor, Religion and Human Rights and Senior Associate Member, Seesox, St Antony’s College, University of Oxford, UK.
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Introduction
By Rachel Welcher

The Oxford Human Rights Hub Blog has consistently drawn attention to violations of irregular migrants’ human rights and has called for better protections for this particularly vulnerable population. Many of the posts in this chapter also highlight the tension between migrants’ human rights and issues of national security, immigration control, and xenophobia, which often plays a role in the policy responses of destination countries.

Not only are the journeys that irregular migrants make from their homelands often inherently treacherous, but migrants are also frequently faced with harsh treatment and human rights violations while en route to their destination countries. In his post (‘Migrant “Push Backs” at Sea are Prohibited “Collective Expulsions”’ p 177), Nikolaos Sitaropoulos discusses the tragic drowning of migrant women and children in the Aegean Sea following interception by the Greek coast guard, which the survivors allege was an unlawful ‘push back’ or ‘collective expulsion’ in violation of Article 4-4 ECHR. Furthermore, Denise Gonzalez draws attention to the systematic abuses perpetrated against migrants traveling through Mexico by highlighting the plight of an Afro-Honduran migrant who was tortured, imprisoned on baseless charges, and racially discriminated against while en route to the United States (‘Angel: Afro-Honduran Migrant Tortured and Imprisoned in Mexico’ p 182).

Irregular migrants who manage to reach their destination countries are often detained based on their ‘illegal’ status. Several posts in this chapter question and criticise immigration detention policies and the conditions faced by detained migrants on the basis of their compatibility with human rights standards. Located a mere six miles north of the Oxford Human Rights Hub’s headquarters, Campsfield House is a prison-like immigration removal centre that has been the subject of serious human rights critique, often within the context of broader criticism of UK immigration policy. Jo Hynes (‘Campsfield Immigration Removal Centre: 20 Years Too Long’ p 168) and Melanie Griffiths (‘Government Lodges Plans to More than Double Oxfordshire Immigration Removal Centre’ p 168) highlight unfair treatment of detained migrants at Campsfield and elsewhere in the UK, including indefinite periods of detention, racial discrimination, and overcrowding. They also describe the strong community and academic response to the human rights abuses at Campsfield, in the form of an active campaign to close the facility and prevent its proposed expansion, which has achieved some degree of success.

Violations of migrants’ human rights in the context of immigration detention are certainly not limited to the UK. The European Court of Human Rights has heard several such cases (e.g. Suso Musa v. Malta [2013] ECHR 721, Rehbock v. Slovenia [2000] ECHR 645), and in M.A. v. Cyprus [2013] ECHR 717, it set out general principles for the judicial review of migrant detention, with which states must comply in order to comport with Article 5(4) ECHR (‘Judicial Review of Migrant Detention in Europe: In Search of Effectiveness and Speediness’ p 174). These principles, which Nikolaos Sitaropoulos argues are particularly significant in light of the trivial approach many states take to depriving migrants of their liberty, include making judicial review sufficiently accessible of Effectiveness and Speediness’ p 174). These principles, which Nikolaos Sitaropoulos argues are particularly significant in light of the trivial approach many states take to depriving migrants of their liberty, include making judicial review sufficiently accessible to detained migrants, ensuring that the process is expedient, and ensuring that it leads to termination of the detention if it is determined to be unlawful.

In Israel, the Supreme Court has twice quashed legislation authorising the detention of irregular migrants for lengthy periods based on violations of the constitutional rights to liberty and human dignity (R Ziegler, ‘Second Strike and You Are (Finally) Out? The Israeli Supreme Court Quashes (Again) the Prevention of Infiltration Law’ p 186). In his follow-up post, Ruvi Ziegler predicts that the third edition of the legislation, which is premised on the same tenets as the first two versions, will be challenged on constitutionality grounds in the near future (‘Detention of African Asylum Seekers in Israel: Welcome to Round Three’ p 187).

A common ‘push’ factor underlying migration decisions is internal conflict, as is the case for the millions of refugees fleeing civil war in Syria. There have been reports of widespread torture, rape, kidnapping, and the targeting of civilians, making the conflict in Syria ‘one of the most egregious human rights atrocities the world has ever witnessed’, in the words of Annie Sovcik (‘Providing Syrian Survivors of Torture Access to Rehabilitation Services’ p 183). Sovcik emphasises the great need for mental health and other rehabilitation services for survivors of torture in Syria, and encourages states to donate funds for this purpose. In addition, Cynthia Orchard and Dawn Chatty call upon the European Council to utilise its Temporary Protection Directive (2001/55/EC) to implement a coordinated temporary protection programme for Syrian refugees, granting them residence in EU Member States until circumstances in Syria become safe enough for them to return (‘High Time for Europe to Offer Temporary Protection to Refugees from Syria’ p 176). Doing so could alleviate some of the burden borne by Turkey, Syria’s neighbour to the north, to where approximately one million Syrian refugees have fled in search of temporary protection status and/or assistance with resettling in a third country (S Topouzova, ‘Navigating the Turkish Legal Regime: Syrian Refugees in Istanbul’ p 179).

Notably, it is not only Syrians who have been impacted by the armed conflict in Syria; the nearly half a million Palestinian refugees who had sought protection in the country prior to the war, many of whom reside in the besieged Yarmouk refugee camp, have suffered greatly. Armed forces have blocked humanitarian aid to the camp, and thousands of refugees have been trapped without adequate food, water, medical care, and other basic necessities for long periods. Nanjala Nyabola asserts that denying humanitarian aid agencies access to Yarmouk violates Common Article 3 of the Geneva Conventions, which concerns the treatment of civilians and non-combatants in internal conflicts (‘Palestinian Refugees in Syria: A Primer for Advocacy’ p 180).
Several blog posts over the past year have focused on responses to the major worldwide problem of human trafficking, which is an affront to human rights and often intersects with migration, security, poverty, and gender issues. In the UK, the Modern Slavery Act 2015 was first introduced in the House of Commons in June 2014, and became law on 26 March 2015. While applauding the awareness-raising effect of the legislation, Peter Carter criticises its lack of vision (‘Modern Slavery Bill – A Brief Review’ p 166). Mei-Ling McNamara further notes that it has been criticised for its ‘conspicuous lack of victim support’, in contrast with Scotland’s Human Trafficking and Exploitation bill (introduced in the Scottish parliament on 11 December 2014), which takes a ‘trauma-informed approach’ to helping victims (‘Scotland’s Answer to Modern-Day Slavery’ p 167).

The UK Court of Appeal has also been criticised for failing to adequately protect trafficking victims’ rights. In the cases of Reyes and Suryadi v Al-Malki [2015] EWCA Civ 32 and Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33, the Court held that diplomatic immunity prevented the victims from pursuing racial discrimination, harassment, and inadequate compensation claims against their traffickers (‘What Traffickers Know that the Court of Appeal Does Not’ p 171). Catherine Briddick calls this judgment ‘frankly breath-taking’ and concludes that it will ‘facilitate and compound . . . [the] exploitation and abuse’ of domestic workers, which are disproportionately women. The Court of Appeal also blocked the racial discrimination claim of a trafficked migrant worker on the basis of the illegality doctrine in Hounga v Allen [2012] EWCA Civ 609., but fortunately the Supreme Court later reversed this decision (‘Hounga v Allen: Trojan Horse Comes to the Rescue of “Illegal” Migrants’ p 170). Alan Bogg asserts that this ‘result . . . is to be applauded’, despite the fact that ‘it has regrettable exclusionary effects on non-trafficked but nevertheless vulnerable migrants’.

A valuable tool in the fight against human trafficking is Europol, which coordinates and facilitates information-sharing among the EU Member States’ national police forces, as trafficking is often a cross-border crime (O Johnstone, ‘Europol and the Fight Against Human Trafficking‘ p 174). Another useful tool is the concept of corporate social responsibility with respect to upholding human rights, as reflected in the United Nations Guiding Principles on Business and Human Rights. However, as Marija Jovanovic points out (‘The Business of Traffic in Humans’ p 172), most anti-trafficking policies aimed at businesses are merely voluntary and lack any enforcement mechanism, which limits their effectiveness.

The posts included in this chapter effectively call attention to significant developments in human rights law and shocking human rights violations impacting migrants, asylum-seekers, and trafficking victims over the course of the past year. They remind us of the importance of continued advocacy on behalf of vulnerable segments of our society, whose human rights remain far from guaranteed.

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Modern Slavery Bill – A Brief Review
By Peter Carter QC | 2nd December 2014

How does it happen? The fire brigade is called to a fire in a terraced house. When the firemen arrive the doors and windows are locked and bolted. They break in to discover that the mains electricity cable had been dangerously diverted to provide power for a cannabis farm. Hidden in the remains are frightened young Asian men of indeterminate age. They have no documents to establish who they are or where they come from. They speak little or no English. The police are on the scene. They arrest the men. What happens to them? Too often and for far too long now they – like other people found at brothels or committing street crime, or running away with forged or stolen identity documents – have been treated as criminals and sent to prison. That is now beginning to change, but too slowly.

It is 250 years since Lord Mansfield ruled in Somerset v Stewart (1772) 98 ER 499 that English law will not tolerate slavery within England. Blackstone in his Commentaries boasted “…this spirit of liberty is so deeply implanted in our constitution, and rooted even in our very soil, that a slave or a negro, the moment he lands in England, falls under the protection of the law and so far becomes a freeman …”. In 1794 the US Congress prohibited the slave trade by the Abolition of Slave Trade Act 1794. Britain took until 1807. The Slave Trade Abolition Act was the culmination of a campaign begun in Parliament in 1788. Then slavery itself was abolished in the Colonies and temporary apprenticeship substituted by the Slavery Abolition Act 1833.

Modern slavery and associated human trafficking has become an international phenomenon, producing global profits for the perpetrators similar to that produced by drug trafficking. But it is still largely hidden. The Palermo Protocol (2000), the Council of Europe Trafficking Convention (2005) and the EU Directive 20011 (in force from last year) have established a process for identifying victims of trafficking and treating them as victims rather than criminals or as illegal immigrants. These instruments recognise the extent of the problem. With one or two notable exceptions (R v O [2008] EWCA Crim. 2835, R v L [2013] EWCA Crim 991) the courts have been slow to respond. There remains incredulity that it can happen here (and “here” can be wherever in the world you happen to ask).

We now have the Modern Slavery Bill. The purpose of the Bill is twofold – (1) to enhance the prospects of eradicating trafficking and exploitation by means of the successful prosecution of the perpetrators; (2) to rescue and protect victims of modern slavery. There is a causative link between these two aims. In order to achieve the first of these aims, the second is critical. Successful prosecution will deter perpetrators.

How much does it improve the present law and practice? It has been described by Anthony Steen (Guardian 3.11.14) as “A lost opportunity”. It is certainly flawed. A Joint Committee of Parliament produced a report on the first draft Bill. It recommended a thorough revision of the law – simplify the current offences of trafficking and slavery rather than consolidate them into a single
Migration, Asylum & Trafficking

Chapter 9

Scotland’s Answer to Modern-Day Slavery
By Mei Ling McNamara | 21st March 2014

A new standalone human trafficking bill for Scotland has been quietly gaining momentum in the corridors of Holyrood.

On Monday it was announced that a formal proposal by Labour MP Jenny Marra for a dedicated Human Trafficking (Scotland) Bill has been adopted by Justice Secretary Kenny MacAskill, which hopes to tighten up criminal justice measures and provide comprehensive support to victims of human trafficking. This bill, which has received cross-party support at a time when the referendum for independence is dividing opinion, has promised to be introduced before the end of the parliamentary session.

This bill could not have come at a more significant time in Scotland’s history. As independence looms on the 2014 agenda, and debates to abolish the centuries-old corroboration in Scots law rage in parliament, the country has seen an alarming rise in the amount of people found to be trafficked for both sexual and labour exploitation. While the UK Human Trafficking Centre reported 99 people in 2013 were referred to agencies in Scotland as being potential victims of trafficking – a 3 per cent rise since 2012 – the government, law enforcement and social services know this is a mere fraction of the total victims who are able to come forward.

One of the hallmarks of human trafficking is not only the shadowy nature of its networks, but the ruthless criminalisation of its victims. Many do not come forward fearing recrimination and prosecution by authorities, and survivors have told me they often chose to remain in the trafficked situation, rather than face a host of terrifying unknowns outside. It may sound counter-intuitive, but a chaotic existence in a trafficked situation has known quantities – even if these stem from control, power and humiliation. It’s a travesty of justice that many face re-victimisation within the British courts. This new bill seeks to stymie that.

The acceptance by the Scottish government to introduce this bill is significant. While the Modern Slavery Bill introduced by Theresa May in Westminster has its merits, it has been notably criticised for its conspicuous lack of victim support, focusing instead on a prosecutorial approach against traffickers. Yet without safeguards to prevent re-trafficking, the bill risks isolating the very people it claims to protect. Crucially, the Human Trafficking (Scotland) Bill has been developed in response to what it sees is a trauma-informed approach to sexual and labour exploitation, while maintaining the ethics and jurisprudence of human rights law.

Scotland’s human trafficking bill has some way to go before it can be voted into law. Yet news of its introduction into the Scottish parliament shows progress and optimism – a country addressing the intractable challenge of human trafficking without steering off course into the murky waters of immigration policy.

Mei-Ling McNamara is a journalist and documentary filmmaker, working in both print and broadcast media. She is a doctoral candidate in Trans-Disciplinary Documentary Film at the University of Edinburgh where her work is focused on forced labour, trauma and the politics of slavery in Britain.
Campsfield Immigration Removal Centre: 20 Years Too Long
Jo Hynes | 23rd June 2014

Campsfield House, an immigration removal centre in Kidlington run by Mitie for profit, is now in its 20th year of operation.

Twenty years of detention without trial, without time limit, without proper judicial oversight and with little chance of bail for the detainees- all just 6 miles north of Oxford.

Campsfield detention centre on first glance certainly looks like a prison; its category C prison security would certainly suggest so. Yet it is far from such. In theory, detainees are supposed to be held here for a short, temporary period before they are deported, if it is deemed a risk that they will abscond. Instead, a system of indefinite detention, largely for administrative reasons, has arisen, with the average detention lasting 4-5 months, and some for 2-3 years. This creates a dual uncertainty hanging over detainees, since some have been held here for several years, yet simultaneously deportations can occur with next to no warning, in some cases the next day.

The UK detains more migrants, for longer and with less judicial oversight, than any other country in Europe. We are also the country in which the role of private companies in running detention centres (7 out of 10 detention centres) is most prominent. The Council of Europe’s Human Rights Commissioner, as well as organisations such as Amnesty International, have called on the UK to revise its immigration detention policy and reverse the trend to ever-more immigration detention- even the Lib Dems in their latest Immigration Policy Paper propose to end indefinite detention for administrative purposes. The facts are clear: immigration detention doesn’t act as a supposed deterrent to immigration and contravenes basic human rights.

In the past month Campsfield has seen a 50 detainee strong hunger strike, after one detainee, Mauladad Kaukar, was forced to sign a voluntary deportation form, despite speaking no English and not having the form explained to him. Both him and Muswar Khan, another detainee who could speak English and who was advocating on his behalf, were both racially abused by staff and threatened with solitary confinement. In the case of Muswar Khan, he has also had his access to the internet and right to work in the centre taken away, after staff realised he was writing emails concerning Mauladad’s treatment and for labelling the previously unlabelled Independent Monitoring Board complaints box. The hunger strike has since stopped, but Muswar has brought Mauladad’s case to the Chair of the Independent Monitoring Board. Yet with 31 of the 45 complaints made by detainees being referred back to the centre to be dealt with internally, according to the IMB’s most recent annual report, Muswar is sceptical about this achieving much.

Since the opening of the centre, an active Close Campsfield campaign has been in operation to work for its closure. This past month the group, alongside Oxford University Amnesty International, have been coordinating an open letter to David Cameron, condemning Campsfield detention centre and the principle of indefinite detention. So far the letter has the support of over 40 academics, including several Heads of Houses, Ken MacDonald QC and Professor Danny Dorling.

Not often do such blatant abuses of human rights happen so systematically, so openly and so close to home.

Jo Hynes is a second year geography undergraduate at Oxford University and President of Oxford University Amnesty International 2014-5.

Government Lodges Plans to More Than Double Oxfordshire Immigration Removal Centre
By Melanie Griffiths | 17th November 2014

The Home Office submitted plans for major expansion of Campsfield House, an Immigration Removal Centre situated just outside Oxford. Local political, religious and charitable organisations are coming together to fight the proposals on the basis that indefinitely detaining people for immigration purposes is inhumane, doesn’t fulfil immigration objectives and is prohibitively expensive.

Immigration detention in the UK
Immigration detention is an administrative, rather than punitive system. People are detained not as the result of a conviction, but for the purpose of an immigration goal, such as deportation. Our detention system is one of the largest in Europe, but has been repeatedly criticised domestically and internationally, including for inappropriately detaining vulnerable people.

The Home Office argues that people are detained for minimal periods, usually just before removal from the country. However, many detainees aren’t at the end of their immigration case but have asylum claims or immigration appeals pending. Others cannot be removed, often through no fault of their own. Indeed, my PhD focused on people with disputed identity, many of whom were detained for long periods as the authorities fought over their identity. Unlike the rest of Europe, there is no maximum period for detention in the UK, meaning that people can be detained indefinitely.
Campsfield opened as an Immigration Removal Centre in Kidlington in 1993. Until recently, there were 216 bed spaces but now, as a result of extra beds being squeezed into increasingly overcrowded rooms, there are 276 spaces. If plans to build a new section of the centre go ahead, the figure will increase dramatically to over 560 spaces. This would make it one of the largest detention centres in the whole of Europe.

Like other centres, Campsfield resembles a prison. People are held against their will, surrounded by surveillance cameras, behind locked gates and razor wire topped fences. Campsfield has long experienced problems, with over half the detainees on hunger-strike just four months after the centre opened in 1993 and the first ‘riot’ occurring three months later. There have since been further hunger-strikes, escapes, disturbances and suicides. Just last year there was a major fire. Despite previous warnings, no sprinkler system had been fitted, significantly increasing the danger and destruction.

Expansion plans
The UK as a whole now has over 4,000 immigration bed spaces, double the number just six years ago. Already this year an extra 800 spaces were created as a result of the re-designation of a prison as an Immigration Removal Centre and the addition of beds at several existing centres. The plan to build a new, bigger centre at Campsfield, would create 290 additional beds.

The land for the proposed build is ‘Green Belt land’, meaning that there must be ‘very special circumstances’ for it to be used for construction. The Home Office is arguing that this stipulation is met by a need for more immigration detention space, so as to increase removals. However, as Home Office statistics demonstrate, although we detain more migrants than ever before, we remove ever fewer from our shores. Rather, people are routinely detained even when they are not at the end of the legal process and/or when they cannot be removed. This means that they are simply ‘warehoused’ in detention for long periods, or are needlessly detained only to be released again.

As such, detention not only damages individuals, but also fails to achieve the government’s own objectives. These and other aspects of detention are currently being scrutinised by the first ever Parliamentary Inquiry on the topic.

Making your voice heard
The Campsfield plans are generating growing local opposition. In recent days the Prime Minister has received letters of concern from 21 concerned local organisations and another from over 70 senior Oxford University academics. The latter was launched by Baroness Helena Kennedy QC on 15 November outside the Radcliffe Camera.
Individuals can also feed into the decision-making process by writing to their MPs and submitting planning objections to the Cherwell District Council. The Planning Committee’s decision is likely to be made on 22nd January 2015 and submissions should be made in December 2014. The Campaign to Close Campsfield is running a workshop on 3rd December 2014 on making planning objections. Further details, including template letters to send MPs, are available on both the Campaign to Close Campsfield and Detention Forum websites. If you want to learn more about supporting people already in detention, contact Asylum Welcome.

Coming up to a general election, it is hardly surprising that immigration issues are high on the national agenda. Unlike previous elections, however, it appears as though this time, the controversial issue of immigration detention is very much at the heart of the debate.

Dr Melanie Griffiths completed a DPhil on the UK’s asylum and detention system at the University of Oxford in 2014. She is currently an ESRC Future Research Leaders Fellow at the University of Bristol.

Hounga v Allen: Trojan Horse Comes to the Rescue of ‘Illegal’ Migrants
By Alan Bogg | 17th September 2014

In Hounga v Allen [2014] UKSC 47 the Supreme Court took the opportunity to overrule one of the most controversial Court of Appeal decisions on employment rights in recent times, where the Court of Appeal held that the doctrine of illegality barred the race discrimination claim of a trafficked migrant worker, Ms Hounga.

The Supreme Court reversed the Court of Appeal on the illegality point and upheld Ms Hounga’s race discrimination claim. This means that ‘illegal’ migrants now enjoy (some) employment rights in (some) circumstances, rather than being outlaws deprived of their fundamental human rights in every circumstance. In so doing, it puts to an end a short but shameful episode in the life of the English common law. It is a result that is to be applauded. How enduring this judgment will prove to be is, however, an open question. While all of the Justices concurred in the result, Hounga offers two approaches to the illegality enquiry in race discrimination claims. Lord Wilson (with whom Lady Hale and Lord Kerr agreed) delivered a speech that was ripe with promise for a progressive development of the law on illegality in respect of employment claims. Lord Hughes (with whom Lord Carnwath agreed) delivered a speech that would have preferred a much narrower approach to the disposal of the case.

Essentially, Lord Wilson appears to suggest a three-stage approach to the determination of the illegality issue. First, was the claimant’s illegality ‘inextricably bound up’ with the tort claim? While Lord Wilson emphasized that this enquiry could not be purged of subjective considerations, thereby depracing approaches that purported to offer an objective causation-based analysis, he nevertheless concluded that the Court of Appeal had fallen into error in concluding that there was an inextricable link. The illegality was part of the context, the circumstances that went to constitute her vulnerability to racial abuse, rather than integral to her tort claim that she had been treated less favourably because of her race. Lord Hughes agreed that the ‘inextricable’ link between the illegality and the tort claim has not been satisfied.

Secondly, there is a need for an enquiry into the public policy basis of illegality to ascertain whether or not the reasons in favour of denying the claim are sufficiently strong. According to Lord Wilson, the overarching value in this area of the common law is the preservation of the ‘integrity of the legal system’, though this encompasses a range of more specific concerns: would allowing her claim permit her to profit from her own wrong? Would it permit the evasion of a criminal penalty? Would it appear to condone Ms Hounga’s illegality and encourage others like her to break the law? Conversely, would denying the claim encourage other unscrupulous employers to employ and abuse migrants with irregular status through the promise of impunity? All of these reasons gave little or no support to the denial of her claim on the grounds of illegality. Ms Hounga was not profiting from her own wrong; she was not evading a criminal penalty; there was no evidence that others might be deterred by disallowing her claim (though it would seem a rather unpalatable prospect for counsel in subsequent cases to argue that since unremedied racial harassment would deter illegal migrants the claim should be barred); and it was not implausible that other employers might be attracted to employing ‘illegal’ migrants if it meant that they could be employed cheaply and without needing to worry about their employment rights.

Thus far, the speeches of Lord Wilson and Lord Hughes are substantially in alignment. The speeches diverge, however, on the third point. Lord Wilson suggested that public policy might sometimes counteract against the denial of tort claims on the basis of illegality. This is new and significant, for public policy has generally been regarded as a doctrine that defeats contract and tort claims. In Hounga, Lord Wilson drew upon international human rights norms, as developed by the ILO and the European Court of Human Rights, to conclude that Ms Hounga had been trafficked. Since it formed part of the public policy of the English common law to afford protection to the victims of trafficking, permitting illegality to operate would be an affront to that public policy. Putting it differently, we might say that the integrity of the English legal system would have been damaged if the trafficked victim in Hounga had forfeited her human right not to be subjected to racial discrimination. Indeed, this is precisely what had happened in the Court of Appeal decision itself.

It is tempting to react with frustration to Hounga. In tailoring its protection to trafficked migrants, it has regrettably exclusionary
effects on non-trafficked but nevertheless vulnerable migrants. In countenancing the balancing of public policy reasons even in human rights claims, it may be regarded as a betrayal of the universality of human rights norms in allowing illegality to figure at all. The temptation should be resisted, however. The Supreme Court decision in Hounga is an example of the common law working as well as can be expected of it, within the institutional constraints of incremental adjudication. The challenge for human rights lawyers is to plot the next steps after Hounga. In particular, Lord Wilson’s category of public policy operating against the defeasibility of human rights claims by illegality is a Trojan Horse. It brings international human rights law into the very breast of the English common law, and it is fraught with subversive potential. The next move is to consider which other aspects of international human rights law might impede the operation of the illegality doctrine, especially where its effects on vulnerable workers are most pernicious.

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What Traffickers Know that the Court of Appeal Does Not
By Catherine Briddick | 11th February 2015

In Reyes and Suryadi v Al-Malki [2015] EWCA Civ 32 and Benkharbouche and Janah v Embassy of the Republic of Sudan and Libya [2015] EWCA Civ 33 the Court of Appeal considered two cases involving domestic work and immunity, a consideration of which reveals the discriminatory and gendered premises on which the law continues to operate.
Ms Benkharbouche, who was employed as a cook in the Sudanese embassy, brought claims in the Employment Tribunal for unfair dismissal, failure to pay the minimum wage and breach of the Working Time Regulations 1998. Ms Janah, whose duties included cooking, cleaning and shopping, brought claims against the Libyan Embassy for unfair dismissal, arrears of pay, racial discrimination, harassment and breach of the Working Time Regulations 1998. In both cases the respondent sought to resist proceedings by asserting state immunity under the State Immunity Act 1978 (SIA). The issue for consideration was whether or not state immunity under the SIA was compatible with the applicant’s rights under Article 6 of the European Convention Human Rights (ECHR) and Article 47 of the EU Charter. The immunity protected by the SIA is derived from the principle in international law that one state cannot sit in judgement on another. However, as paragraph 21 of the judgement states, the scope of immunities required by international law are the subject of ‘great uncertainty’ and the right is violated if a state adopts a rule restricting access to the courts which international law does not require. The Court of Appeal concluded that the SIA did go beyond what was required; it therefore issued a declaration of incompatibility under the Human Rights Act 1998 and disapplied sections of the SIA relevant to the claims based in EU law to enable those actions to proceed.

In contrast the Court, which heard both cases together, held that diplomatic immunity could successfully prevent Ms Reyes and Ms Suryadi from pursuing claims for racial discrimination, harassment and failure to pay the minimum wage following their trafficking by the Al-Malki’s into the UK for domestic servitude. The Vienna Convention on Diplomatic Relations 1961 confers on diplomats complete immunity from civil actions except in cases that concern commercial activity carried out outside of the diplomat’s official functions (Art 31(1)(c)). In a frankly breath-taking conclusion the Court of Appeal stated that although the denial of legal remedies to the trafficked women which resulted from their decision ‘may appear’ unfair, any ‘apparent inequity’ reflected a policy decision ‘already made’ which privileged diplomatic relations over individual rights (paragraph 77).

The provision of services that are important for the proper running of an embassy cannot be judged ‘incidental’ when carried out in a home. The salient feature for Lord Dyson, what the employee actually does, is not changed by where she does it. The failure of the Court of Appeal to recognise what traffickers know to be the case, that women’s domestic work has considerable value, commercial and otherwise, is a result of patriarchal attitudes which essentialise and devalue women’s skills and experiences and which seek to keep issues that are the legitimate concern of human rights law outside its purview by relegating them to the private, domestic sphere. The effect of this judgement for domestic workers, who are subject to gendered immigration rules which prevent them from changing employers, is to facilitate and compound their exploitation and abuse.

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The Business of Traffic in Humans
By Marija Jovanovic | 4th May 2014

Human trafficking is a complex phenomenon touching upon different legal and policy frameworks. Being first and foremost a very serious crime, its relationship with human rights law is not as straightforward as many are quick to imply. Bringing it within the ambit of traditional human rights law, and invoking the responsibility of a State for the harm inflicted upon victims, requires engaging with the concept of positive duties. It creates a triangular relationship between a trafficker, his victim, and a State: the extent of States’ positive obligations is far from clear-cut.

Importantly, human trafficking is also a business venture. By treating human beings as commodities, it generates enormous profit, with limited or no risks. Its estimated turnover is said to be more than US$32 billion a year. However, unlike other profit-driven criminal enterprises that operate exclusively within illegal markets, human exploitation usually takes place in legitimate markets – such as agriculture, construction, or domestic service. Therefore, it is not easy to determine what role, if any, businesses have in the fight against this global scourge, and whether human rights law bears any relevance in that context. Do business enterprises have self-standing obligations arising out of human rights law? This inevitably raises a question of human rights obligations of non-State actors (the “horizontal” application of human rights law). Does a growing shift in power from the once dominant State to corporations justify a fundamental shift in responsibility for protecting human rights – effectively privatizing the enforcement of human rights laws?

The 2011 UNGDP deals with this business-human rights nexus. The Principles are structured around three pillars: the State duty
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to protect human rights; the corporate responsibility to respect human rights; and access to remedy. The second pillar appears to establish a self-standing responsibility of business enterprises to respect human rights, including their duty to act with due diligence to avoid infringing the rights of others, and to address adverse impacts of their activities. This seems a welcome, if controversial, hypothesis, given the nature and the status of the Principles. It is clear that they should not be read as creating new international law obligations. The responsibility of business enterprises to respect human rights is said to be ‘distinct from issues of legal liability and enforcement….’ Therefore, it seems premature to claim that human rights law is going through a major conceptual transformation, treating businesses as duty-bearers in their own right. In that context the following statement from the recent UK national action plan for the implementation of the UNGDP sounds overly ambitious: ‘At a time when some companies have bigger turnover than some countries’ GDP (…) we need all companies – from the biggest to the smallest – to embrace their responsibilities towards society, including respecting human rights’.

At national level, the UK Government sought to position Britain as ‘a world leader in the fight against modern slavery’ by introducing a Modern Slavery Bill. However, whilst the Report of the Modern Slavery Bill Evidence Review acknowledged a crucial role for business, the Draft Modern Slavery Bill published last December disappointingly commits only to ‘continue to work with business on a voluntary basis’. Following pre-legislative scrutiny of the Draft Bill, the Joint Committee published a Report offering an amended Bill seeking to correct perceived shortcomings of the Government’s draft. Nevertheless, it merely requires relevant companies to include modern slavery in their annual strategic reports. Arguably, the desire not to create unduly burdensome requirements for businesses seems to have prevented introducing legislation with more teeth.

Developments across the Atlantic seem more promising. The 2010 California Transparency in Supply Chains Act – the first of its kind – requires retailers and manufacturers doing business in California, with annual revenues of over US $100 million, to disclose information about their efforts to eradicate slavery and human trafficking from their direct supply chains. Also, several recent initiatives at Federal level have tightened anti-trafficking laws directed at businesses, helping those that contract with the US government to enforce existing anti-trafficking policy and to clarify steps that federal contractors must take to fully comply with anti-trafficking measures. These initiatives, however, are far from comprehensive, and, it is debatable whether they stem from genuine human rights considerations, or rather concerns with maintaining a good image and business reputation.

Evidently, the nature and scope of obligations placed on business still depend solely on national legislation. These duties are mainly voluntary, lacking any structured enforcement mechanism or a clear idea of their conceptual and normative grounding.

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Judicial Review of Migrant Detention in Europe: In Search of Effectiveness and Speediness
By Nikolaos Sitaropoulos | 27th January 2014

Detention has been highlighted in recent years by a number of international and non-governmental organisations as an ineffective and inefficient tool of migration control employed by a large number of states. In 2013, the European Court of Human Rights continued to find violations of Article 5(4) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("ECHR") by various state parties and even rendered a quasi-pilot judgment in the case of Suso Musa v. Malta [2013] ECHR 721.

The grounds of these violations related to the lack of an effective judicial review mechanism, and, in the majority of the cases, to national procedures that did not respect the speediness requirement of Article 5(4) ECHR. The possibility of detention for a maximum period of 18 months in EU member states, established by Article 15 of the 'Return Directive' in 2008, has rendered even more evident the need for an effective, speedy judicial review in immigration and asylum cases.

Article 5(4) ECHR entitles a detainee to institute proceedings challenging the procedural and substantive conditions upon which his deprivation of liberty is based. The general principles applied by the Court in this regard are set out in M.A. v. Cyprus [2013] ECHR 717, as follows:

- Article 5(4) does not guarantee a right to judicial review of such a scope as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for "lawful" detention.
- The remedies must be made available during a person’s detention with a view to that person obtaining speedy judicial review of the lawfulness of his detention capable of leading, where appropriate, to his release. The accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.
- The existence of the remedy required by Article 5(4) must be sufficiently certain, not only in theory, but also in practice.
- The requirement of procedural fairness under Article 5(4) does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances.
- Under Article 5(4), all detainees also have a right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of their detention and to its termination if it proves unlawful. In this context, the Court has laid down strict standards. For example, in the cases of Sarban v. Moldova No. 3456/05, Kadem v. Malta[2003] ECHR 19 and Rehbock v. Slovenia[2000] ECHR 636, the Court concluded that time periods of twenty-one, seventeen and twenty-three days, respectively, were excessive.
- Although Article 5(4) does not require the existence of bi-level judicial review, in cases where it exists, both levels should meet the speediness requirement (Djalti v. Bulgaria No. 31206/05, para. 64). Of importance in this context is legal aid. Although the ECHR does not require provision of free legal aid in the context of detention proceedings, if legal representation is required under domestic law, the non-existence of legal aid raises issues of compatibility with Article 5(4) (Suso Musa v. Malta, para. 61). In the case of Suso Musa, the Strasbourg Court took an exceptional step and adopted a quasi-pilot judgment, indicating to Malta (in the non-operative part of the judgment (para. 119 et seq.)) the necessity of general measures at the national level establishing, inter alia, a judicial- character mechanism providing for speedy and fair judicial review of migrant detention. What actually prompted the Court to act in this manner was its conclusion that the problems detected in the case could give rise to numerous other well-founded applications that would excessively burden the Court’s docket. The Court had already found a similar violation by Malta in 2010, in another case concerning migrant detention, Louled Massoud v Malta No. 24340/08.

The above guidelines provided by the Strasbourg Court’s case law are significant, especially in a period when deprivation of migrants’, including asylum seekers’, liberty upon arrival or in view of forced return from Europe has been trivialised.

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Europol and the Fight Against Human Trafficking
By Owain Johnstone | 29th July 2014

On Tuesday 24th June 2014 the Human Trafficking Discussion Group (under the umbrella of the Oxford Migration Studies Society) was delighted to host a talk by Sergio D’Orsi of Europol, speaking about that organisation’s important work on human trafficking.

Sergio spoke engagingly about both Europol’s general institutional role and capacities and its specific focus on human trafficking within the organisation’s broader mandate.
If you are not familiar with Europol's work, it can best be described as a coordination and liaison mechanism for European police forces – and also a mechanism for liaising with non-European forces when necessary. While Europol itself does not possess any executive powers, it can help to support and coordinate policing activity by Member States whenever this involves cross-border crime of some kind. As such, Europol is a key body when it comes to creating a coordinated and effective European policing response to cross-border threats. It offers a means of communication between different countries’ operatives as well as a large intelligence database.

A large part of Europol's mandate focuses on organised crime, within which is situated its human trafficking team, of which Sergio is a part. That team has an important role to play given the increasingly prevalent problem of human trafficking in Europe. They are also a source of expertise on trafficking, able as they are to draw on and collate experience and intelligence from across Europe and elsewhere. Sergio noted a number of contemporary trends in trafficking drawn from this knowledge, including an increase in levels of intra-European human trafficking, the growing flexibility of organised criminal groups to react to novel laws and enforcement mechanisms, and an increased demand for illegal labour following the economic crisis. In other words, trafficking is a growing problem – in Europe as much as anywhere.

One of the aspects of Sergio's talk that particularly stood out was his emphasis on the variability of human trafficking. Criminal groups can be small or large, routes are rarely constant (in contrast to people smuggling) and business models can be sophisticated and rapidly changing – the internet has become a particularly significant influence on trafficking activity, permitting traffickers to advertise, communicate, transfer money and take ‘bookings’ for anything from escort services to prostitution, and all with relative anonymity.

Yet despite this flexibility and variability, Sergio also emphasised the need to remember that traffickers and their victims are often of the same nationality and even come from the same local communities. One implication of this is that victims might find themselves abroad (in the UK, for example), where the only people who speak their language are their traffickers. A related finding is that organised criminal groups engaged in trafficking often have close links with immigrant communities in destination countries.

The overall impression that Sergio left us with was of human trafficking as a business – and like many businesses it is made up of a wide variety of actors and often linked to local contexts. He also noted the consequent importance of the bottom line, meaning that from an enforcement perspective it becomes even more important to address the financial aspects of trafficking.

Human trafficking, then, is a complex, multifaceted and rapidly evolving phenomenon, which makes the role of a coordinating and intelligence sharing body like Europol particularly crucial. If we are to tackle trafficking we must get to grips with its complexity and recognise that no country is able to address the issue alone.

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High Time for Europe to Offer Temporary Protection to Refugees from Syria?
By Cynthia Orchard and Dawn Chatty  |  27th October 2014

Approximately 3 million people have fled Syria due to the armed conflict. About 96% of the refugees remain in Lebanon, Turkey, Jordan, Iraq, and Egypt. By July 2014, the number of Syrian asylum applicants in Europe reached 123,600, about 4% of the total. With such high numbers of displaced persons so close to European borders, and with large numbers of Syrian refugees in Europe, the activation of a coordinated temporary protection regime in Europe is overdue. The recent deaths of hundreds of migrants in the Mediterranean Sea, some of them Syrian refugees, illustrate the urgency of expanding safe, legal routes into Europe for refugees.

Following the uncoordinated response to the refugee crisis generated by conflict in the former Yugoslavia in the 1990s, in 2001, the European Council issued a Temporary Protection Directive (2001/55/EC). It provides a framework and minimum standards for responses to the mass displacement of persons unable to return to their country of origin (for example, due to armed conflict). Under Article 2(d), the Directive can apply to a spontaneous movement or an assisted evacuation into Europe of a large number of people from a particular country or region; and under Article 8(3), States should facilitate the entry of eligible persons, including by the issuance of visas.

The Directive has never been activated but could be part of a reasonable response to the Syrian refugee crisis. It would work something like this: the European Council would designate the group for whom temporary protection is required (in this case, people who have fled Syria due to the armed conflict). Then participating states would facilitate the entry and temporary protection of people from the designated group; and the designation also would apply to members of the group who entered Europe independently. People who have committed serious crimes would be excluded from protection. Beneficiaries would be granted temporary protection for one year (renewable if the circumstances in Syria had not substantially improved). The group designation could be withdrawn when the circumstances in Syria permitted displaced persons to return home safely or on the European Council’s decision.

This temporary protection regime would be similar in some ways to existing refugee resettlement and humanitarian admission programmes, but offers several advantages. Temporary protection does not require a status determination procedure (other than to establish membership in the designated group), as is normally necessary for refugee status, which would reduce the time and resources needed to process beneficiaries. In addition, the programme would be coordinated across Europe, promoting responsibility-sharing amongst European countries. Finally, the programme would offer protection to significantly more people.

Temporary protection should not take the place of asylum. As confirmed in the Directive (Paragraph (10) and Articles 4 and 19),
Migrant ‘Push Backs’ at Sea are Prohibited ‘Collective Expulsions’
By Nikolaos Sitaropoulos | 8th February 2014

In the early hours of 20 January 2014, a boat coming from Turkey carrying twenty-seven Afghan and Syrian migrants was intercepted by the Greek coast guard near the isle of Farmakonisi, in the southeast Aegean Sea, and later capsized. Eight migrant children and three migrant women drowned. While this operation was described by the Greek authorities as a rescue, the migrant survivors adamantly alleged that it was, in fact, a ‘push back.’ ‘Push back’ is a widely-used term that has overshadowed the legal term, ‘collective expulsion,’ the prohibition of which was expressly provided for in 1963 in the one-sentence, oft-forgotten, Article 4 of Protocol No. 4 (‘Article 4-4’) to the European Convention on Human Rights (‘ECHR’).

In the case of Becker v. Denmark [1962] ECHR 1, the former European Commission of Human Rights defined collective expulsion as any measure ‘compelling aliens as a group to leave the country, except where such a measure is taken after and on the basis of a reasonable and objective examination of the particular cases of each individual alien of the group.’ The purpose of Article 4-4 is to enable migrants to contest the expulsion measure, thereby guarding against state arbitrariness and safeguarding fairness in forced return procedures.

Under the Strasbourg Court’s established case law, the fact that members of a group of migrants are subject to similar, individual expulsion decisions does not automatically mean that there has been a collective expulsion, insofar as each migrant is given the opportunity to argue against this measure to the competent authorities on an individual basis.

Moreover, there is no violation of Article 4-4 if the lack of an expulsion decision made on an individual basis is the consequence of applicants’ own ‘culpable conduct’. For example, in Berisha and Hajliti v. the former Yugoslav Republic of Macedonia,” No. 18670/03 the applicants had pursued a joint asylum procedure and thus received a single common decision. Another example is the case of Dritsas v. Italy No. 2344/02, in which the applicants had refused to show their identity papers to the police and as a result, the latter had been unable to issue expulsion orders to the applicants on an individual basis.

The locus classicus case involving interception at sea is Hirsi Jamaa and others v. Italy No. 27765/09. This case concerned the 2009 interception and forced return to Libya of a large group of African migrants by Italian navy ships in the Mediterranean, based upon relevant bilateral agreements between Italy and Libya. The Court in this case noted that Article 4-4 is applicable not only to migrants lawfully within a state’s territory but also to all foreign nationals and stateless individuals who pass through a country or reside in it. The Court found Italy to be in violation of the above provision on the grounds that the migrants’ transfer to Libya was carried out without any examination of their individual situations, there was no identification procedure conducted by the Italian authorities, and the staff aboard the transporting ships were not trained to conduct individual interviews and were not assisted by interpreters or legal advisers.

State responsibility in this context also arises under Article 2 ECHR (right to life), as demonstrated in another, earlier Strasbourg Court case, Xhavara and fifteen others v. Italy and Albania No. 39473/98. This case concerned the interception in 1997 of a group...
of Albanian irregular migrants in the Mediterranean by an Italian navy ship. Fifty-eight migrants drowned as a result. The Court held
that, given that the fatal accident was caused by an Italian navy ship, the Italian authorities were under an obligation, pursuant to
Article 2 ECHR, to carry out an investigation that was 'official, effective, independent and public.' On this point, the Court concluded
that the criminal investigation initiated by the Italian authorities had provided adequate safeguards with respect to the effectiveness
and independence requirements.

The tragic migrant interception operation in the Aegean Sea last January is part of the long list of tragedies in the Mediterranean
and a consequence of long-standing European migration policies and practices that make migrants' lawful entry into Europe
overly difficult. Although European states have no legal obligation to change their policies, they are nonetheless under a clear
legal obligation to provide adequate redress to migrants who have undergone such painful odysseys due to ‘push back’ or rescue
attempts.

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United Nations Human Rights Council: Commission of Inquiry into Human Rights Abuses
in the Democratic People’s Republic of Korea
By James Lewis | 3rd April 2014

On 26 March 2014 the United Nations Human Rights Council (“HRC”) passed a Resolution ‘condemning in the strongest terms’
the continuing violation of human rights and calling for the referral of a wide catalogue of human rights abuses by the Democratic
Republic of Korea (“DPRK”) to the International Criminal Court (“ICC”) for investigation (“Resolution”). The Resolution follows
an extraordinarily comprehensive report published by the Commission for Inquiry on Human Rights Abuses in the DPRK
(“Commission”) which included extensive witness testimony on the systematic abuse of women and children.

The Commission was established on 21 March 2013 by the HRC to investigate human rights violations in the DPRK and reach
a recommendation on whether the situation in the DPRK should be submitted to the ICC for investigation on charges of crimes
against humanity.

An unprecedented amount of evidence was compiled over a year-long investigation, involving over 80 witnesses providing
testimony during public hearings held in London, Washington D.C., Seoul, and Tokyo. This led to the Commission’s formal
conclusion (delivered on 17 March 2014) that it had found “systematic, widespread and grave human rights violations occurring in
the DPRK” on a scale that reveals “a totalitarian state that does not have any parallel in the contemporary world”.

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Of particular importance is the Commission’s Report of 7 February 2014 (“Report”), containing a comprehensive documentation of the DPRK’s human rights abuses using an unparalleled volume of new witness testimony. This new testimony covers not only the DPRK’s well-documented abuses including arbitrary detention and execution, forced labour, and political oppression, but also in particular, the DPRK’s systematic abuse of women and children.

The Report details, using primary accounts from both victims and humanitarian workers, the widespread trafficking of women for prostitution, forced marriages, and forced concubinage in the People’s Republic of China (“PRC”). Women are targeted by brokers, who offer them food or employment, then smuggle them across the PRC border for sale. Several women testified that victims are sometimes unaware that they will be leaving the DPRK. Brokers offer them false promises of employment elsewhere within the DPRK, but instead traffic them into the PRC. One victim stated that she was sold in 2003 by traffickers for 8,000 won (US$ 7.50).

A woman is typically sold at least twice before she is finally sold into the sex industry or to a man for marriage. Trafficked women are not registered in the PRC and neither are the ‘marriages’ nor any children born. This is because registration and documentation would risk exposing the women to the PRC authorities who routinely forcibly repatriate them to the DPRK. Thus, although the children born to Chinese fathers could claim nationality and State education under PRC law, they are often unable to enjoy any benefits as their registration would risk exposing their mothers. As a result of being undocumented, trafficked women routinely face rape, violence, and death at the hands of their husbands, pimps, or others who exploit their status.

Pregnant woman repatriated back to the DPRK face forced abortions as required by a DPRK eugenic policy of genetic purity. These brutal abortions are carried out in holding or detention and interrogation centres. Descriptions include repeated physical trauma to induce miscarriages, insertion of chemicals or drugs into the bloodstream, or forcible extraction of the foetus. No medical assistance is provided to any of the victims who almost inevitably experience permanent organ damage or death from blood loss or infection. It is also common practice for prison guards to drown or suffocate infants born inside prisons or force the mothers to kill their own infants.

These testimonies are only examples of the brutal abuses committed particularly against women and infants detailed in the Report. Given the compelling evidence of the widespread and categorical abuse of human rights in the DPRK, it is unsurprising that the HRC passed its recent Resolution on such strong terms. The Resolution was adopted by a vote of 30 to 6, with 11 abstentions. However, as the referral to the ICC will need to come from the Security Council, such a referral will likely be blocked by Russia and China who both voted against the Resolution.

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Navigating the Turkish Legal Regime: Syrian Refugees in Istanbul
By Stanislava Topouzova | 3rd May 2014

Between March 21st and March 28th, a group of Oxford MSc students from the Department of International Development travelled to Istanbul to conduct fieldwork for a variety of migration-related questions. They met with advisors, specialists, and representatives from the International Organization for Migration (IOM), the Helsinki Citizen’s Assembly (HCA), the Ministry of Interior, and the Tarlabasi Community Centre among others. This article was informed by those meetings.

Since March 2011, according to the United Nations High Commissioner for Refugees (UNHCR), over one million Syrians have arrived in Turkey due to the ongoing conflict in Syria. The Turkish Prime Ministry Disaster and Emergency Management Presidency reported that over 900 000 Syrians have arrived in Turkey since the conflict began.

Many Syrians who enter Turkey at the southern border are housed, often temporarily, in one of 21 UNHCR camps that have been established at the border. From this point of entry, many Syrians embark on yet another journey: one through the Turkish legal system in search for official “temporary protection” status, modelled after the European Union Directive on Temporary Protection.

The primary law concerning refugees in Turkey, the Law on Foreigners and International Protection (No. 6458, 04/04/2013), defines a refugee as: “a person who as a result of events occurring in European countries and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality…”. In effect, this law maintains the “geographical boundaries” outlined in the Geneva Convention on the Status of Refugees and indicates that the Turkish government grants refugee status and protections only to persons from Europe fleeing persecution.

According to this law, any other individual who enters Turkey due to a well-founded fear of persecution can be granted a “conditional refugee status” after a determination procedure and an evaluation of their application. Ordinarily, applications are evaluated by UNHCR staff at one of many evaluations centres across the country. After completing interviews and evaluations, UNHCR staff determine if a case for asylum is “genuine” and whether the applicant qualifies for resettlement in a third country,
typically Canada, the United States, Australia, or countries in Europe.

The resettlement process is protracted and arduous, as the law permits the Directorate General to oblige conditional refugees to reside, and register, in a particular province or city anywhere in the country while waiting for third-country resettlement. Thus, many conditional refugees awaiting third-country resettlement are scattered in villages and towns across the country while waiting to be resettled.

When the application of a conditional refugee is accepted by a third-country government and has successfully cleared all security checks, the International Organization for Migration (IOM) in Turkey acts as one of the primary vehicles for facilitating the resettlement process. The organization is specifically charged with the task of assisting refugees with the transition into the country of settlement. Refugees have to complete “cultural adaptation” programs and basic language training as preparation for entry into the country of resettlement.

Yet, for the majority of Syrians in Turkey, third-country resettlement is not an option under the “temporary protections” policy. Most Syrians in Turkey continue to live outside of the formally-established UNHCR camps and to wait in local towns, villages, and cities.

As the Turkish government continues to amend its operational framework and approach to the evolving situation with its Syrian border, the Parliament has promulgated, in the 2013 Law on Foreigners and International Protection, a set of more robust support provisions for asylum-seekers in Turkey. Likewise, the Turkish Government has established a new civil society-based Directorate General for Migration Management to eventually take over most refugee coordination operations from the UNHCR. Despite these developments in emergency planning and legislation, many challenges remain for Syrian refugees in Turkey. Ultimately, these challenges are not limited to legalities and logistics. Each new statistical figure and newly-elaborated legal measure serves as a signpost of the deeper challenges that Syrian refugees face in Turkey: challenges about being and belonging, finding a community and stability, and ultimately – rebuilding.

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Palestinian Refugees in Syria: A Primer For Advocacy
By Nanjala Nyabola | 25th January 2014

In the face of crisis, it is very easy for those of us in neither government nor humanitarian work to switch off the news. Certainly, this seems to be the case with Syria, where the ongoing civil war has set off one of the largest humanitarian crises in recent history. To date, over 2 million Syrian refugees have fled into neighbouring countries. Millions more internally displaced persons within the
country remain unaccounted for. And the nearly half a million Palestinian refugees that had sought protection in Syria prior to the war exist in a violent and increasingly detrimental legal limbo.

The situation in the Yarmouk refugee camp, an informal camp in the outskirts of Damascus hosting the largest population of Palestinian refugees in Syria, is a painful example of what happens when specialised protections for protected groups are subsumed within a larger narrative. In 2012 there were over 148,000 Palestinian refugees registered with UNRWA residing in Yarmouk. These communities relied on humanitarian groups to supplement basic services provided by the government. Although thousands have fled, many remain owing to fighting between the government and combatant groups sheltering in the camp; itself a violation of humanitarian law.

Currently, Yarmouk camp is under siege, and food and medical aid is unable to get through. Last week, Al Jazeera broadcasted a distressing report of refugees eating animal feed and mothers dying in labour owing to malnutrition. The president of the International Committee of the Red Cross was also recently in Syria to urge the Syrian government to grant humanitarian actors access.

Humanitarian law provides strong protections for Palestinian refugees that must be enforced, and advocacy is needed to push for that, particularly as political leaders from both sides meet in Geneva later this month for peace talks. Syria is a party to the four main Geneva Conventions, and they are at the very minimum bound by Common Article 3 of the Conventions to protect the humanitarian rights of civilians and non-combatants in non-international conflicts. This article creates an active duty to treat those not directly involved in the conflict humanely and non-discriminatory, and urges parties to the conflict to allow the ICRC or another impartial humanitarian body access to civilians to provide key medical and other services.

These requirements must also be read in light of a subsequent provision in Article 3 that urges parties to the conflict to give effect to other provisions of the Geneva Conventions, e.g. those that protect civilians from inhumane and degrading treatment. Permitting humanitarian agencies access to Palestinian refugees in Yarmouk is the only way parties to the Syrian conflict can faithfully satisfy their obligations under the Geneva Convention.

Further, the Yarmouk situation is in violation of fundamental guarantees of human rights law, and refugee law as lex specialis for refugees as protected persons. Significantly, the de facto embargo in Yarmouk is a violation of refugees' right to movement (ICCPR Article 12: Refugee Convention Article 28) and undermines Syria’s commitment to cooperate with UNRWA to protect Palestinian refugees.

Recall that there is practically nowhere for Palestinian refugees to return to. Return to Israel or Palestine would be inconsistent with the refugee law requirement not to return individuals to places where they face a risk of persecution. Many Palestinian refugees are currently in Jordan, Lebanon, Iraq and Turkey, but the demographic and economic pressures on these countries are immense. Burden sharing by third countries is therefore necessary – by offering third-country resettlement for Palestinian refugees or by significantly increasing financial support to surrounding countries hosting refugees.

With this baseline knowledge, any individual should be able to advocate for the protection of Palestinian refugees in or from Syria. Various methods of doing so are possible, such as calling on national governments to urge continued financial support for the ICRC, UNRWA, UNICEF, the Syrian Red Crescent and other organisations on the ground in Syria. An increased awareness of the situation facing refugees in Syria, particularly Palestinian refugees whose situation grows more precarious, will ensure that their plight is not ignored.

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Implementation of Tripartite Agreement on Hold
By Brid Ni Ghrainne | 1st June 2014

As host to the largest Somali refugee population in the world, it is little wonder that Kenya’s shoulders have grown weary of carrying a burden which, in terms of numbers, falls just short of the half million mark.

Little wonder too is the desire of many Somali refugees to return to their country of origin. Many have spent over 20 years in Kenyan refugee camps after the collapse of the Somali government in 1991. Indeed, amidst reports circulating that between 30,000-80,000 refugees had returned voluntarily to Somalia in 2013, the time was ripe in November of last year to conclude an agreement to facilitate further returns. However, the implementation of this agreement reached a sudden halt in the last few days following the 27 May boycotting by the Somali Government of tripartite talks with Kenya and the United Nations High Commissioner for Refugees (UNHCR).

The Tripartite Agreement between the Government of the Republic of Kenya, the Government of the Federal Republic of Somalia,
and the United Nations High Commissioner for Refugees Governing the Voluntary Repatriation of Somali Refugees Living in Kenya, 2013 was signed in 10 November 2013 and was welcomed by NGOs, UNHCR, and various stakeholders as representing an important step in the development of durable solutions for Somali refugees. The Tripartite Agreement has been carefully drafted so that the option of returning refugees to Somalia is not treated as an alternative to asylum. Return can only be carried out in specific circumstances, as it does not entail the cessation of refugee status and therefore there still exists insufficient protection from persecution in the country of origin.

Thus the principle of voluntary return and the right to return in safety and dignity form the backbone of the Tripartite Agreement. The Preamble of the Agreement also reaffirms the prohibition of refoulement, which protects refugees from being sent to places where their lives or freedoms are in danger. Kenya and Somalia are bound by this principle as States Parties to the 1951 Convention Relating to the Status of Refugees and Kenya is a State Party to the 1969 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, which also prohibits refoulement.

Voluntary repatriation has not, however, been the practice of Kenya in the aftermath of the conclusion of the Tripartite Agreement. In April 2014, Kenya launched a massive security crackdown on Somali refugees following terrorist attacks in several areas, culminating in the forced deportation of 359 refugees. As various NGOs have informed us, the current situation in Somalia is not conducive to the mass return of refugees and only a few parts of Somalia are safe for return. Unsurprisingly, therefore, both Amnesty International and the UNHCR have condemned these acts as a breach of international law. The Somali government has responded by refusing to attend a meeting concerning the Tripartite Agreement, which was due to take place on 27 May. According to the Somali government:

“As we are concerned about the plight of Somali refugees and the unlawful activities committed by the Kenyan security forces against the refugees of Somalia in Kenya, we cannot attend such meeting.”

The launch of a 12-member Tripartite Commission to oversee the gradual and voluntary repatriation process has now been suspended. It remains to be seen how the acts of the Kenyan and Somali authorities will impact the future of the Tripartite Agreement before its implementation has even begun. It is also worrying that the Tripartite Agreement can be terminated by either party at six months’ notice, and that at the time of writing, the parties to the Agreement have not engaged in dialogue to overcome this first but highly significant obstacle to implementation.

Angel: Afro-Honduran Migrant Tortured and Imprisoned in Mexico

Imagine that you are a father of two in Honduras and are in desperate need of a job allowing you to pay for medical treatment for your seven-year-old son, who has been diagnosed with cancer. In your home country, you are unable to find meaningful employment opportunities, so your only hope of saving your son’s life entails risking your own by crossing Guatemala and then Mexico as an undocumented migrant with the hope of reaching the United States of America.

But instead of crossing the US border, you are betrayed by a human smuggler and arbitrarily detained by police, even though you have committed no crime. You end up in a high-security prison, falsely accused of organized crime and other drug-related crimes for which you could be sentenced to up to 60 years of prison time. Meanwhile, the son whose life you hoped to save dies while you are in prison. That is the story of Angel Amilcar, an Afro-Honduran migrant and highly-recognized human rights defender who, after a 2-month journey across Guatemala and Mexico in 2009, was arbitrarily detained in the northern Mexican border city of Tijuana, state of Baja California, and still awaits the end of his trial.

Mexico is a country of transit for thousands of undocumented migrants who travel to the United States in search of job opportunities and, ultimately, to increase the odds of survival for their families. However, each migrant’s prospects of reaching Mexico’s northern border are bleak, as Mexico constitutes a virtual graveyard for migrants and their dreams of a better life. In December 2010, Mexico City-based NGO “Miguel Agustin Pro Juarez Human Rights Centre” (Centre Prodh) and the Washington Office on Latin America (WOLA) published a report entitled “A Dangerous Journey through Mexico: Human Rights Violations against Migrants in Transit”, which analysed how tens of thousands of migrants are systematically extorted, sexually abused, and/or kidnapped while they travel through Mexico. Amnesty International also documented this humanitarian tragedy through its 2010 report “Invisible Victims: Migrants on the Move in Mexico”. The chapter on Mexico in Human Rights Watch’s annual World Report has consistently included a section denouncing the grave abuses committed against migrants.

Angel’s case shows that in Mexico, migrants are potential victims of all kinds of human rights violations, including false incrimination
and unfair imprisonment. According to a report to be published in the coming weeks by Centre Prodh, between May and October 2013 there were 1,219 Central Americans imprisoned in Mexican jails – who almost certainly remain in prison to date – accused of supposed crimes including homicide, theft, organized crime, illegal possession of weapons, and drug-related crimes. These cases raise serious concerns in light of both Angel's case and the systematic abuses against migrants in Mexico, coupled with the well-known structural deficiencies of the Mexican justice system, historically characterized by a presumption of guilt that leads to the imprisonment of countless innocent people.

Angel was detained during a police raid on a house to which he had been brought under threat by the human smuggler who falsely promised to help him cross the border. But instead of being treated as a victim, Angel was arrested, insulted and seriously discriminated against on the grounds of his ethnicity, tortured by the police and the military, forced to sign a false statement, exhibited before the media as a criminal, and prosecuted for crimes he did not commit. After documenting the case and concluding that Angel was accused and imprisoned as a result of discrimination due to his ethnicity, Amnesty International named him a Prisoner of Conscience on July 22, 2014.

In the coming weeks, a federal court will issue a judgment on Angel's case. However, before that happens, the federal prosecutor will have one last opportunity to drop the charges. Now, more than ever, Angel needs all the support he can get to regain his freedom.

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Providing Syrain Survivors of Torture Access to Rehabilitation Services
By Annie Sovcik | 13th October 2014

Mental health and other rehabilitation services can be key to restoring basic functioning and facilitate resilience and positive coping strategies for refugee survivors of torture.

In the summer of 2012, "Ibrahim" was arrested at a security checkpoint in Damascus. For the next 20 days, he was repeatedly beaten unconscious, hung from the ceiling and kicked while being interrogated. When he was released, "Ibrahim" found he no longer had a home to return to – during his time away, his house and neighborhood had been completely destroyed. Although his wife and young children escaped, the life the family had known was over. The sound of explosives, sight of snipers, uncertainty of forced displacement, and hardship of extreme poverty became their new reality.
As civil war continues to ravage Syria, this family’s story is hardly unique. The numbers are staggering: over 3 million Syrians are registered as refugees and another 6.5 million are internally displaced. Over 50% of forcibly displaced Syrians are children.

Beyond the numbers are horrifying reports of torture, targeting of civilians, rape, kidnappings, starvation and massacres. In addition to being one of the worst humanitarian crises of our time, the events in Syria have unfolded into one of the most egregious human rights atrocities the world has ever witnessed. At our clinics in Jordan, staff at the Center for Victims of Torture (CVT) providing mental health counseling and physiotherapy services to Syrian survivors of torture and severe war atrocities have heard hundreds of stories of widespread and “industrial-style” torture that are consistent with documentation by the United Nations, other human rights organizations, and a collection of photographs smuggled out of Syria that provide evidence of the “systematic killing” and torture of about 11,000 detainees. CVT’s torture survivor clients include a growing number of children and adolescents who have themselves been abducted for weeks or months and beaten, sexually assaulted, held in isolation, deprived of food, water and otherwise tortured.

Recognizing the destructive effects of torture, Article 14 of the U.N. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (“CAT”) prescribes that survivors should have access to redress, including rehabilitation services. CAT Committee General Comment 3 explains, “In order to fulfill its obligations to provide a victim of torture or ill-treatment with the means for as full rehabilitation as possible, each State party should adopt a long-term, integrated approach and ensure that specialist services for victims of torture or ill-treatment are available, appropriate and readily accessible.”

As described in CVT’s recent article on the mental health of Syrian refugees published in the Forced Migration Review, studies have found a strong association between exposure to instances of trauma and mental health symptoms. Daily stressors caused by conflict and displacement, such as inadequate housing, unemployment and changes in family structure may worsen symptoms. These problems affect adults and children directly, and indirectly, by affecting parent’s relationships with their children. They impact social interactions, exacerbate feelings of isolation and separation from community supports. They have a direct impact on physical health, resulting in problems with functioning, including self-neglect, decreased participation in daily activities, and decreased capacity to care for children.

Mental health and other rehabilitation services can be key to restoring basic functioning and facilitate resilience and positive coping strategies for refugee survivors of torture and their families. Recognizing this, donor countries seeking to support survivors of torture should contribute - or increase their contributions - to the United Nations Voluntary Fund for Victims of Torture, which provides grants to organizations that offer psychological, medical and social assistance, legal aid and financial support to survivors.
of torture. Overall, donor and host states, as well as the United Nations High Commissioner for Refugees, should elevate the prioritization of mental health and psychosocial support services as an integral component of the overall strategy on responding to the Syrian refugee crises.

Annie Sovcik is the Director of the Washington Office at the Center for Victims of Torture (CVT). CVT provides healing services to survivors of torture and severe war atrocities at its clinics in the United States, Jordan, Kenya and Ethiopia and engages in training and capacity building initiatives worldwide.

The Unified Screening Mechanism: Hong Kong to Assess Refugee Claims Alongside Torture Claims
By Lillian Li  |  20th November 2014

The UNHCR previously had the role of assessing and determining refugee claims ("persecution claims") in Hong Kong in accordance with Art. 33 of the Convention Relating to the Status of Refugees (1951) ("Refugee Convention"). The UNHCR has now ceased its refugee screening mechanism and has implemented the ‘Unified Screening Mechanism’ ("USM") in response to the Court of Final Appeal’s ruling in the case of C v the Director of Immigration FACV 18-20/2011.

The USM officially commenced on 3 March 2014 and the Immigration Department is now responsible for assessing and determining both torture and persecution claims under one integrated system. All potential claimants may now bring a claim either on the basis of torture, persecution, or both.

A USM claimant lodging a persecution claim must show the following:

• he/she has a well-founded fear of being persecuted on account of one or more grounds of race, religion, nationality, membership of a particular social group or political opinion,
• he/she is outside his/her country of nationality and is unable, or, owing to such a fear, unwilling to avail himself/herself of the protection of that country; and
• his/her life or freedom would be threatened on account of his/her race, religion, membership of a particular social group or political opinion should he/she be expelled from Hong Kong or returned to another country where the applicant has made a persecution claim.

These five grounds (in bold) are the same as those stated in Art.33 of the Refugee Convention. However, the Government has confirmed its position that it will not ratify the Refugee Convention or its 1967 Protocol and that the ruling in C v the Director of Immigration does not compel it to do so.

All USM claimants are entitled to receive publicly funded legal assistance from lawyers who are part of the Duty Lawyer Service (which has been providing legal assistance to former torture claimants since December 2009 after the Court of First Instance ruled in December 2008 in FB & Others v the Director of Immigration HCAL 51/2007 that the Government had an obligation to provide legal assistance to torture claimants who are unable to afford legal representation). Legal assistance will cover the entire USM screening process; including the completion of forms, submission of evidence, attendance at screening interviews, and any appeal process. All unsuccessful claimants are permitted to lodge an appeal.

USM Claimants who substantiate their persecution claims will be referred to the UNHCR who will over-see the re-settlement of the claimant to a third country. Despite the reforms brought about by the USM, the Government has maintained its policy of refusing to re-settle successful claimants in Hong Kong.

One of the most significant impacts of the USM is that all decisions of the immigration officers are now capable of being subject to judicial review and scrutinized by the local courts to ensure that their assessments meet a ‘high standard of fairness’ (as required under local law). Under the previous scheme, decisions made by the UNHCR were not subject to judicial review as the Government has no jurisdiction over the UNHCR. The Director of Immigration also formerly maintained a policy of repatriating all unsuccessful claimants as adjudged by the UNHCR without first making a separate and independent inquiry into the merits of their application. This repatriation policy came under heavy criticism as it was not possible to ensure that the UNHCR determination process reached a high standard of fairness.

The implementation of the USM has been seen by many non-governmental organizations and public lawyers as a milestone in the development of Hong Kong refugee law and policy. It also evidences the Government’s compliance with its international obligations under the Convention against Torture (1984) and customary international law.

However, some of the same criticisms made about the previous screening systems have also been made to the USM screening
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process. Local NGO staff workers and USM claimants contend that the screening process lacks accountability and transparency, local advocacy groups have not been consulted, and the questions asked to claimants have not changed from the previous systems. As of November 2014, there are 9,500 outstanding USM claims and only 504 claims have been dealt with since March. The recognition rate is 0.2%.

Lillian Li currently works with the Hong Kong Judiciary and is a qualified solicitor in Hong Kong. She was previously a casework volunteer at the Hong Kong Refugee Advice Centre (now known as the Justice Centre) for two years.

Second Strike and You are (Finally) Out? The Israeli Supreme Court quashes (again) the Prevention of Infiltration Law
By Reuven (Ruvi) Ziegler | 9th October 2014

On 22 September 2014, the Israeli Supreme Court sitting as a High Court of Justice quashed in a 217-page judgment (HCJ 8425/13 Anon v. Knesset et al) the Prevention of Infiltration Law (Amendment no. 4).

The amendment enacted two schemes: first, section 30A, authorising the detention for one year of any ‘infiltrator’ (the term was introduced by the above law, and shall be used in quotation marks in this discussion) entering Israel after the amendment’s coming into force. Second, Chapter D, authorising the holding in an ‘open’ residency centre of ‘infiltrators’ whose removal from Israel (according to the State’s official determination) proves to be ‘difficult’. ‘Infiltrators’ are to be held indefinitely unless they ‘voluntarily’ agree to return their state of origin, or to be transferred to a third state. Almost a year to the day, on 16 September 2013, the same panel quashed Amendment no. 3 that authorized the detention of “infiltrators” for three years. This is the first time that the Supreme Court has re-annulled primary legislation.

Justice Uzi Vogelman authored the main judgment, which holds both legislative schemes to be in violation of the constitutional rights to liberty (section 5 of Basic Law: Human Dignity and Liberty) and to human dignity (sections 2 and 4 thereof) by failing to satisfy the proportionality requirement in section 8 (the ‘limitation’ clause); the latter provision stipulates that ‘[t]here shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required.’ Justice Vogelman emphatically stated that ‘infiltrators are people too. And if this merits explanation, let it be said explicitly: infiltrators do not shed any part of their dignity due to their method of arrival [or] by entering a detention or residency facility, and their right to human dignity remains intact even if they have arrived irregularly’ [123].

Six of the nine justices (Uzi Vogelman, Miriam Naor, Edna Arbel, Yoram Danziger, Salim Joubran, Esther Hayut) annulled section 30A (Chief Justice Asher Grunis and Justices Neal Hendel and Yitzhak Amit dissenting). A close reading of the previous judgment (HCJ 7146/12) reveals that Justice’s Hendel’s dissent should have been anticipated, as he dissented from the operative part of the otherwise unanimous judgment. Similarly, Chief Justice Grunis asserted in his concurrence that a re-enacted law authorising a significantly shorter detention period could pass constitutional muster. In contradistinction, Justice Amit’s dissent rests on distinguishing between section 30A and the quashed Amendment no. 3: while the former applies prospectively, and is hence directed towards a non-specific group of persons who have not yet transgressed the state’s borders, the latter applied
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Detention of African Asylum Seekers in Israel: Welcome to Round Three
By Reuven (Ruvi) Ziegler | 15th December 2014

On 8 December 2014, hours before dissolving itself in preparation for early elections arranged for 17 March 2015, the Israeli Parliament, the Knesset enacted (by a 47 to 23 majority, with 3 abstentions) the ‘Law for Prevention of Infiltration and Ensuring the Departure of Infiltrators from Israel’ Under the new legislation, ‘infiltrators’ who enter Israel and cannot be deported will be automatically detained for three months at the Saharonim prison in the Negev desert (reduced from one year under the quashed legislation). ‘Infiltrators’ already in Israel, as well as new arrivals (following their three months’ detention) can be detained at the Holot detention centre for 20 months (as opposed to indefinite detention under the quashed legislation). Over 2,200 persons are currently held in Holot pursuant to the quashed legislation; they are expected to remain for what is now fixed-term detention.

The detainees will be required to report for a headcount between 8 and 10pm every night, and the detention centre will be locked shut at night. While the length of detention was shortened, its prison-like characteristics (managed by the Israel Prison Service, which conducts searches on persons entering and leaving the facility), the fact that detainees are barred from working, and the facility’s remote location in the Negev desert are likely to render the possibility to leave the facility at daytime rather futile. Moreover, violation of the sign-in conditions can lead to up to four months’ detention in the closed facility, at the discretion of the Population, Immigration and Borders Authority.

In the two previous ‘rounds’ of litigation, the HCJ unveiled the unsoundness of the overall state policy. On one hand, Israel recognises the fact that Eritrean and Sudanese nationals cannot be deported. On the other hand, it detains them in an effort, now explicitly manifested in the legislation’s title, to entice them to leave. It is worth reiterating Justice Uzi Vogelman’s main opinion in the above HCJ judgment, stressing [193] that ‘the question is not only quantitative – what is the maximum constitutional length of time for detention in custody – but also (and perhaps primarily) qualitative – whether it is permissible to detain a person not subject to effective deportation proceedings. To this question I respond…absolutely not.’

Since the legislation applies to ‘infiltrators’ who according to the state’s determination cannot be deported, persons detained will be released after 20 months without any plan for regularisation of their precarious legal status. Indeed, the legislation also amends the ‘migrant workers law 1991’, imposing financial sanctions on the (majority of) non-detained ‘infiltrators’ who are in un-regularised employment: they will not receive severance pay or pensions to which other Israeli workers are entitled. Instead, their employers will have to deposit 16% of the salary in a separate account, and to deposit further 20% of their salary on behalf of their employees. This money will be ‘released’ only upon the employees’ departure. Hefty fines are imposed for breaches. The legislative aim is two-fold: encourage asylum seekers to leave, and discourage employers from employing them. The immediate outcome will be further destitution, especially as ‘infiltrators’ do not receive benefits or state assistance.

A petition to the HCJ challenging the constitutionality of the legislation is imminent. The HCJ, faced with detention legislation premised on the same tenets found to be unconstitutional less than three months ago, will be forced into an making an unsavoury choice: quash the legislation for the third time, an unprecedented move in the state’s history, and face real risk of legislative attempts in the next parliament to limit its judicial review power; or uphold it based on a proportionality analysis, permitting arbitrary detention of persons in need of international protection. Stay tuned—it will be a hot winter.

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Internally Displaced Persons in Ukraine
By Richard Verber | 19th August 2014

Well over 300,000 people have been displaced from their homes due to the ongoing violence in Ukraine. We have seen two waves: the first displacement from the south of Ukraine began before the March referendum in Crimea, and the second from the east due to ongoing fighting between the Ukrainian army and pro-Russian separatists.

The UN Office for the Coordination of Humanitarian Affairs (OCHR) estimates that some 3.9 million people live in areas directly affected by violence.

Back in June, the Ukrainian government recognised the issue of internally displaced persons (IDPs) and ordered the creation of an electronic database followed by a new law to determine their legal status. As of August 14, 2014, the database is yet to be created and no law has reached the statute books. This renders IDPs’ legal status unclear. The lack of a database is hampering relief efforts as it is unclear how many people need support or where best to direct resources.

Although no law has been passed, the national government has given an informal order to regional (“oblast”) governments to assist IDPs. They have not stipulated what level of support should be offered though. Oblasts’ budgets vary, meaning some are able to provide shelter, some can offer social services, some both and some neither. Efforts are supplemented by NGOs such as ours, private donations and the UNHCR. Were a humanitarian crisis to be declared, the UNHCR would be able to intervene more easily through the mobilisation of international donor organisations.

Defining IDPs’ legal status is further hampered by the varying degrees to which the IDPs feel themselves to be displaced. Many consider their displacement to be only temporary: having fled the fighting, they hope to return to their homes when they can. We have seen this in Sloviansk and Kramatorsk. The widespread fighting there, however, has created a second wave of IDPs, who, having gone back, have found rebels living in their homes or their houses destroyed. Those who could afford it left their homes months ago when they realised how events might unfold.

Even more Ukrainians have fled to Russia (188,216) than are displaced in Ukraine (139,170), according to UNHCR figures. Some have Russian citizenship, some claim asylum as refugees. The UNHCR has said that most do not claim asylum, however, choosing to apply for some other legal status instead for fear of creating difficulties for themselves down the line.

What will make creating an electronic database challenging is that IDPs are often forced to flee with just a plastic bag containing a
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few clothes. As they have no documents, they are unable to claim their entitlements when they arrive at a different city. Those with documents can get help more easily. Legal assistance is urgently needed for those without documentation, many of whom fled for their lives as the fighting approached. Adding further complexity is that some Ukrainians who feel close to Russia don’t want to register: they don’t trust the Ukrainian authorities or feel they’re ‘behind enemy lines’. Some are Russian citizens who don’t want to register as they feel they might get in trouble.

Lastly, the term ‘refugee’ is not used to describe IDPs because as the law currently stands, only someone who finds themselves stateless, or in a country which is not their ‘own’, can apply for refugee status. Ukrainian citizens, still in Ukraine, cannot therefore apply for refugee status, and are not entitled to the rights refugee status affords. Others still feel that the government isn’t going to support them anyway, or think it will only be a short amount of time before they go back home. The trauma begins when they realise this will not be the case.

As the new school year rapidly approaches, the need for a database becomes ever more urgent. Parents will want to register their children somewhere, so we expect the IDP figures to change in the coming weeks. How will they be accommodated in the education system? And how long will they have to remain there for?

It is likely to be a while before we know any answers.

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Introduction
By Elena Butti

The past year has been an eventful one for children’s rights. April 2014 saw the entrance into force of the Third Optional Protocol (3OP) to the Convention on the Rights of the Child (CRC) on a Communications Procedure. In October 2014 the Nobel Peace Prize was awarded to two child rights activists (one of them, Malala Yousafzai 17-years-old) fighting for the right to education. Finally, on 20th November 2014 we marked the 25th anniversary of the CRC.

The OxHRH Blog posts that accompanied these developments and collected in this chapter are, however, far from celebratory. The 25th Anniversary constituted an opportunity to look back and reflect on what has been achieved and what is still to be done. Many posts refer to the paradoxically stark contrast between the expectations raised by the almost-universally-ratified CRC and the reality in which many children live. The question is, then, for academics to find out why this gap exists, and for policy-makers to determine how to reduce it.


Poverty and inequality do not only affect children within a country, but also those who, for a reason or another, move across countries. Mariela Neagu’s piece (‘The Uncomfortable Place of Inter-Country Adoption in the Human Rights’ p 195) sheds light on the problematic issue of inter-country adoption, where rich countries’ demand for children generates interpretations of the CRC which are often to the detriment of the best interest of children in third world countries. Migrant children are similarly vulnerable. They are often forced by structural factors in their countries of origin, such as poverty or political persecution, to migrate to richer countries. When they arrive, they are subject to strict immigration laws, as outlined in Isabelle Kadish’s piece (“British Schindler and a History of Neglect of Refugee Children” p 202), and may even face detention as Holly Buick’s contribution (‘Towards the abolition of the detention of immigrant children?’ p 199) explains. These are all examples whereby the CRC is not altogether ignored by first world countries, but rather its provisions are strategically interpreted. As a result, policies and practices serve interests other than those of the child, such as providing children for adoption or limiting immigration.

Indeed, law is important but it can only be effective if its spirit is understood and interpreted in the social and cultural context of every country. It has to be read and used in conjunction with other social factors that determine the wellbeing of children. In this light, Mariya Ali’s piece (‘Practices Harmful to Women and Girls – Joint CEDAW and CRC General Recommendation/ Comment’ p 194) invites us to reflect on the ever-lasting tension between (children’s) rights and culture. She notes how loose, culturally determined interpretations of ‘best interest’ may allow for practices such as female genital cutting, early marriage and plastic surgery which are considered important in some cultures but harmful in others. Yet, the top-down imposition of western cultural standards through law is not the solution. For example, in my own research in Tanzania (E Butti, ‘What Made These Women so Mad at Me?’ Arguing for a ‘Soft’ Approach in Addressing the Issue of Female Circumcision’ (2013) Culture and Human Rights at http://culture-human-rights.blogsport.fr/#1) I have found that the legal prohibition of female genital cutting only contributes to driving the practice underground rather than discouraging it. As Paul Bornan argues (‘Reflecting on 2014: 14 things we’ve learned’ The Child Poverty and Development Blog (2015) at http://blog.younglives.org.uk), effectively addressing harmful practices requires a deep understanding of the root causes and cross-cultural dialogue which remains sensitive to local interpretations of ‘best interest’.

As the ‘Education’ sub-chapter of the Socio-Economic Rights chapter of this anthology highlights, education could play an important role in addressing the issues outlined above. As Prof. Fredman noted in the first OxHRH webinar on the Right to Education this year (see: http://ohrh.law.ox.ac.uk/right-to-education-prof-sandra-fredman-oxford-university/), the right to education is a ‘multiplier right’ because it allows children to better enjoy all the other rights. Education can counter poverty and migration by providing better livelihood options for children, and can help to address delicate cultural issues through more informed dialogue. However, it is a long-term investment. It requires the perseverance shown by Malala Yousafzai and Kalash Satyarthi. But not all politicians are so long-sighted. Sad evidence of this is the recent issue of the Guidelines for Protecting Schools and Universities from Military Use During Armed Conflict by the Global Coalition to Protect Education from Attack. The initial idea behind this project was to create a binding convention, but the governments’ lack of willingness to seriously commit to protecting schools in conflict determined a resort to an instrument of soft law devoid of any binding power. Why? The answer is simple: schools are a very convenient base for government armies, too.

To go back to the original question, then, why is there such a big gap between the promises of the CRC and the reality experienced by so many children across the world? Why are children still so invisible, as Sarah M. Field’s piece (‘Geneva II, politicking and possibility for Syria’s invisible 43%’ p 198) illustrates, in contexts where important policy decisions are taken? While ‘children’s
rights’ are advertised by many of those in power as a priority, the expression is often rhetoric devoid of actual meaning and commitment. As the posts in this chapter show, overriding considerations such as alternative financial priorities and the desire to control immigration flow, or a tendency to put in place short-sighted and culturally insensitive solutions, too often come at the expense of children’s wellbeing.

Increasing children’s own ability to report about violations of their rights, as the CRC Optional Protocol 3 allows (commented upon by Sara Austin in ‘Children Gain Access to International Justice’ p 197) can be a step forward. But it cannot be the only way. Those in power must stop using a children’s rights rhetoric merely to create a good self-image at little cost. Children’s lives will not be improved through tokenistic interventions. Full commitment to put other interests aside to protect children is needed. For academics, this means that the time has arrived to stop looking at children’s rights as a stand-alone issue, but rather, as the work of the OxHRH Blog demonstrates, to look at them in context. Urgent politically charged issues such as the changing nature of conflict, growing migration flows and climate change need to be looked at through the lenses of children’s rights, and to ask what those rights, often formulated in abstract terms, mean to children themselves. In other words, it is about looking at apparently disconnected world problems through the eyes of the next generations and asking: what would I want for my tomorrow?

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Practices Harmful to Women and Girls – Joint CEDAW and CRC General Recommendation/Comment
By Mariya Ali | 19th December 2014

Coinciding with the 25th anniversary of the United Nations Convention on the Rights of Child (CRC) and the 35th anniversary of the Convention on the Elimination of Discrimination Against Women (CEDAW), the two UN human rights committees have jointly issued a General Recommendation/General Comment (GR/GC) outlining State obligations in preventing and eliminating harmful practices inflicted on women and girls. These practices are maintained and perpetuated through societal attitudes and passed down through generations. This GR/GC attempts to break the generational transmission by those who have undergone procedures such as Female Genital Mutilation (FGM). Such practices are celebrated, often masked in a festive mood, and believed to bring respect to the girl and family.

Among the other issues addressed by both the committees are widowhood practices, infanticide, binding and body modifications, including fattening, neck elongation and breast ironing. They also highlight plastic surgery undergone by women and girls to conform to social norms of beauty. Social norms are internalised in childhood and early adolescence through the socialisation process.

The GR/GC explicitly addresses the importance of facilitating discussions among children and those that are in their early adolescence “on social norms, attitudes and expectations that are associated with traditional femininity and masculinity and sex- and gender-linked stereotypical roles; and, working in partnership with them, to support personal and social change aimed at eliminating gender inequality and promoting the importance of valuing education, especially girls’ education, in the effort to eliminate harmful practices that specifically affect pre-adolescent and adolescent girls.”

The committees highlight that harmful practices are “grounded in discrimination” and describe the causes of harmful practices as “multidimensional,” which “include stereotyped sex and gender-based roles, the presumed superiority or inferiority of either of the sexes, the attempt to exert control over the bodies and sexuality of women and girls, social inequalities and the prevalence of male-dominated power structures.” Although the concept of honour applies to all these practices at varying levels, the GR/GC does not make this explicit.

These practices result from a combination of factors including misinterpretation of religious rulings, customs, tradition and cultural influences giving rise to honour cultures that prescribe strict codes of sexual morality and general behaviour. Honour values can be termed an ideology giving power to men and oppressing women and children, based on gender and sexuality. Men are seen as the custodians of women’s chastity, and any loss or damage to their honour is damage to the male kin and collectively to her family. These practices are shown as protection rather than abuse for women and girls when viewed through the honour lens.

Sometimes girls and women are killed or driven to suicide because of the perceived dishonour their suspected or actual sexual activity, or even rape, is supposed to have brought on their family. The GR/GC acknowledges that the perpetrators of sexual violence avoid punishment altogether or receive a reduced sanction. The committees also acknowledge the pressure on young girls to conform to practices such as FGM in order to avoid being isolated, stigmatised and rejected.

The term “honour” is gender-neutral and can carry many meanings such as respect, dignity and reputation. Therefore, what constitutes the “best interest of the child” in communities that observe strict codes of sexual morality and general behaviour can be overshadowed when viewed through the honour lens. Harmful practices that are enmeshed in honour ideology can be eliminated gradually, allowing changes to occur organically and to achieve sustainability.

The GR/GC has therefore emphasised the importance of adopting a rights-based approach to transforming social and cultural norms, through cross-cultural and internal dialogue in order to “collectively explore and agree on alternative ways to fulfil their values and honour/celebrate traditions without causing harm and violating human rights of women and children…”

The CEDAW and CRC Committees place importance on legislative prohibitions on harmful practices and emphasise that capacity building must include front-line professionals, including health and education professionals and social workers, traditional and religious leaders, the police, immigration authorities, public prosecutors, judges and politicians at all levels. Along with these efforts at raising awareness through the dissemination of the GR/GC, protection services must be strengthened to ensure the sustainability of new social norms. A paradigm shift can be effectively achieved only through holistic approaches, as the Committees have proposed.

Furthermore, the GR/GC also links practices of forced and childhood marriages and polygamy with poverty and the principle of supply and demand. These factors are relevant in a globalised world where people move from country to country and take their customary laws with them.

Country reports have shown that, although children’s rights have been respected in many State parties, the rights afforded by the CRC are not carried through by those enshrined in the CEDAW with the attainment of adulthood. This GR/GC, therefore, brings the
life cycle perspective to the forefront, as well as the importance of working together on women's rights and children's rights to tackle the various forms of violation committed against women and children in the name of protecting honour and sexuality.

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The Uncomfortable Place of Inter-Country Adoption in the Human Rights Arena
By Mariela Neagu | 12th December 2014

While November marks the anniversary of the UN Convention on the Rights of the Child (UNCRC), the United States (one of the two countries yet to ratify the UNCRC) celebrates 'adoption month'.

Inter-country adoption (ICA) occupies a very marginal place within the UNCRC. According to article 21, 'inter-country adoption may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin.' Moreover, article 21 only applies to countries that 'recognize and/or permit adoption.'

Although adoption was initially included in the text of the draft UNCRC, Bangladesh took the position that adoption is not recognised under the Muslim law and requested 'a form of words … be found to protect Islamic conceptions on the subject' (Detrick, 1999, 346). Muslim countries do not recognise adoption, rather protecting children in need using kafalah, a form of permanent foster care in which the child maintains his or her identity. The other reason why the UNCRC almost entirely excludes ICA, leaving it as an option of last resort, is the fact that during the drafting process, a high number of gross abuses were brought to the attention of the drafting group (UNICEF, Innocenti, 1998). ICA has long been characterised by widespread abuses and corrupt practices, and this why it was barely accepted as an option of last resort in the text of the UNCRC.

But despite wide ratification of the UNCRC, what little protection that is offered in article 21 is not followed in practice. Basic features of domestic adoption, such as placement with the prospective parents before adoption is finalised, are legally difficult in ICA. If bonding does not occur, children will end up in care in a completely estranged environment.

In ICA, children are often transported by middlemen to their adoptive parents – taken by people she/he does not know to people
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she/he does not know, while many thousands or tens of thousands of euro change hands. In that sense, adoption resembles sale of children, (Article 2a, Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography), or ‘child laundering’ as David Smolin, one of the academics critical of ICA calls it (Gibbon and Rotabi, 2012, 243).

ICA is largely the response to a demand for children in developed countries, rather than the absence of care in the countries of origin. Taking children away does not lead to any improvement of the protection of children in those countries, but rather the contrary (Chou and Browne, 2008).

According to human rights conventions, such as the UDHR and the ICESCR, motherhood should be protected, and parents have a right to social protection and assistance. Enforcement of these rights would, in many cases, prevent the separation of children from their families. And if they don’t, the state has a duty to provide a suitable form of care. According to article 20 of the UNCRC, when considering solutions, ‘due regard shall be paid to the desirability of continuity in a child’s upbringing and to the child’s ethnic, religious, cultural and linguistic background.’ From a human rights perspective, sending children in ICA can be regarded as the result of a country’s failure to fulfill its international human rights law obligations.

The last years have brought new insights from an institution shielded by secrecy. A recent book, Adoptionland: from Orphans to Activists, gives the perspective of the adoptees. Movies like Philomena disclose a very unfortunate episode in the recent history of Ireland. Mercy, Mercy – A Portrait of True Adoption is a documentary filmed over four years, which follows the route from a country of origin to a European country, shows the subtleties of everyday life in ICA. Although different in style, they encapsulate fifty years of ICA history, showing the features of ICA and the complexities that lie behind it. They represent an important step in revealing the bleak shades of a rosy picture and could serve as a source of inspiration for scholars in different fields.

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The Uncertain Status of Child Rights in the UK
By Rebecca Carr | 26th November 2014

This November marks the 25th Anniversary of the Convention on the Rights of the Child (CRC). An atypical fusion of both civil and political, and economic, social and cultural rights, the CRC is the most widely ratified international human rights treaty in history, with all but two of the world’s states signing on. While impressive gains have been made to protect children’s rights over the years, the current UK Government’s commitment to truly upholding the CRC can be called into question and indeed must be held to a higher account.
At its essence, the CRC seeks to promote the “inherent dignity and equal and inalienable rights” of all children. Since 2010, however, austerity measures have been used to justify a series of government policies that have led to the erosion of many children’s socio-economic rights, including their rights to health, food and an adequate standard of living.

Still, almost a third of all children in the UK live in poverty; over 330,000 children were reliant on emergency food banks in 2013/2014, and Shelter reports that over 90,000 children will be homeless this Christmas.

Civil and political rights have taken a hit too. For example, children as young as 10 will soon be able to receive ‘IPNA’s’ (injunctions to prevent nuisance and annoyance), under a new government system to regulate anti-social behaviour, and the police’s use of Taser guns on children increased by 139% between 2009 and 2011 alone.

Not all children in the UK experience such rights violations to the same degree; children from poorer backgrounds face a higher risk. Those living in poverty often lack the means to live with the basic dignity that a State’s observance of the CRC would enable, and critically, they have less access to the power structures that serve to shape the social conditions dictating their lives.

The links to be found between poverty and rights violations is well documented; however, the government’s response to this nexus appears short sighted.

While the government has taken some steps to address child poverty in the UK, such as implementing the Child Poverty Act 2010 and appointing a Children’s Commissioner and Social Mobility and Child Poverty Commission, it has failed to offer a clear or effective method for children’s human rights enforcement.

The government has failed to ratify the third optional protocol to the CRC that would, for example, enable children raise their individual complaints with the CRC’s monitoring committee themselves. Further, it has failed to directly incorporate the provisions of the CRC domestically, as the European Convention on Human Rights has been domesticated through the Human Rights Act 1998, which would enable children invoke its provisions before UK courts and allowing those provisions to be applied by national authorities.

Drastic cuts to the legal aid budget, resulting from the Legal Aid, Sentencing and Punishment of Offenders Act 2012, removing funding for entire categories of law, such as family law (whereby only those cases in which there is evidence of domestic violence, forced marriage or abduction can attract funding), will affect up to 68,000 children a year, according to the Bar Council. Further, proposals to limit the ability of third party interveners seeking to bring judicial review cases before the courts, as outlined in the Criminal Justice and Courts Bill, by requiring them to pay any costs incurred by the other side as a result of their involvement (except in exceptional circumstances), will further undermine the abilities of those seeking to enforce children’s rights.

If rights are to be effective, children must be able to access and rely on the courts, and other rights enforcement bodies’ protection, when violations of their rights occur.

As the CRC’s momentous 25th anniversary is reflected on, the government must now take the requisite steps to address ongoing child rights violations in the UK, by affording children and their representatives with the opportunities to enforce their rights, and to ultimately hold it to a higher account.

Rebecca Carr is a BPTC Student at BPP University and recently completed an LL.M. at the University of Toronto.
When the opportunity arose during my graduate studies at Oxford to develop a dissertation on the rights of children, I wrestled with what I could contribute that would make a meaningful change in the lives of the children I had met. The biggest gap that I saw was that while 193 States had ratified the CRC, nothing tangible could be done to ensure that children received justice when their rights were systematically denied.

Through that process, I developed a proposal for the creation of the 3rd Optional Protocol to the CRC (OP3 CRC) and went on to launch and lead the global campaign that helped bring this law into force on April 14, 2014. It was a tangible contribution that I could make towards protecting the rights of children and to helping ensure that they receive the justice they so urgently need.

The OP3 CRC allows children, groups of children or their representatives, who claim that their rights have been violated by their State, to bring a communication/complaint to the UN Committee on the Rights of the Child. It also allows any interested party to provide information about grave or systematic violations of children’s rights to the UN Committee on the Rights of the Child through an inquiry procedure.

The challenge is that this procedure is only available to children if their State has ratified the OP3 CRC. Children have waited too long for this moment, and many more will continue to wait for their governments to take tangible action to bring their rights into reality. As the international community prepares to mark the CRC’s 25th anniversary this November, I urge the members of the UN to refrain from delaying justice any longer. I commend the ten Member States that took swift action to ratify the OP3 to ensure its entry into force, and I am encouraged by the 45 States that have signed the protocol and are taking steps towards ratification. I urge the remaining 138 States that have ratified the CRC to also ratify the OP3 without delay.

We simply cannot afford to let more precious lives slip away while rationalizing delays in providing timely justice. In the spirit of the promises made to children when the CRC was first created 25 years ago, UN Member States should show children that their rights really do have meaning by immediately ratifying the OP3 CRC.

Sara L. Austin is a Director at World Vision Canada and a Steering Committee Member of the International Coalition for the Optional Protocol for the Convention on the Rights of the Child.

__Geneva II, Politicking and Possibility for Syria’s Invisible 43%__

By Sarah M. Field | 8th January 2014

The possibility of peace in Syria may seem more like an international force (pun intended) than a beacon of hope. History though tells us to ‘believe….”* The form of the conflict’s resolution is simply unimagined – as yet. A dig deeper though and history also tells
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us another story: the transformation of conflict is likely to be partial – children, particularly, are likely to be invisible within decision-making towards peace agreements. To date, the Syrian peace process substantiates this: there is no reference to children, who make up 43% of the population, within Geneva Communiqué I and just one reference within the Communiqué of the London 11.

And herein lies the paradox. From the Central African Republic to Syria (and beyond), no one can be unaware of the impact of conflict on children. Though politicians recurrently invoke them – the children hurt and harmed by conflict – as a call to action (whether towards military action or advancing peace), they seldom raise the subject of children and their rights within decision-making towards agreements. A cynic might reason the confluence of interests is missing; without any broader political gain, principled commitments to children are insufficient to ensure the child question is raised and prioritised. Certainly there is some truth to this reasoning. However, it is also likely that the politicking towards – and subsequently within – the peace trajectory subsumes consideration of children.

Simply, there is nobody to raise and prioritise the subject of children and their rights. There is nothing new about this; all it does is re-affirm why rights are important, and in particular, the right to be heard. Or in other words, an intimate connection to the right – such as that of the right holder – is key to asking the child question, influencing the process and impacting on the outcomes (the peace agreements). The question then is how: how to ensure children’s rights ‘in’ and ‘through’ the process.

To an extent, the answer to this is simple: fulfilling those promises our representatives made to children over twenty-four years ago – legal obligations to which almost all jurisdictions have committed by virtue of ratification of the Convention on the Rights of the Child, including the Syrian Arab Republic. Two are of particular relevance: ensuring the best interests of the child and assuring respect for children’s views within decision-making affecting them.

Of course, applying these legal obligations to peace processes is complicated. However, contrary to our imaginings, peace processes also present possibilities. First, the staged and elongated character provides space for asking the child question. Second, the hybrid legal form ensures engagement with international law, including within decision-making about how to constitute the space. Third, there is often an interface between political commitments to international human rights law and political imperatives; asking the human rights question (transforming inequalities within the process and outcomes) contributes towards advancing the peace momentum. Fourth, the creativity that propels peace processes forward as they fracture and stall opens space for dreaming ‘…things that never were….’*

Framed by over 1,000 days of conflict in Syria, the political challenges of securing a peaceful solution are immense. History tells us, though, within (and between) these challenges there are possibilities for securing a peace inclusive of children. A possible beginning is to appoint a legal representative to the space with a mandate to ask the child question – to raise the subject of children and their rights. Without such a structural response, there is no certainty the child question will be asked as the peace trajectory edges falteringly forward. If the child question remains unasked, the possibility of outcomes for the children of Syria is reduced – now and into the future.

Fourteen days until Geneva II, now is the time to ensure children are part of the conversation.

*These are quotations from respectively Seamus Heaney (‘The Cure at Troy’) and George Bernard Shaw (‘Back to Methuselah’).

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Towards the Abolition of the Detention of Immigrant Children?

By Holly Buick | 13th February 2015

In its recent Advisory Opinion 21/14, the Inter-American Court of Human Rights (IACtHR) adopts a firm position against the detention of children during immigration proceedings, employing a novel approach to the legality of depriving children of their liberty in this context. Once again, the Court has used its advisory jurisdiction to advance the protection of migrant rights beyond existing interpretations of international law.

Among other issues, the court was invited to provide its opinion on the interpretation of the “last resort” principle in this context. The principle originates from article 37 (b) of the Convention on the Rights of the Child, which provides that detention “shall be used only as a measure of last resort and for the shortest appropriate period of time.”

The IACtHR reviews its case law and other sources on deprivation of liberty in a criminal context and notes the exceptional nature of detention on remand used as a precautionary measure. The suggestion is that the deprivation of liberty in immigration proceedings, which involve no suggestion of criminality, requires an even higher standard of exceptionality.
This reasoning can be seen as part of a more general attempt in the Court’s jurisprudence to distinguish administrative immigration proceedings from the sphere of criminality, challenging what the Court has termed “the phenomenon of the criminalization of irregular migration.” Based on the argument that administrative offences relating to immigration status may not have the same consequences as criminal offences, the court rejects the application of the “last resort” principle in this context (Para. 150).

Having thrown out the “last resort” test, the Court proceeds to formulate its decisive statement that detention of children in immigration proceedings exceeds the requirement of necessity and is contrary to the best interests principle, and that therefore: “States may not resort to the deprivation of liberty of children who are with their parents, or those who are unaccompanied… as a precautionary measure in immigration proceedings” (Para. 160, emphasis added).

It should be noted that the IACtHR’s interpretation of article 37 (b) is not in line with that of other human rights bodies. The standard position, found in decisions of the ECHR and UN Human Rights Committee, as well as being enshrined in European immigration legislation, is that article 37 (b) does apply to the detention of children for immigration purposes. This also appears to be the position of the Committee on the Rights of the Child in its General Comment 10 on the juvenile justice system.

However, the IACtHR finds textual support for its position in the Committee’s General Comment 6: ‘Detention cannot be justified solely on the basis of migratory status. Where detention is exceptionally justified for other reasons, it shall be conducted in accordance with article 37(b) of the Convention that requires detention to… only to be used as a measure of last resort.’ (Para. 61, emphasis added).

It remains to be seen whether the Court’s interpretation of the Convention will be more widely accepted. Leaving aside this issue and that of the status of the advisory opinion, what is the potential impact of rejecting the last resort principle?

The Court is right to be wary of the principle in this context. It has been unhelpful in allowing states to sidestep their obligations even in the face of a critical mass of voices calling for abolition, based on evidence of the serious and unnecessary harm caused to children who are detained. Research has shown that in applying the principle some states does little more than design tick-box exercises for immigration officials to make “justifiable” decisions to detain children or even defend their mandatory detention policies as a “legislative last resort” in the face of perceived crises, in a blatant misinterpretation of the Convention. American states such as Mexico are following European governments in making slow progress towards “alternatives,” paying lip service to the “last resort” principle while, in fact, making widespread use of detention.

Rejecting the last resort principle in favour of a general prohibition has important implications for the “alternatives” debate in which policy makers and campaigners are increasingly engaged. The IACtHR’s interpretation would immediately force states to design and implement policies that exclude the detention of children.

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‘Children in an Age of Austerity’: The Impact of Welfare Reform on Children in Nottingham
By Haleema Wahid | 7th July 2014 OXHRH

In its recent Advisory Opinion 21/14, the Inter-American Court of Human Rights (IACtHR) adopts a firm position against the detention of children during immigration proceedings, employing a novel approach to the legality of depriving children of their liberty in this context. Once again, the Court has used its advisory jurisdiction to advance the protection of migrant rights beyond existing interpretations of international law.

The Welfare Reform Act 2012 has introduced the biggest changes to state welfare since the establishment of the Welfare State. Many of the changes have had a direct impact on children in families, and child poverty is also expected to rise. By 2020, it is anticipated that a fifth of all working age parents and their children will be living in poverty.

The Campaign to End Child Poverty estimates that, in Nottingham City, almost a third (32%) of children are living in poverty and ranks Nottingham in the top 20 of local authorities with regard to child poverty. Their 2013 figures indicate the level of child poverty in Nottingham North is 37%, 33% in Nottingham East and 24% in Nottingham South.

The Advice Nottingham Policy & Campaigns team has produced a report to evaluate these figures and examine just how welfare reform policies are affecting children in Nottingham. ‘Children in an Age of Austerity’ brings to light the real-life cases and stories of children in Nottingham, who are experiencing adversity as a direct result of the benefit changes. Evidential conclusions are presented, which were derived using information received from Advice Nottingham’s clients, local schools and key commentators in the area of social policy, children’s rights and child poverty.
The severe impact of welfare reform is starkly realised in our findings. We found that families deemed to be ‘under-occupying’ their home are experiencing financial hardship and face either increased costs or the possibility of moving home; children may have to change schools or travel further to get to school if their families are forced to move as a result of under-occupancy. Non-resident parents/carers face financial penalties for under-occupancy or losing the room their children use, potentially reducing parent-child contact.

Families with children who are reliant on benefits are struggling to meet their requirement to contribute to council tax, resulting in financial hardship and debt. Families with children who are in rent arrears face losing their homes due to possession orders. Outside of London, Nottingham currently has one of the highest number of possession claims, where one in 63 homes is at risk of being repossessed. Disabled parents and parents of disabled children are facing financial hardship due to changes to the awarding of disability benefits.

Every single school that was surveyed for its perspective on welfare reform reported that welfare reform had had a negative impact on children in schools, with four of the six indicating that the negative impact was likely to be ‘large.’ Parents subject to benefit sanctions are relying almost entirely on food banks to feed their children.

With the above in mind, we recommend that non-resident parents who have a room designated for their children should not be subject to under-occupancy rules. Families rehoused as a result of domestic violence should not be penalised if they have ‘surplus’ rooms. Benefit sanctions should be applied more fairly. Help should be offered to all parents whose benefits have been sanctioned. Department for Work and Pensions (DWP) staff should aim to accommodate requests to expedite decisions for clients with dependent children. All families with children should be able to access hardship funds. And, finally, schools should be given additional support when they identify pupils experiencing social, behavioural or emotional problems as a result of welfare reform.

It is hoped that the messages coming out of this report resonate strongly with policy-makers and members of the public. We cannot look at welfare reform in a simplistic way; rather, we must look beneath the tip of the iceberg and anticipate the true potential for damage to our children and young people, as well as acknowledge the damage already caused. We owe our children a childhood free from fear and poverty. We hope that this report, at least in some part, can motivate a collective effort to achieve this.

The full report can be downloaded from the Advice Nottingham website: http://www.advicenottingham.org.uk/news.

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“British Schindler” and a History of Neglect of Refugee Children
By Isabelle Kadish | 20th June 2014

Sir Nicholas Winton celebrated his 105th birthday at the Czech embassy in London this past May. Guests included members of the Winton family, friends, and members of his other family, affectionately coined “Nicky’s Family.” This family, originally composed of 669 members, has now expanded to well over 6,000 – and each and every one of these individuals quite literally owes his or her life to Winton.

In late 1938, Winton, a 29-year-old British stockbroker, travelled to Nazi-occupied Prague with a friend. Winton spent his three-week vacation volunteering in Czech refugee camps. By the time of his departure, he had devised a rescue plan for the thousands of Czech children affected by the Nazi occupation.

After setting up a makeshift office in the dining room of a hotel in Prague, Winton contacted the governments of nations he thought might harbor these children. In fact, Winton’s letter about the matter to President Franklin Delano Roosevelt was recently discovered in the U.S. Department of State Records. Dated May 16, 1939, Winton wrote to President Roosevelt: “In Bohemia and Slovakia today, there are thousands of children, some homeless and starving, mostly without nationality, but they certainly all have one thing in common: there is no future, if they are forced to remain where they are.”

Winton never received a reply from President Roosevelt, nor any member of the White House or State Department. Rather, he eventually received a letter from a mid-level political officer at the American Embassy in London stating that there was nothing to be done.

What Winton may not have realized were the serious obstacles to any sort of relaxation of United States immigration quotas before and during the Second World War. While some Jews were admitted into the U.S. from 1938-1941 under the preexisting German-
Austrian quota, the U.S. did not pursue an organized and specific rescue policy for Jewish victims of Nazi Germany until early 1944.

In the end, only Britain and Sweden granted permission for the children to be transported to their countries (though ultimately, they were only transported to Britain). Winton, however, was forced to work under very strict conditions. In order to transport just one Czech child to safety, he needed a British family willing and able to adopt and £50 – many Czech refugee families could not even afford a single meal – to be paid to the Home Office on account of each child. Nonetheless, Winton intended the rescue of thousands of children – a mass evacuation from Czechoslovakia to Great Britain.

Permission in hand, the rescue of these Czech children was then entirely up to Winton and his made-up organization, “The British Committee for Refugees from Czechoslovakia, Children’s Section,” consisting of his mother, his secretary and a few volunteers. Eight trains of “Nicky’s children” successfully reached Britain through Germany and France. The final, ninth train containing 250 children never reached Britain, as the war broke out on the eve of its departure. Winton still managed to save 669 children. The vast majority of their parents perished in the Holocaust.

Winton was knighted by Queen Elizabeth in 2002, and today there is a growing movement to award him the Nobel Peace Prize, with already over 250,000 signatures worldwide.

While Sir Winton proves an inspiring figure of Holocaust resistance, his story and the recent discovery of his plea to President Roosevelt reveals a history of all-too-static immigration and refugee laws in first world countries. Since the Second World War, and especially in the 1990s, refugee asylum has emerged as a major political ‘problem’ throughout nations in Western Europe, including the UK. There are over 60,000 ‘refugee’ children residing in the UK and, while offered a safer future, by the time they reach secondary school, there is a substantial learning gap between UK schoolchildren and refugee children.

Today, President Obama has continued Roosevelt’s harsh legacy, deporting more immigrants than any other president in the history of the U.S. – amounting to nearly 2 million individuals. This carries a high price for families across the U.S.: one quarter of all deportees are separated from their U.S. citizen children, and unlike “Nicky’s Family,” these children are rendered absolutely parentless.


Isabelle Kadish is a student at the University of Pennsylvania pursuing a Bachelor’s degree in English Literature and Hispanic Studies.
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Introduction
By Dr Meghan Campbell and Karl Laird

Equality has been described as the most challenging right but it is also one of the key rights in transforming institutions and societies to ensure that all people are empowered to create and enjoy a meaningful life. Equality is a universally recognised right that is often entrenched in national constitutions and a foundational value of many national and international legal orders. While there may be broad agreement on the value of achieving equality, the posts collected in this chapter emphasise that there continues to be deep disagreement on how equality should be conceptualised and how national and international laws and policies can further this universal aim.

After commencing with a collection of posts that focus upon some of the overarching questions that inform the current ‘equality agenda’ – namely affirmative action, new approaches to implementing and monitoring equality outside of the court structure and the impacts of austerity measures – the chapter is then sub-grouped on traditional and emerging status based grounds of inequality: women and gender, race and ethnicity; disability; poverty; LGBTIQ; and indigenous and human rights.

Both the victories and continuing struggles for gender equality best exemplify the continued confusion on the substantive meaning of equality. The judiciary has been one site where gender equality is proving to remain elusive. Throughout the common-law world, and in many civil jurisdictions, the composition of the judiciary remains overwhelmingly male, notwithstanding the increasing number of women entering law school and practicing in the legal profession. Indeed, there still remains deep resistance to even recognising the gender imbalance in the judiciary. Kim Rubenstein forcefully respond to that critique, stating: ‘it is difficult to dispute that we already have a system of affirmative action in favour of men. Do men really merit this outcome or is the system, by unspoken assumption, looking after them?’ (‘Rethink needed as new Australian High Court Justice appointment seems to maintain gender imbalance’ p 223).

With the urgency to have women on the bench and the failed past attempts to achieve this, Belgium just recently took an important step forward and passed legislation requiring a gender quota for the Constitutional Court (‘Belgian Parliament Introduces Sex Quota in Constitutional Court’ p 226).

However, when it comes to realising gender equality in relation to reproductive issues, the response has been decidedly mixed. On the positive side, the Convention on the Elimination of All Forms of Discrimination Against Women Committee held that ‘failing to provide maternity benefits is a direct form of gender based discrimination’ (‘Recognising Maternity Leave as a Human Rights Obligation’ p 232). This is an important recognition as it ensures that women are not financially punished for having children. In Northern Ireland, the country’s strict laws on abortion were challenged on the grounds that it discriminated against women living there who had to incur the cost of travelling to other parts of the UK where the procedure is legal and available. The High Court held that this increased difficulty faced by women in Northern Ireland did not amount to discrimination under Article 14 of the ECHR. Beth Grossman observes that ‘it seems fundamentally unfair that a reproductive right long established in and enjoyed by women in every other country of the United Kingdom be logistically and financially restricted for those in Northern Ireland on relatively technical legal grounds’ (‘The Uneasy Decision in A and B v Secretary of State’ p 241). Richard Martin explains that due to several other high profile cases, though, the Department of Justice in Northern Ireland has engaged in a public consultation on reforming the criminal law on abortion to consider allowing abortion in cases of a fatal fetal abnormality or where pregnancy is the result of rape (‘Northern Ireland’s Human Rights Commission Granted Leave for Judicial Review to Challenge the Country’s Near-Blanket Ban on Abortion’ p 242). While this does not guarantee increased access to reproductive services, including the voice and participation of Northern Irish women in the design of the law is crucial.

India has also seen some troubling developments in relation to gender equality and reproduction as, ‘women voluntarily opt for undergoing sterilisation as a trade-off for cash and welfare incentives. However, many women are trading off their lives’ (‘Revisiting Mass Sterilisation in India-Population Management or Menace?’ p 228). The experience of these women highlights the importance of addressing in tandem gender and socio-economic disadvantage. Notwithstanding women in Australia having enjoyed recognition and protection against pregnancy discrimination for decades, a recent survey revealed that ‘49 per cent of mothers... had experienced discrimination in the workplace.’ Disturbingly, only 13 per cent of those women who experienced discrimination sought legal advice (‘Pregnancy Discrimination in the Workplace’ p 231). In a landmark decision in Burwell v Hobby Lobby, the US Supreme Court decided that closely held corporations are not required to facilitate access to contraception on the basis of the corporation’s religious beliefs. Justice Ginsburg ‘points out that contraceptive coverage is essential to women’s health and reproductive freedom and the judgment jeopardises both of these interests’ (‘Burwell v Hobby Lobby’ p 236).

Contributions to this chapter also highlight the troubling issues of gender equality, amplified by online spaces in the digital age. Thiago Alves Pinto highlights that the same ‘problems of victim blaming, stalking and gender discrimination ‘are taking a new shape in space which allows for more anonymity, thus accountability’ (‘Gamergate and Gendered Hate Speech’ p 247). Ann Olivarius highlights the weakness of the current criminal and civil responses to revenge porn (‘Harassment Against Women Goes Online: The Problem of Revenge Porn’ p 248). Laura Hilly asks some essential questions in response to gender discrimination on the internet to ensure legal responses do not further reinforce the shaming of female sexuality and the stigmatisation of women who are not distressed or ‘have no desire to apologise for taking private photographs’ (‘UK Efforts to Criminalise Revenge Porn: Not a Scandal, but a Sex Crime’ p 249).
Similar to gender equality, this year has seen promising developments in the path towards full equality for the LGBT people, but also some distributing trends. Importantly, there has been some welcome attention paid to the rights of transgender persons in particular, who often seem to be marginalised in the LGB discourse. Such marginalisation is highlighted by the fact that the prominent UK LGB charity Stonewall does not advocate on behalf of transgender persons. As Peter Dunne points out, the LGB community has at best neglected the transgender community, at worst it has compromised gender identity rights to promote greater equality for gay men and lesbians ("Searching for the ‘T’ in LGBT Advocacy Peter Dunne by Peter Dunne’ p 276). Last year debates surrounding same-sex marriage dominated the LGBT dialogue in the United States in 2015 and the Supreme Court looks set to decide this issue once and for all as it hears oral argument in the case of Obergefell v Hodges as this publication goes to print ("What next for LGBT equality?” p 287). However, in many other countries marriage is an institution that gays and lesbians in many other countries could only ever dream of joining, given the prevalence of laws criminalising same-sex intercourse. Uganda’s recently enacted anti-homosexuality law is but one example of this (‘Uganda’s anti-homosexuality law and our cultural wars’ p 279). The fact that the Constitutional Court of Uganda invalidated the legislation demonstrates that gays and lesbians still require insulation from majoritarian forces in many jurisdictions around the world. That is not to say, though, that the judiciary will always expand the rights afforded to the LGBT community. This much is evident from the fact the Supreme Court of India re-criminalized homosexuality four years after it was de-criminalized by the Delhi High Court (‘Naz and Reclaiming Counter-Majoritarianis’ p 283).

As Jonathan Cooper discusses, gays and lesbian equality in the UK has advanced a great deal from when the Wolfenden Committee recommended the de-criminalisation of homosexuality in 1957 (‘From Torment to Tolerance and Acceptance to the Everyday: The Course of LGBT Equality in the UK by Jonathan Cooper’ p 280). This post demonstrates, however, that it is important not to become complacent and too self-congratulatory, given that many LGBT people around the world are still persecuted on a daily basis.

It worth touching briefly on the remaining status based grounds for equality. There has been some important decisions and legislation on racial equality. Helen Mountfield observes that the judgment in Moore & Coates v Secretary of State for Communities and Local Government (Equality & Human Rights Commission intervening) is important because it ‘counters the suggestion that singling out applications for planning permission by gypsies and travelers for scrutiny is not discriminatory because they are asking for something different from the settled community rather than symmetrical “equal treatment”’. (‘Recognising Travellers’ Needs: The Courts Begin to Move’ p 260). In both the USA and South Africa there have been crucial judgments in the development of raced based affirmative action. In Schuette v BAMN, Justice Kennedy dodged the ban on racial preference whereas Justice Sotomayor argued that the Michigan ban ‘was especially burdens minorities by requiring them to amend the state constitution in order to pursue a policy that is in their interest!’ (‘Schuette v BAMN: A Need to Rethink Equal Protection’ p 263). There was a similar split within the South African judiciary in South African Police Services v Solidarity obo Barnard on the standard of review for affirmative action cases. Andrew Wheelhouse reflects that although the push for a heightened standard review has been defeated, ‘it will be interesting to see if the dignity analysis is taken up in subsequent cases’ (‘A House Divided: Grappling with Affirmative Action in South Africa’ p 261). This year’s blog posts also highlight the importance of transforming the conceptualization of disability from a medical issue to a social issue that focuses on the existent social barriers (‘Mainstreaming Disability in Development: The Need for a Disability-Inclusive Post-2015 Development Agenda’ p 266).

It is this theme of wary advancement, simultaneously acknowledging successes as well as the need for vigilance on a number of issues, that emerges from an analysis of this year’s Blog posts on equality. Although progress been made and this ought to be celebrated, there is much more to be done before those who have historically been marginalized by society achieve the equality necessary to create and enjoy a meaningful life.

Dr Meghan Campbell is the Weston Junior Research Fellow, New College, Oxford University and Deputy Director of the OxHRH.

Karl Laird is a Lecturer in Law at St Edmund Hall, Oxford.
This will be a year of political and constitutional turbulence for equality law. What changes can we expect after the general election? Professor Sir Bob Hepple QC examines some of the key issues and makes proposals for the priorities of an incoming government. This post reflects on the position of equality law and the protection of citizens in light of the increasingly precarious relationship between the UK and the European Court of Human Rights and the EU, as well as its devolved regions.

So far, the political parties have said little specific about their intentions in regard to equality law. The Conservatives’ threat to withdraw from the European Convention on Human Rights (ECHR), and their undertaking to hold a referendum on future membership of the EU, could fundamentally affect the constitutional basis of our equality law. One of the main purposes of the Equality Act is to make our domestic law consistent with Britain’s international and European treaty obligations.

The courts interpret the Act so as to give effect to those obligations. David Cameron and his colleagues have announced the intention to “end the ability of the European Court of Human Rights to force the UK to change the law”, and to allow “only the most serious cases” to proceed. Dominic Grieve, the former Conservative Attorney-General, has said that this move would be “damaging for the UK and for human rights across Europe”, and warned that non-compliance with the European Convention on Human Rights would call into question the devolution settlements for Scotland, Wales and Northern Ireland, which all enshrined convention rights.

The Human Rights Act already preserves the sovereignty of parliament to refuse to change the law, although if parliament does so the UK may be in breach of its international obligations. Unless the UK withdraws from the Council of Europe and the EU altogether, victims of discrimination and other breaches of convention rights will still be able to go to the Strasbourg Court, putting us back to the pre-2000 position. There have been several discrimination cases where the ECHR has “led to pioneering decisions” for example on the rights of gay people and transsexuals, the right to manifest religious belief and dismissal on grounds of political opinion. If implemented, the proposals will create confusion and uncertainty in an already complex area of law. If a British Bill of Rights replaces the ECHR it is unclear what it will say about the principle of equality as a fundamental human right.

There appears to be no likelihood of Cameron succeeding in negotiating any changes to the EU Treaty which would remove or modify the principle of non-discrimination against EU nationals. If he makes this amendment a condition for continued membership of the EU, precipitating a “Yes” vote for withdrawal, the UK will lose one of the major pillars of domestic equality law. Without the EU, British law would not have the principle of equal pay for men and women for work of equal value, nor laws against discrimination because of age, sexual orientation and religion, nor equal treatment of part-time, fixed-term and agency workers. The case law of the Court of Justice of the EU over the past 40 years has vastly expanded the scope of our domestic law. Withdrawal from the EU would be a major setback for the advancement of equal rights in Britain.
Another constitutional issue which will loom large, is the devolution of powers to Scotland. The report of the Smith Commission (published on 27 November 2014) envisages that the Equality Act will remain a “reserved matter” (for the UK Parliament), but goes on to say that “the powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies” and that “the Scottish Parliament can legislate in relation to socioeconomic rights in devolved areas”. It appears from paras. 63 and 64 of the report that there will be devolved legislative powers over the operation of tribunals, such as in respect of rules and fees, even though substantive discrimination law remains reserved. Scottish and Welsh Regulations on the enforcement of the public sector equality duty (PSED) already go further than those applicable to English public authorities. We face the not unwelcome prospect of “regulatory competition”, which may encourage England to follow the more progressive practices in the other home countries. However, significant differences between these countries could be confusing and burdensome for UK-wide companies.

This post is based on Sir Hepple’s article in the Equal Opportunities Review (Issue 255, Feb. 2015) and presentation at the TUC/EOR Discrimination Law 2015 conference on 23 January 2015.

Professor Sir Bob Hepple QC is the immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

The Equality Agenda in 2015: Part II – Access to Justice
By Bob Hepple | 9th March 2015

In this post, Professor Sir Bob Hepple’s ‘Equality Agenda in 2015’ focuses on the impact of the recent introduction of employment tribunal fees. What might be done to reduce the cost of tribunals to the taxpayer while still ensuring access to justice?

2015 marks the 800th anniversary of Magna Carta, so it is not inappropriate to recall clause 40 (still on the statute book), which states: “To no one will we sell, to no one will we refuse or delay, right or justice.” The imposition of employment tribunal fees since 29 July 2013 has proved to be a devastating obstacle to access to justice contrary to the spirit of Magna Carta, denying justice to thousands of victims of discrimination who cannot afford the fees and have also been deprived of free legal advice and representation.

Evidence gathered by the Trade Union Congress (TUC), Citizens’ Advice in England and Scotland, the Law Society of Scotland and researchers at Bristol and Strathclyde universities show that people with genuine claims are being prevented from lodging them because of inability to pay. All types of discrimination claim, for which a fee of £1,200 is now payable by a single claimant, fell by around 80%, and sex discrimination claims by 91%, in the period April to June 2014 in comparison with the previous year. The latest statistics (July to September 2014) show a slight increase in sex discrimination claims but this is still more than 80% below pre-fees level.

Hopes that the courts would strike down the Fees Regulations have now been dashed on two occasions. In February 2014 in R (Unison) v Lord Chancellor (EHRC intervening) [2014] EWHC 218 (Admin), Moses LJ and Irwin J held that the level of fees did not breach EU principles of effectiveness or equivalence, nor was there a breach of the PSED. They concluded that the application was premature because there was insufficient evidence of the disparate impact on individuals of a protected class. A second application relied solely on a breach of the principle of effectiveness and of unjustified indirect discrimination. On 17 December 2014, this was dismissed by Elias LJ and Foskett J (Unison No.2, case CO/4440/2014). The Court indicated it could not evaluate the arguments without reliable evidence as to the impact on particular individuals; and, in any event, the Government’s aims in setting up the fees scheme were legitimate and proportionate.

The Government is currently reviewing its fees policy and it can be expected that if re-elected to office, the Conservative Party will maintain a fee-charging system, possibly with some modifications, for example through an expansion of the fees remission arrangements, if significant disparate impact on particular groups is shown. The Labour Shadow Business Minister, Chuka Umunna MP, told the TUC conference in September 2014 that a Labour Government would reform ETs and put in place a new system that will maintain a fee-charging system, possibly with some modifications, for example through an expansion of the fees remission arrangements, if significant disparate impact on particular groups is shown.

What reforms are possible that would simultaneously reduce the cost of tribunals to the taxpayer and ensure access to justice? The objective of reducing unmeritorious claims is already met by various rules on striking out, deposits and costs. Paradoxically, s.138 of the Equality Act (based on earlier legislation) was repealed in 2013. This helped to avoid unnecessary litigation by allowing a person who thought there may have been unlawful discrimination to send a questionnaire on a prescribed form to a potential respondent, and thus could avoid litigation where an innocent explanation was given. The deletion by the Deregulation Bill 2014–15 of the power of ETs under s.124 Equality Act to make wider recommendations has also removed an incentive for employers to take remedial action that would prevent future litigation. A Government that is serious about reducing litigation would restore ss.124 and 138.

Greater use of preliminary hearings is another way of reducing lengthy and expensive hearings. There has been a considerable
increase in the number of such hearings. No further fees are charged for these. The former President of Employment Tribunals, David Latham, has pointed out that these hearings can resolve many issues. It will be necessary for an incoming Government to evaluate the impact of the new system of early conciliation. In addition, the “arbitration alternative” under the auspices of Acas (introduced in 1998 for unfair dismissal but not utilised) should be re-examined, with a view to adapting it for discrimination cases. The advantages of such an alternative could be speed, informality, an investigative approach and cheapness – all aims of the original tribunal system.

This was based on Professor Sir Hepple’s article in the Equal Opportunities Review (Issue 255, Feb. 2015) and presentation at the TUC/EOR Discrimination Law 2015 conference.

Professor Sir Bob Hepple QC is immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

The Equality Agenda in 2015: Part III – Advancing Equality
By Professor Sir Bob Hepple QC | 12 March 2015

In a climate of public spending cuts and with political priorities in areas such as the NHS, there are two important measures for advancing equality that would not involve major public expenditure.

1. Equality representatives (ERs)
If an incoming Government enacts only one new piece of equality legislation it should be to strengthen the role of equality representatives (ERs) at workplaces who would be involved in equality audits and in drawing up and enforcing employment and pay equity plans. One opportunity for this kind of engagement will arise when an employment tribunal has ordered a mandatory pay audit, under s.98 of the Enterprise and Regulatory Reform Act 2013, following an equal pay breach.
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There is a ready-to-hand model in the Safety Committees and Safety Representatives Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996. A regulation for ERs could provide that if an employer recognises a union it must consult with union-appointed ERs on equality matters, and provide them with paid time-off and training. The regulations could go further than the health and safety regulations by requiring consultation with other representatives if there is no recognised union.

This needs to be supplemented by bringing into force s.78 Equality Act, which enables a Minister to make regulations requiring private and voluntary sector employers with at least 250 employees to publish information relating to differences in pay between their male and female employees. The Coalition Government did not implement this power, arguing that its voluntary “Think, Act, Report” (TAR) programme was a sufficient encouragement to employers to be transparent about pay for men and women. However, TAR has failed to deliver the promised target of getting private and voluntary sector employers to be more transparent.

2. Strengthening the public sector equality duty (PSED)

In the period of austerity in which the PSED has functioned since 2008, it has played an important role in delaying or stopping cuts in public services where it has been possible to show that the authorities failed to have “due regard” to the impact on one or more protected groups. The effective enforcement of the duty by judicial review (JR) will be seriously hampered if the Criminal Justice and Courts Bill 2014–15 is enacted in its present form (at the time of writing this is a matter of “ping-pong” between Lords and Commons).

The Bill would require the High Court or Upper Tribunal to refuse permission for JR or withhold a remedy if they think it “highly likely” that the outcome for the applicant would not have been substantially different had the conduct of the public authority not occurred. The Bill also establishes a presumption that interveners in a JR would, unless there are exceptional circumstances, have to pay the costs incurred by another party as a result of the intervention. This will have a deterrent effect on interventions by the cash-strapped EHRC and other organisations like the Trade Union Congress. The EHRC’s interventions, such as in the Bracking case [2014] EqLR 60, have had a major impact on the outcomes of JR. There are also provisions in the Bill on costs-capping orders, which risk restricting access to the courts. These changes to JR, if enacted before the election, should be reviewed by an incoming Government.

The next review of the PSED is due to take place in 2016. Among the issues that need to be considered are the extent of the duty. The present “due regard” standard means that the focus of JR applications has had to be on procedures – a “tick-box” approach – rather than substance. An incoming Government should remedy this by reformulating the duty so as to oblige public authorities to eliminate discrimination and to take proportionate steps towards the advancement of equality. This could encourage public bodies to institute real changes, which would be judged by the EHRC and the courts on the basis of the proportionality principle.

This is closely linked to the issue of engagement of stakeholders and ERs (above). The all-important function of the public duty is to involve stakeholders in formulating and implementing equality plans. The current regulations for England (unlike those for Scotland and Wales) do not require the authority to publish details of their engagement with stakeholders. They should oblige the authority to take reasonable steps to involve stakeholders.

This post is based on Sir Hepple’s article in the Equal Opportunities Review (Issue 255, Feb. 2015) and presentation at the TUC/EOR Discrimination Law 2015 conference on 23 January 2015.

Professor Sir Bob Hepple QC is the immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

Rights Protection in 2014: A Review of the Indian Supreme Court
By Jayna Kothari | 29th January 2015

2014 was an interesting year for protection of fundamental rights by the Indian Supreme Court. We undertook an unprecedented rights review at the Centre for Law and Policy Research.

One of the strongest areas of protection in 2014 has been around equality on the basis of sex and gender. 2014 saw the Supreme Court decide two big cases where it overruled discrimination based on sex. One of them was National Legal Services Authority vs. Union of India and Ors. (“NALSA”) Writ Petition Civil No.604 of 2013 where the National Legal Services Authority initiated a public interest litigation to remedy the failure of state law and policy to recognize and protect transgendered persons. The Court established that the anti-discrimination provisions under Articles 14 to 16 included the right not to be discriminated against on the grounds of sexual orientation and gender, and that the word “sex” in Articles 15 and 16 of the constitution also included other self-identified gender identities. The Court held in NALSA that all the state’s laws and policies must let individuals to decide their own gender and record this as “male”, “female” or “third gender”.
Another important judgment on sex discrimination was Charu Khurana and Ors v. Union of India and Ors. Writ Petition Civil. No. 78 Of 2013. Here, a female Petitioner was refused membership as a make-up artist the Cine Costume Make-up Artists and Hair Dressers Association, whose rules only allowed men to be make-up artists. The Court held that the Petitioner could not be denied membership, as discrimination on grounds of gender was a clear violation of her right to equality and a denial of “her capacity to earn her livelihood which affects her individual dignity.” Interestingly, the Court applied this requirement of non-discrimination on the Association, a private entity, and held that any clause in the bylaws of a trade union calling itself an Association cannot violate Articles 14 and 21. This opinion allows for the horizontal application of fundamental rights and breaks away from its earlier restrictive application in Zoroastrian Co-operative Housing Society Ltd Case No. Appeal (civil) 1551 of 2000.

Union of India vs. Atul Shukla Civil Appeals No. 4717-4719 of 2013 was significant as the first Supreme Court ruling on age discrimination. The Indian Constitution does not expressly prohibit discrimination based on ‘age’ under Articles 15 and 16. The case challenged the terms of service for officers in the Indian Air Force, prescribing different ages of retirement for different officers. The Court held that classification only on the basis of age resulting from a deliberate decision to create a younger workforce was a violation of Article 14 guaranteeing equality. Though the Court did not recognise age to be a prohibited ground of discrimination under Articles 15 and 16, this case will intensify the Court’s scrutiny of age-related discrimination.

Finally there were some important decisions around the death penalty which, while not challenging the death penalty, laid down important law relating to procedural administration of death row and mercy petitions. In Shatrughan Chauhan & Anr. vs. Union of India and Ors Writ Petition (Criminal) No. 55 Of 2013 the Court commuted the death sentences of 15 convicts whose mercy petitions had been rejected by the President on the ground of mental illness. The Court laid down guidelines for commutation and evaluated various supervening circumstances: prolonged delay in execution of a death sentence, insanity, mental illness/ schizophrenia of the convict. The Court stressed that no exhaustive guidelines or outer time limits could be prescribed for disposing mercy petitions and the analysis must proceed on a case-by-case basis, entailing that the court must step in when the delays were “unreasonable, unexplained and exorbitant. “More procedural protections came through in Mohd. Arif and Ors. v. The Registrar, Supreme Court of India and Ors Writ Petition (Criminal) 77 Of 2014. A Constitution Bench, by a 4:1 decision, held that judicial review of death penalty cases must be heard in open court by a bench of at least three judges rather than just by circulation, justifying that the right to life could be deprived only upon following a procedure that was ‘just’, ‘fair’ and ‘reasonable’.

This Review throws up interesting conclusions. First, the year 2014 has shown that the Supreme Court is indeed a site for the campaign of sex equality. The progressive NALSA decision is in stark distinction to the 2013 Koushal judgment Civil Appeal No 10972 of 2013 where the Court refused to overrule the criminalization of homosexuality. Secondly, the Court is making positive developments in unexplored areas— age discrimination, horizontality of fundamental rights and rights of persons with mental disability on death row persons with mental disabilities in the context of the death penalty. What is disappointing is the lack of any strong decisions on social rights. Besides the landmark Pramati judgment Writ Petition (Civil) No. 416 of 2012 affirming the constitutionality of the Right of Children to Free and Compulsory Education Act 2009, we see no judgment on social rights like housing, health or livelihood.

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Public Consultation on the Overhaul of Hong Kong Anti-Discrimination Laws
By Sebastian Ko | 26th September 2014

On 7 October 2014, the Hong Kong Equal Opportunities Commission (“EOC”) will conclude its inaugural review of the anti-discrimination legislation (the "Consultation") in the Special Administrative Region of China (the "SAR"). The Consultation represents an ambitious project to align domestic laws with Hong Kong’s constitutional guarantees of equality and obligations under international covenants and with contemporary social values. Simplification, modernisation and harmonisation of laws and mainstreaming of equality principles are the cornerstones of the Consultation.

Among other issues, the EOC has invited comments on the following issues:

- whether the existing anti-discrimination laws, namely, the Sex Discrimination Ordinance, the Disability Discrimination Ordinance ("DDO"), the Family Status Discrimination Ordinance and the Race Discrimination Ordinance ("RDO"), should be unified in one legislation;
- whether the grounds of protection should be expanded to include nationality, citizenship and residency; de facto relationships;
Current laws protect people from discrimination, harassment and victimisation on the grounds of their sex, pregnancy, marital status, disability, family status and race. The laws apply to the contexts of employment, education, retail consumption and government services. However, the EOC has identified numerous gaps and limitations in the existing anti-discrimination framework as well as discrepancies in the way the four Ordinances protect the relevant grounds. For example, the RDO does not cover government bodies, unlike the other three Ordinances. The law does not protect a person from sexual harassment by another in a common workplace, where there is no employment relationship between them. Indeed, the EOC’s public consultation document contains a long list of issues for legislative spring-cleaning.

The Consultation is motivated by the urgent need to ease certain social frictions that have flared in Hong Kong’s rapidly changing demographics. The expansion of the racial grounds is meant to address the growing prejudice experienced by new immigrants and visitors from Mainland China. Discrimination between ethnic Chinese Hong Kong-ers and ethnic Chinese Mainlanders, for example, is not unlawful in the RDO. The scope of the Consultation, however, excludes examination of the potential grounds of sexual orientation, gender identity, intersex status and age. It will be difficult for the Consultation to thoroughly address the reform of family and marital status protections in light of such exclusions. The EOC has indicated that it will consider reviewing these grounds in separate consultations.

The EOC seeks to modernise Hong Kong laws by drawing on international practices, and has made preliminary recommendations based on the laws of Australia and England and Wales. While these recommendations are sensible, whether the pending law reform will garner public support depends on how different interests are balanced by the defences, exemptions and procedural safeguards –relevant proposals have yet to be disclosed. Moreover, a major concern for Hong Kong-ers is that legal reform could lead to a Pyrrhic victory for “equality” when underlying tensions are left unresolved, if not aggravated. Anti-Mainlander sentiments have been attributed to ineffective immigration policies vis-à-vis Mainland arrivals, which Beijing has overriding influence over due to Hong Kong’s status as a SAR. This throws a unique spanner in the works for adopting suggestions based on foreign laws.

The outcome of the Consultation is expected to have enormous impact on equality and human rights protection in Hong Kong. The EOC will submit its findings to the Hong Kong government in mid-2015.

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Chapter 11

Does Affirmative Action Create Unfair Advantage?

By Dimitrina Petrova | 18th June 2014

Affirmative action, also known as positive action, is a controversial issue in many contexts.

For example, Black economic empowerment and employment equity measures have come under attack in South Africa; racial criteria in university admissions in the USA have been contested in the courts; constitutional provisions in Malaysia favouring Bumiputra are said to have outlived their legitimacy and to be creating unfair privileges; and in Britain, the public sector equality duty is said to favour some disadvantaged groups at the expense of others.

As with many expressions that dwell in both political and legal quarters, have different meanings in different contexts and whose meanings have changed over time, “affirmative action” is controversial at two levels. At the more superficial level, disagreement is due to the ambiguity of the term: once a strict definition is adopted, disagreement about the meaning of words can disappear. At a deeper level, having agreed the meaning of words, people can then truly disagree about affirmative action because they have differing notions of fairness and justice, and thus different political attitudes, whether conscious or not.

But it is safe to assume that whatever our political values, we all oppose the creation of unfair advantage: this is our common ground. From here, we will try to identify principles and criteria for the legitimate use of affirmative action. EU law allows “special measures providing for specific advantages in order to make it easier for the underrepresented [group] to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”. But are those aims sufficient? It would be interesting to see if experts could agree an over-arching purposive principle, for example, that affirmative action is justified so long as it has significant positive results in advancing equality?

Provided we agree at this very general level, the question is how such a broad principle can be translated into specific policy guidance. When considering various “special measures”, such as quotas, reserved places, targets, preferences for a limited period, etc., how do we ensure that they are proportionate to the legitimate aim of advancing equality? Another tricky issue is how to define the ground for the preferential measure, so as to reflect the reality of inequalities? Is one characteristic, say ethnicity, or religion, taken alone, always appropriate? For example, if Suni Muslims are excluded from political participation, and their relative wealth or poverty does not matter, it may be justified to tie the positive measure to religion alone. But if poor Roma children in Eastern Europe face obstacles to accessing pre-school, and the same is true for poor non-Roma, would it be fair to base a positive measure on ethnic criteria? How much should the overlap between ethnicity and poverty matter for our affirmative action criteria? In other words, how does one ensure that justice for groups does not create injustice for individuals? Or is the lack of such a balance a part of the price?

The 2008 Declaration of Principles on Equality stated: “To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.” This principle, in my view, is a game changer. It reflects a departure from the notion of formal equality, i.e. identical treatment which could be complemented by the occasional exception, in the form of affirmative action (which is tolerated rather than due, and always open to attack by aggrieved individuals). With such a departure, the destination is a right to substantive equality which requires positive action. It transforms the latter from an exception to a necessary element within the content of the right to equality.

From this perspective, our work at The Equal Rights Trust has provided abundant evidence that the bigger problem around the
world today is not what is happening, but what is NOT happening: the scarcity of affirmative action. The damage done by the occasional abuse of positive action (in Malaysia, for example), is dwarfed by the damage done by the persisting abstention from positive action, which perpetuates and entrenches the power imbalance everywhere. If the growth of inequality is increasingly acknowledged as one of the biggest challenges of this century, affirmative action can no longer remain an afterthought.

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__Everyday Utopias and Challenging Preconceptions__

By Claire Overman | 10th May 2014

Davina Cooper’s “Everyday Utopias: The Conceptual Life of Promising Spaces” considers the contribution that “everyday utopias” – networks and spaces that perform regular daily life in a radically different fashion – make to transformative politics. They do this by demonstrating the viability of alternatives to dominant social structures: there is no clearer way to challenge basic presumptions of how things should work than by successfully showcasing alternatives.

Writing for the Hub, Dr. Cooper has discussed the advantages of such an approach through the sphere of equality rights for nudists. In particular, it forces us to consider the practical implications of provision for equality. She cites the example of urban spaces, designed for clothed individuals – dirty benches, tarmac roads and narrow pavements implicitly accommodate clothed, rather than naked, activity. Thus, thinking about equality in this more practical way allows us to abandon our attachment to the dominant social norm.

That this approach to considering equality is beneficial can be seen in the sphere of disability discrimination. An example is the conceptual shift in thinking about the causes of such discrimination. Certain statutory material adopts the “medical” definition of disability, which attributes the difficulty which a disabled individual may have in everyday life to that disability. For instance, Section 6 of the UK Equality Act 2010 states that a person is defined as having a disability if he or she has a physical or mental impairment, and that impairment has an adverse effect on day-to-day activities. Contrast this with the “social” definition of disability, which holds that an individual’s everyday difficulties stem not from the impairment itself, but from the fact that the world around them has been constructed for the able-bodied majority. Article 1 of the UN Convention on the Rights of Persons with Disabilities adopts this definition. It states that people with disabilities include those whose impairments, “in interaction with various barriers,” may hinder their effective participation in society. An individual in a wheelchair isn’t disadvantaged because of her wheelchair. She’s disadvantaged because, catering for the non-wheelchair-bound majority, steps rather than ramps are the preferred method of accessing buildings.

Another point made by Dr. Cooper in “Everyday Utopias” is that equality as a normative principle does not exist in a vacuum, but is instead inextricably linked with other norms. Her example of nudism is again illustrative. She notes that, even where it is permitted, it still operates within the confines of other norms: “organized associational nudism is replete with rules, conventions and etiquette…how to cook, deal with menstrual blood, manage sweat and other personal secretions…” The norm of equality in this example has to compete with other norms of acceptable standards of hygiene, amongst others.

Once this complexity of normative interaction is revealed, we can look at attempts to counter discrimination with a fresh perspective. Consider equal pay for men and women. One argument used to resist equal pay measures is that women will inevitably contribute less to the workforce. For instance, Posner’s argument from 1989 was that “the average woman expects to take more time out of the work force to raise children,” meaning that she will invest less in human capital than her male counterpart.

However, employing the broader view advocated above, we see that the hindrance to women’s effective participation in the workforce stems not from them being child-bearers, but from the fact that the norm is for women to take on the role of childcare. The case law in this area is promising in its willingness to look at the influence of such entrenched norms when considering equality provisions. In the case of Markin v Russia App. No. 30078/06, the European Court of Human Rights held that providing maternity leave to servicewomen but not servicemen “ha[d] the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.”

Dr. Cooper’s approach to considering equality law is therefore progressive, and appears to be part of a welcome trend of looking beyond the individual victim of discrimination and to society and its norms. In doing so, we are able to reconsider what, not long ago, were non-negotiables (that women would stay at home and care for children, for instance). It allows us to redefine the limits of equality law, by forcing us to reconsider what truly drives differences in treatment.

Claire is a former editor and communications manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.
International Women’s Day: Women and Girls Struggle for Equality in the Courts
By Blakeley Decktor | 8th March 2015

What better time than International Women’s Day to embolden citizens to exercise their power over the judicial process? The Gender Justice Uncovered Awards provide a vehicle for the public to be vigilant with the justice system by holding judges accountable for their decisions.

What started as a call from women to end workplace discrimination has grown into a global movement to address inequality, violence and discrimination against women and girls. Every 8th of March on International Women’s Day we ask political leaders to address these issues, but rarely do we make the same appeal to judges. What better time than International Women’s Day to embolden citizens to exercise their power over the judicial process? The Gender Justice Uncovered Awards provide a vehicle for the public to be vigilant with the justice system by holding judges accountable for their decisions.

I have written previously about Bludgeon nominees, judicial decisions where judges relied on stereotypes and prejudice failing to uphold the human rights of women and girls. This post highlights Gavel nominees: influential examples of the judicial process as a space for promoting human rights. Gavel awards praise the work of those committed judges who lay out a clear framework for advancement of human rights, creating a path for others to follow.

Some victories come at the expense of irreparable loss. In Spain courts failed to protect a seven-year-old girl when they allowed her father unsupervised visitation, despite his history of gender violence against women. Her mother Ángela implored the court to order supervised visits, filing over thirty complaints until tragically, on April 24, 2003, the girl's father murdered her during a visit, unsupervised. Following a 12-year court battle, the CEDAW Committee condemned Spain in 2014 for relying on negative stereotypes to diminish the seriousness of domestic violence. The Committee called for training to eliminate such stereotypes and demanded the State always consider gender-based violence in child custody and visitation proceedings. Currently, Spain is charged with implementing the Committee’s recommendations, a phase where the political will to prioritize the elimination is essential to the process and which presents an opportunity for the State to demonstrate it's commitment to combat this type of violence.

After fifteen years, a Colombian court held the military accountable after two active-duty soldiers raped a woman in 1999. When the woman first came forward, the Court denied the military’s responsibility holding that the soldiers’ conduct was not related to their military service. Only after a new court visibilized the systemic use of violence against women as a tactic of war, the representations of masculinity and femininity that armed groups instill in its members, and the ways women are targeted during conflict, could the court properly hold the Army responsible. It required the military mandate training and implement guidelines to prevent, investigate and punish violence against women.

The struggle for workplace equality continues in Argentina as an applicant was refused employment as a bus driver specifically because she was a woman. A decision in the case by an appeal court was first nominated for a Gavel Award in 2010 because it called for an end to gender-based discrimination. The case later reached the Supreme Court, which has affirmed women, indeed, have a right to choose their profession free from discrimination.

In Botswana, where the penal code criminalizes consensual same-sex sexual conduct, the High Court ruled that the State must afford LGBT rights organization LEGABIBO state-registration. The High Court guaranteed that Constitutional protections apply to all individuals and affirmed that the criminal statute involving sexual conduct criminalizes behavior, not attraction. The Court praised the objectives of the organization for promoting good values such as self-reliance, non-discrimination, health, and education. Fortifying the importance of allowing debate and advocacy, the judge stated that in a democratic society asking for a law to be changed, such as the one criminalizing same sex activity, is not a crime or incompatible with peace, welfare and good order. The Court’s affirmation that the organization does not offend morality sets out a critical discourse in the face of sweeping criminalization of speech, assembly and other rights of perceived same-sex attraction around the world.

Judges continue to issue both positive and negative decisions related to gender equality. On International Women’s Day, we invite you to celebrate the visionaries working to create a better future free from violence and discrimination in order to demonstrate that courts have the power to defend the rights of women and girls. We celebrate on this day seeing there is more to do and knowing we have the power to act.

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Inspiring Change Through Law for International Women’s Day
By Laura Hilly 9th | March 2014

March 8th is International Women’s Day, formally observed by the United Nations in recognition of the fact that ‘securing peace and social progress and the full enjoyment of human rights and fundamental freedoms require the active participation, equality and development of women’ and to acknowledge ‘the contribution of women to strengthening the strengthening of international peace and security.’ The official theme for International Women’s Day 2014 is ‘Inspiring Change’.

While there is much more to be done in order to fully realise the human rights of women around the world, today we celebrate four cases that can inspire us all to continue to see law as a positive instrument for realising women’s human rights.

Women’s Inheritance Rights
Late last year we saw an encouraging decision from the Court of Appeal of Botswana drawing upon a ‘living’ interpretation of customary law to underscore the importance of gender equality and to protect women’s socio-economic rights. In Ramantele v Mmusi CACGB-104-12 the Court upheld Edith Mmusi’s and her sisters’ right to inherit their parents’ home, despite a claim from her male nephew that under Ngwasketse customary law the family home always passes to male heirs. As Tara Winberg wrote in an earlier post, ‘the Mmusi ruling has recognised and elevated the social reality of women’s inheritance over customary law stereotypes of exclusively male heirs.’

Sex-Workers’ Rights
The Canadian Supreme Court in the case of Canada (Attorney General) v Bedford struck down as unconstitutional provisions that criminalised a certain activities associated with prostitution. The Court reasoned that such provisions violated the constitutional right to security of sex workers, who are predominately women. The criminal provisions prevented women from implementing safety measures such as hiring bodyguards, working indoors or properly screening potential clients and perform health checks. All of these prohibitions materially increased the risk of harm to sex workers. As Meghan Campbell argues, the reasoning of both the Supreme Court and the Ontario Court of Appeal in Bedford is welcomed because ‘rather than debate on the morality of prostitution or the importance of quiet and orderly neighbourhoods and streets, the [Court] squarely addresses how the law increases the risk of serious bodily harm to those who work in prostitution. Not only did it focus on the prostitute, but it allowed her interests to
triumph’

Positive obligations to protect women and girls from domestic violence
The European Court of Human Rights has continued to develop a substantive equality approach to human rights. In Eremia and Others v Moldova [2013] ECHR 453 1 police and the social services had put pressure on Ms Eremia to drop the case against her abusive husband, and had made sexist and stereotypical remarks to her when she complained of ill-treatment. The ECtHR held that there had been a violation of Art 14, in conjunction with Art 3. The case is important for a number of reasons, not least that the Court recognizes the gender discriminatory aspects of domestic violence. It confirms the positive obligations upon governments to protect from domestic violence, and applies a test of ‘effectiveness’ in this regard. As Dimitrina Petrova highlights, ‘the Court stated that the authorities’ actions were not a simple failure or delay in dealing with the violence against Ms Eremia, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman. It was clear from the facts of the case that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women.’ Accordingly, although the state had put in place a legislative framework allowing measures against persons accused of family violence, and had taken steps to protect the applicants, these had not been effective. This case clearly signals a move by the ECtHR towards a substantive conception of equality that is prepared to recognise and address institutionalised prejudices.

Education Rights in South Africa
In his official message for International Women’s Day, UN Secretary General, Ban Ki-moon highlighted primary education for girls as one of the key areas to address on the journey towards gender equality. Recent litigation in South Africa, whereby the delay on behalf of the government in providing chairs and desks for learners in socio-economically deprived classrooms in the Eastern Cape was declared as a breach of their constitutionally enshrined right to education, is a welcome development. Education has the power to transform lives, particularly the lives of women and girls. We look forward to seeing more developments in this area over the next 12 months.

Dr Laura Hilly is a Postdoctoral Fellow and Deputy Director of the Oxford Human Rights Hub.

The ‘Bludgeon’ Nominees in the Gender Justice Uncovered Awards 2015
By Blakeley Decktor | 12th February 2015

Judges from all over the world should be held accountable for the discriminatory decisions they issue on matters related to gender equality, and for how these rulings affect the lives of women and girls. The ‘bludgeon’ category in the Gender Justice Uncovered Awards organized each year by Women’s Link Worldwide and the participation of people of all the world contribute to it.

The privilege of deciding an individual’s fate by interpreting and applying the law is one granted to judges by the people. With it comes the responsibility to protect human rights and not allow the law to compound discrimination. The people, who entrust judges to issue legal decisions, maintain the right to question these decisions, especially those that fail to protect gender equality or the rights of women and girls. Women’s Link Worldwide created the Gender Justice Uncovered Awards as a tool for people to monitor judicial decisions around the world and hold judges accountable for their decisions. Every year, we invite people from all over the world to nominate court decisions that promote gender equality for a Gavel Award, and those that set it back for a Bludgeon Award. A jury (this year: Junot Díaz, Claudia Paz y Paz Bailey and Manjula Pradeep) chooses the winners for gold, silver and bronze Gavels and Bludgeons and people from all over the world vote online for the Gavel and Bludgeon People’s Choice Awards. This article analyses some of the decisions nominated for a Bludgeon award in the 2015 Gender Justice Uncovered Awards.

In a decision by the United States Supreme Court allowing employers the choice to refuse to cover contraceptives for their employees, Hobby Lobby forces women to pay out-of-pocket in order to access contraceptive coverage. The decision defines corporations as people, awarding them freedom of religion protection at the expense of the thousands of employees who do not share their beliefs.

The Special Fast Track court of India grew out of a 2012 public outcry calling for better laws and strategies to prevent violence against women in India following the fatal gang rape of a Delhi woman. A Judge in this court specifically envisioned to advance the rights of women and girls found that forced sex within the context of marriage cannot be defined as rape. The Judge issued this decision in a case where the woman had been drugged, forced to sign marriage-related documents while intoxicated and later raped.

A court ruled to decrease the amount of compensation a woman recovered following a medical error that left the woman in severe pain and without the ability to carry out everyday tasks, sometimes as simple as walking or sitting. Employing stereotypical gender roles to justify its verdict, the Portuguese Court based her damages on her responsibilities as a wife and mother rather than compensating the woman for her significant losses of health and well-being of a woman as an individual.

In a decision refusing transgender people the ability to change gender markers on ID documents, the Constitutional Court of Peru,
further marginalized and put at risk transgender people by labelling them as having a “personality disorder”, “a mental disorder” and “a pathology.” The decision uses unscientific grounds to uphold the right and safety people enjoy every day possessing identification documents that match one’s gender.

The Gender Justice Uncovered Awards provides an accessible platform for people around the world to read, discuss, and think critically about how judges’ interpret and implement the law. This form of vigilance on the part of the public forces judges to be more critical of their own interpretation of the law and ideally more committed to their duty to comply with their obligations to implement human rights.

Blakeley Decktor is a Staff Attorney based in Bogota Colombia at Women’s Link Worldwide, an international human rights organization that works to promotes the rights of women and girls. Prior to joining Women’s Link she served as a Legal Fellow at the International Gay and Lesbian Human Rights Commission (IGLHRC).

Winning Decisions in the 2014 Gender Justice Uncovered Awards

By Tania Sordo Ruz | 6th July 2014

Judges from all over the world are held accountable for the decisions they issue and for how these rulings affect the lives of women and girls worldwide. This post considers the court decisions recognized by the jury and the public for advancing or setting back gender equality in the 2014 edition of the Gender Justice Uncovered Awards.

I have previously written on some of the decisions that did the most to help or harm gender equality, which had been nominated for the 2014 Gender Justice Uncovered Awards, presented by Women’s Link Worldwide.

On June 25 2014, the jury spoke, as did the public, who voted for the People’s Choice Awards, picking the decisions that did the most to advance or set back gender equality. Their votes helped raise awareness of the ability of the Awards to create dialogue between civil society and justice systems.

In its review of decisions in which judges used their legal authority to guarantee equality, the jury, made up of Yvonne Mokgoro from South Africa, Héctor Abad Faciolince from Colombia, and Kerry Kennedy from the United States, awarded the Bronze Gavel to the “Genocide of the Ixil Maya People” case from Guatemala. In this case, the court sentenced Efraín Ríos Montt to 80 years in prison for genocide and war crimes, including sex crimes and gender violence. The Silver Gavel went to the “Two-Finger Test” case from Bangladesh, in which the Supreme Court ordered several government agencies to justify the continued use of this invasive procedure performed on rape victims. In response, the Bangladeshi government formed a committee to create new guidelines, which if implemented would ban the practice.

And the 2014 Golden Gavel was won by the “160 Girls Case” from Kenya, in which a judge ordered the police to reopen its
investigation of a long list of cases of child rape and enforce applicable laws.

Turning to the worst court decisions for women’s and girls’ human rights, the jury awarded the Bronze Bludgeon to the “Tzotzil Girl Case” from Mexico, in which a 14-year-old indigenous Tzotzil girl was jailed and fined after she left her husband and returned to her family. The Silver Bludgeon went to the “Punished for Driving” case from Saudi Arabia, a ruling sentencing a woman to 150 lashes and 8 months in prison for driving a car and resisting arrest when she was stopped by local police. And finally, the 2014 Golden Bludgeon was taken by the “Gang Rape” case from India, where a Village Council sentenced a 20-year-old woman to be gang-raped as punishment for having a relationship with a man from another community.

The public got involved in the Awards too, casting its votes on the Women’s Link Worldwide web site, applauding the court rulings that upheld women’s and girls’ rights and denouncing sexist decisions that set back gender equality. The People’s Choice Gavel went to the “Double Orphan” case from Spain, a ruling in which a judge found that the daughter of a victim of gender violence was a total orphan after her father went to prison for murdering her mother. And the People’s Choice Bludgeon was taken by the “Yakiri Case” from Mexico, in which a young woman who was kidnapped, assaulted, and raped was imprisoned for aggravated murder for defending herself against the rapist who tried to murder her.

Every year, the Gender Justice Uncovered Awards show that judges worldwide need to be held accountable for their decisions. The Awards encourage dialogue about how these rulings uphold principles of equality or fail to do so. This year, 34 decisions were nominated for a Gavel and 31 for a Bludgeon, and many organizations and members of the public got involved too, helping raise awareness that gender justice has to become a worldwide reality.

Tania Sordo Ruz, attorney at Women’s Link Worldwide. Master in Interdisciplinary Gender Studies and in Latin American Studies: Cultural Diversity and Social Complexity from the Autonomous University of Madrid. Member of the Feminist Studies Group at the Bartolomé de las Casas Institute of Human Rights of the Carlos III University of Madrid.

How can Judges be Held Accountable?
By Tania Sordo Ruz | 6th June 2014

Each year, operating as a channel of communication between society and legal systems, Women’s Link Worldwide organises the Gender Justice Uncovered Awards, demonstrating how justice with gender perspective must be a reality around the world. This post takes a look at some of the court decisions which have most positively and negatively affected gender rights.

In legal practice, it is not uncommon to find discriminatory court rulings that violate the rights of women and girls, leaving them with no protection when they need it the most. Unfortunately, these decisions occur all over the world. For example, in a case in the Montana District Court, in the United States of America, a 14-year old girl was raped by her teacher. Her aggressor was sentenced
to a mere 30 days in prison since the judge considered that the girl was acting “older than her chronological age” and was “as much in control of the situation” as the 49-year old teacher who raped her. Similarly, judges of the Constitutional Court of the Dominican Republic did not recognise the nationality of a Dominican mother-of-four, as she was the daughter of Haitian immigrants. Further, it demanded that the government do the same in all cases of Haitian descendants born in the Dominican Republic.

Nevertheless, and more promisingly, judges also take courageous decisions and use the force of law to guarantee equality. For example, a woman in Zimbabwe fell pregnant after falling victim to an act of rape and, despite national law authorising it, was denied access to emergency contraception and later to an abortion. She was therefore forced to give birth. Despite all the pressure placed upon them, the judges of the country’s Supreme Court upheld the State’s responsibility for not having guaranteed the woman’s rights, demanding that she be compensated and that measures of nonrepetition be taken. Similarly, the right to property of women in polygamous marriages in Rwanda was safeguarded by judges of the Rwandan Supreme Court which confirmed that the principle of equitable distribution of property in cases of dissolution also apply to these unions, despite the fact that these marriages are not recognised by national law.

All of these cases are part of the Gender Justice Uncovered Awards (GJUA) organised by Women’s Link Worldwide (WLW), an international human rights non-profit organisation working to ensure that gender equality is a reality around the world.

As these cases confirm, judges give content to the principle of gender equality, therefore contributing to its progress or its regress. However, in this endeavour, how are judges held accountable for the decisions they take? The women in these stories have names, as well as a life that has changed, either for better or for worse, due to the judicial decisions taken in these cases. In this way, the GJUA propose a channel of communication between society and judiciary, rendering the court rulings and statements of judges around the world visible, as well as inviting people to debate about how these cases did or did not guarantee equality.

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Rethink Needed as new Australian High Court Justice Appointment Seems to Maintain Gender Imbalance

By Kim Rubenstein | 12th December 2014

The appointment of Geoffrey Nettle QC, as the replacement for Justice Susan Crennan on the High Court of Australia when she retires in February 2015 calls, yet again, for a radical rethinking of the way High Court judges are appointed. It provides further impetus to those who believe in equality of opportunity in Australia to call for a mandated commitment to at least 40 per cent composition of either gender at any time on the High Court of Australia.

Attorney-General George Brandis, in announcing the new appointment, made reference to the following attributes of the new appointment – his “brilliant career in the law” his combined degrees from the ANU and Melbourne University, and his Bachelor of Civil Law from Madgalen College, Oxford. There are a growing group of women judges on the Courts in Victoria, both sitting on the Supreme and Federal Courts who could have been announced in the same fashion – as having brilliant careers, of being Supreme Court prize winners and Rhodes Scholars and Law Review editors. Why was a man preferenced over the woman who could have been extolled in the same, or arguably even more meritorious fashion?

At the moment it is (save for the one single woman) an entirely male conservative cabinet deciding who the “best” person is for the job. Indeed, our century-old experience of judicial selection has shown that when male politicians gaze at the available gene pool of potential High Court appointees, they see only reflections of themselves and what they understand as depictions of merit.

And while there are plenty of women now who would tick all the boxes required, we need to also acknowledge that other matters that are essential to the role of High Court justice include: reflection of the community, responsiveness to the community’s needs, life experiences reflecting those of the community. This is because law is not just a scientific tool used to determine answers – it is full of values, and values are developed through life experience.

This was starkly illustrated in the United States, where the Supreme Court heard argument on the constitutionality of state legislation prohibiting the burning of crosses. The hearing provoked a particularly passionate interjection by Justice Clarence Thomas, the only African-American on the Supreme Court. He spoke of the “reign of terror” struck by the Ku Klux Klan in the nearly 100 years before Virginia passed the challenged law. A burning cross is indeed highly symbolic, Justice Thomas said, but only of something that deserves no constitutional protection. A burning cross is “unlike any symbol in our society”, he said.

The New York Times reported that “during the brief minute or two that Justice Thomas spoke, about halfway through the hour-long argument session, the other justices gave him rapt attention. Afterwards, the court’s mood appeared to have changed. While the
Justices had earlier appeared somewhat doubtful of the Virginia statute’s constitutionality, they now seemed quite convinced that they could uphold it as consistent with the First Amendment”.

The court’s mood change reminds us of the significance and importance of the diversity of life experience on one’s view of the law and the way disputes are resolved. More importantly, it shows the need for a diversity of such experience to be available to the highest court of the land. In Australia, we must also ensure that the diversity of our community is reflected in the High Court of Australia and gender is one of the meritorious matters that must be considered in the appointment process.

There are those who will respond by saying paying attention to gender is an unnecessary exercise of affirmative action. In counterpoint, however, it is difficult to dispute that we already have a system of affirmative action in favour of men. The stacking of the numbers against women can be readily seen in the most cursory examination of the senior ranks of Australian society. Do men really merit this outcome or is the system, by unspoken assumption, looking after them?

This backdoor system of affirming men in the top posts is more insidious in its impact on society. It is a statement by this government to the daughters and granddaughters of the current men and women of Australia that even if they achieve all the traditional baubles of merit and have brilliant law careers, they will not be considered for the High Court of Australia. It undermines any hope of justice not only being done but being seen to be done.

Professor Kim Rubenstein is the director of the Centre for International and Public Law and a Public Policy Fellow at the Australian National University.

### Judicial Appointment of Women on the Decline in Canada and Australia

**By Ravi Amarnath and Laura Hilly | 2nd March 2015**

While many countries have superficially committed to the goal of gender equality with a lot of noisy chatter about women on boards and women’s participation in politics, it appears that the glass ceiling is hardening for female judicial applicants in Canada and Australia, at least in the Superior Courts.

In its latest round of judicial appointments in December 2014, Canada’s Conservative government appointed just eight out of 33 – or 24 percent – of vacant federal judiciary positions to female applicants. Counting the latest appointees, roughly 34 percent of all judges serving on Canada’s superior and appellate courts, as well as the Federal Court, Federal Court of Appeal and Tax Court of Canada, are female.

While the judicial appointments procedure in Canada involves a number of individuals, it remains largely a political process. Committees in each province and territory representing the bench, the bar, law enforcement and the general public interview prospective candidates for vacant positions. The final say on federal appointments, though, is vested with the Cabinet, who act on
the advice of the federal Minister of Justice, or in the case of appointing Chief Justices, the Prime Minister of Canada.

Critics of the Canada’s current federal government allege that it has been at best indifferent, and at worst purposefully stagnant, in its pursuit of gender parity on the bench. It is difficult to validate these complaints, though, since the appointments process for judges is secretive.

Canada’s Office of the Commissioner for Federal Judicial Affairs Canada is responsible for the administration of the federal judicial appointments process. While applicants must indicate their gender when applying, these statistics are not made public.

However, a recent report validates the idea that Canada has regressed on achieving gender parity on the bench. In March 2013, Canada’s chief actuary estimated that gender parity would be achieved by 2035, 8 years later than forecasted in a previous report from March 2010.

The situation in federal courts and tribunals in Australia is no more encouraging. While the High Court of Australia has, until recently, proudly boasted gender parity in its composition (with three women justices out of seven) this number was reduced to two women out of seven with the recent retirement of Justice Susan Crennan and Justice Geoffrey Nettle announced as her replacement.

This reduction in numbers of women on the High Court of Australia is particularly concerning when viewed in light of the wider federal landscape. Despite women currently comprising 46 per cent of the practicing legal profession (counting both barristers and solicitors) at present, only 11 women out of the 46 members of the Federal Court of Australia are women (soon to be 11 out of 47 (23 percent) when Justice James Edelman commences his appointment on 20 April 2015). Since coming to the office in late 2013, the current Commonwealth Attorney-General, Senator George Brandis, has had 17 opportunities to make appointments to federal courts and tribunals. On only two occasions has he found a woman to be the ‘best person for the job’.

This also comes as Senator Brandis has decided to move away from the more structured process for federal appointments, established by the previous Labour government 2008, that included articulating publically available appointment criteria; advertising vacancies and calling for nominations; and establishing an Advisory Panel to make recommendation to the Attorney-General. Rather, he has reverted to the old process of ‘secret sounding’ with, as Professor Andrew Lynch describes, the ‘revival of smog-like opacity around federal judicial appointment processes.’

A recent independent report prepared by Karon Monaghan QC and Sir Geoffrey Bindman QC for the British Labour Party highlights that the pursuit of a diverse judiciary, including a gender diverse judiciary, is important not only to protect the public face and legitimacy of the institution, but to ensure that there is equal opportunity for the many women who enter the legal profession to excel on equal footing with their male colleagues.

It is also a matter that impacts upon the quality of justice that such institutions can afford. Monaghan and Bindman were firmly of the view that:

‘if we wish to see a judiciary that collectively produces socially sensitive and well-reasoned decisions of the highest quality – a judiciary which does the job the public expects of it – then it must be a diverse judiciary. A diverse judiciary will dispense better justice.’

Regressive rates in appointing women to the federal judiciary in Canada and Australia severely compromise this and must be cause for concern.

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Dr Laura Hilly is a Postdoctoral Fellow and Deputy Director of the Oxford Human Rights Hub.

Gender and the Judiciary: Bosnia and Herzegovina
By Majda Halilovic and Heather Huhtanen | 14th June 2014

It is sometimes assumed that if codified law is objective, neutral, and impartial, gender will have little or no influence on the implementation of the law.

Yet research, including the work accomplished by Project Implicit, has increasingly revealed the limits to which an individual is able to be impartial and objective regardless of their profession. This paper summarizes research aimed at uncovering the influence of gender within the judiciary of Bosnia and Herzegovina.
In 2013 DCAF, a centre for security, development and the rule of law in Geneva, and the Atlantic Initiative, an NGO promoting Euro-Atlantic integration in Bosnia and Herzegovina (BiH), conducted research looking into the influence of gender within the judiciary of BiH. The views and opinions of approximately 161 judges, prosecutors, attorneys, and court associates were captured through an anonymous online questionnaire and in-person interviews. The research revealed the influence of gender, whether real or perceived, in both the social and professional relationships of court professionals, and on judicial practice and decision-making.

Questionnaire and interview data identified a number of ways in which gender-related attitudes or behaviors can impact the atmosphere of the judiciary and collegial relationships among and between members of the judiciary. For example, the online questionnaire found that 24% of respondents had either witnessed or personally experienced a member of the judiciary being called or referred to by a name other than their title or surname (i.e. honey, sweetie, young man, etc.) in the courtroom or courthouse. This data was reinforced by a number of anecdotes shared during interviews. One female attorney recounted being called ‘girl’ in court by a male attorney. Another female, a judge, recalled a male judge turning to her during a judicial panel proceeding and asking, “What did you want to say, beautiful?” Women represent approximately 60% of all judicial appointments in BiH. Perhaps not surprisingly, gender stereotypes were routinely used to explain this phenomenon. For example, one female judge framed the gender balance of judges in the following way:

There are more women [in judicial positions] because this is a very hard job with a large case load and women are harder working and more responsible than men. Men tend to stay away from the position of judge because this job is no longer very valued and is not properly rewarded.

In contrast, a number of male interviewees minimized the work and role of judge. One male judge suggested that the reason there are more women in judicial positions is because the job is, in fact, less strenuous than other jobs. A male prosecutor went so far as to link the gendered nature of power relations between women and men to the representation of women in the BiH judiciary. He postulated: Maybe because women are subordinate to men at home, that is the reason they apply for the position of judge; in this position they are dominant at work, which compensates for their situation at home. These responses provide examples of gender stereotyping by both women and men in the judiciary.

Women distinguish themselves as better suited for legal positions in relation to their ‘natural’ characteristic of being harder working and more responsible than men – and by contrast suggest that men are not hard working and responsible. Men characterize women as innately less capable (by characterizing the job itself as not difficult) or motivated by a desire for power and domination (in contrast to an interest in the law or justice).

Lynn Hecht Schafran, director of Legal Momentum’s National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) argues that this “stereotypical thinking about the nature and roles of women and men” is one of the most prominent ways in which gender bias influences court operations, procedures, and decision-making. And indeed, the sum of these reflections, from referring to a woman as a girl or ‘beautiful’, to believing that women are in judicial positions because the job is easy (men) or that women are in judicial positions because they are harder working and more responsible (women), actively contributes to an environment in which impartiality, or at the very least, the appearance of impartiality, are difficult to achieve.

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Heather Huhtanen is a project coordinator for the gender and security programme at DCAF in Geneva. She holds a master’s degree in international development – women, gender and development from the International Institute of Social Studies, Erasmus University, the Netherlands.

Belgian Parliament Introduces Sex Quota in Constitutional Court
By Adelaide Remiche | 21st April 2014

On the 4th of April 2014, the Belgian Parliament passed a Bill that introduced a sex quota in the composition of the Constitutional Court (CC). It requires the Court to be composed of at least a third of judges of each sex.

This requirement will however not enter into force immediately, but only once the Court is in fact composed of at least one third of female judges. In the meantime, a judge of the underrepresented sex shall be appointed every time that the two preceding appointments have not increased the number of judges of this underrepresented sex. For example, if women remain unrepresented on the Court (as they currently are, representing only around 16% of the Court), and the next two appointees are men, the third appointment will have to be a woman.

Introducing quotas in the composition of the CC of Belgium – a paradigmatic example of a State which has historically had to find compromises between various groups – is not in itself revolutionary. As a matter of fact, the composition of the CC has, from its
creation, required linguistic and "professional" quotas: six judges should be Dutch-speaking, three of whom should be former MPs, and six judges should be French-speaking, again, three of whom should be former MPs. Even this new introduction of sex-based quotas is not completely at odds with the previous spirit of the rules surrounding judicial appointments: the Act on the CC has stated since 2003 that 'the Court shall be composed of judges of both sexes'. However, this previous requirement was a minimal one and did not guarantee the achievement of meaningful sex diversity: only four women – all former MPs – have been appointed to the Constitutional bench since its creation in 1984. Moreover, up until January 2014, the Court has never counted more than one woman at a time among the twelve judges sitting on the bench. Requiring at least one woman on the bench has led (until 01/2014) to the appointment of only one woman to the bench at any particular time. No more.

Such an underrepresentation of women has been constantly criticised by some MPs, who have lobbied for more than 10 years for more sex diversity on the bench. They have argued for diversity for three main reasons. First, it would reinforce the democratic character of the courts. Second, it would allow for a better protection of sex-specific interests. And finally, it would improve the quality of justice by bringing more flexibility and more creativity on the bench. Since 2003, various bills have been proposed to introduce sex-based quotas as a mean to achieve diversity.

Their promoters have relied on four different, but interrelated, arguments:

1. The introduction of sex quotas is a powerful stimulus for change that has proved to be useful, notably with regards to the gender composition of the Parliament.
2. There is some urgency to appoint more women on the constitutional bench.
3. Other less restrictive alternatives – such as requiring that at least one member of the Court should be a woman – have failed to bring about real sex diversity.
4. Quotas are not a radical measure since there are enough qualified women who could be appointed to the bench.

Ten years and eight bills later, the promoters of sex-based quotas have finally won, at least with regards to the composition of the CC.

This political debate is based on theoretical underpinnings that are worth discussing, including in academic circles. While such questions have been investigated in the common law context, they are still relatively unexplored within the civil law legal cultures. It is time for civil lawyers, and in particular French-speaking scholars, to start to engage seriously with these difficult but fascinating issues.

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Revisiting Mass Sterilisation in India – Population Management or Menace?
By Shivani Misra | 21st December 2014

According to the 2011 census, the population of India was recorded as 1.2 billion people. Such a situation calls for urgent measures to address family planning and to control of population growth.

Like in most modern democracies, government agencies, burdened with welfare obligations take upon themselves the duty to ensure a controlled population figure. Following such a welfare model, the Indian government has been conducting sterilisation camps across the country and awarding cash incentives for the same. Female sterilisation is seen by some, including those writing government policy, as a viable medium to control population growth and is often preferred over the alternatives of using contraceptive pills, condoms or even male sterilisation. The coercive nature of such policy measures are presented by the government as not only acceptable, but as imperative. However, the tragic deaths of 12 women in one such sterilisation camp in the state of Chattisgarh and the hospitalisation of 60 more, unveiled a series of horrifying realities of the population control policies endorsed by the Indian government. The incident urges one to think and reflect upon the nature of population control measures.

Why Women?
A UN report on contraceptive patterns showed that India carried out 37% of the world’s female sterilisation and 1% of male sterilisation. The heavy contrast in the figures may be viewed as a reflection of the deep rooted patriarchy that is entrenched in the Indian society. Women’s sterilisations are seen as an easy method that would enable population control without obstructing the male virility. Human Rights Watch also noted that health workers were assigned targets for family planning services which, to a major extent, involved motivating people for female sterilisation. This remains prevalent today despite India asserting at the International Conference on Population and Developments in 1994 that there would be a target free approach to family planning. While female sterilisation is far more common than male sterilisation in India, the latter though procedures such as a vasectomy, is safer, simpler, about half the cost of female sterilisation, and are probably more effective.

Health Care Precautions
Women voluntarily opt for undergoing sterilisation as a trade off for cash and welfare incentives. However, the shocking incident of November 2014 saw many women trading off their lives. Appallingly, this isn’t a one off incident. Between 2009 and 2012 the government paid compensation for 568 deaths resulting from sterilisation. A total of 1,434 people died from such procedures in India between 2003 and 2012. In the present state of affairs, journalists reported on the abysmal conditions of the instruments used for surgery and the lack of proper pre and post operative care. Contaminated drugs used in the camps were also identified as probable causes of the tragedy.

Needless to say, the approach taken up by the Indian government needs to be revised:
• The selective nature of targeting women to undergo sterilisation is fundamentally flawed and warrants attention. Both sexes must be equally engaged in the process. More male participation in effective contraceptive selection is needed. Thus, awareness and counselling on contraceptive choice needs to be increased.

• Contraceptive alternatives need to be made easily accessible and people must be motivated to use them.

• Lastly, consent for sterilisation processes must be sought only after informing the individual about the implications of surgery and also of the availability of other (more transient) alternatives.

Policy makers must carefully scrutinise such discriminatory policy decisions through the lens of equality and welfare. The question that needs to be inspected upon by our collective consciousness is whether such policy initiatives should be encouraged when the state machinery lacks the facilities to safely implement them?

Shivani Misra is an undergraduate law student in GGSIP University, Delhi.

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**The Rhodes Project: Celebrating Many Versions of What Women Can Be**

*By Susan Rudy | 25th November 2014*

Earlier in 2014, the Rhodes Project marked its 10th anniversary with a celebration at the home of its founder, Dr Ann Olivarius. In 2004, Olivarius, a member of the second class of women Rhodes Scholars, embarked on a project to better understand the lives and experiences of her fellow female scholars. Since its inception, the Rhodes Project has conducted interviews with over 125 Rhodes women and developed into a dynamic research centre.

The history of the Rhodes Scholarship has primarily been illustrated using the stories of men: figures like Bill Clinton, J. William Fulbright and Bob Hawke loom large, and little heed is paid to the women who have received the scholarship. In his 2008 history of the Rhodes Scholarship, Legacy, Philip Ziegler dedicates a single paragraph to discussing the achievements of Rhodes women – he asserts that they are generally less impressive, but doesn’t seek to explain why.

The Rhodes Project was founded to correct this imbalance by investigating the lives of women Rhodes Scholars. Over 1,200 women have earned Rhodes scholarships, and the Rhodes Project has collected a rich set of data regarding their lives and careers. Rhodes women are a unique category of high achievers, and many have enjoyed successful careers in countless fields of work, including politics, finance, business and academia, often while sustaining long-term partnerships and raising children. Their experiences can illuminate our understanding of contemporary women’s lives more broadly, at work and at home.

Research at the Rhodes Project has examined Rhodes women’s experiences at Oxford and after, how they progress in their careers and manifest leadership, and how they contend with the challenges of balancing their professional with their personal lives. We have also considered what they have to say about whether they had or need role models, and if they do, where they look for them. With Dr Kate Blackmon of the Saïd Business School I have addressed academic conferences and published a number of briefings and working papers on these topics and we are now co-authoring a book on the gender gap in leadership, forthcoming with Oxford University Press.

What we have learned is that leadership involves much more than assuming a senior role. It is deeply connected to issues of identity. Whether or not young women Rhodes Scholars fulfil their potential for leadership has everything to do with how they see themselves – and how others see them – at crucial points in their lives. In the life stories told by Rhodes women, a recurring theme is the difference between how they wanted to behave as leaders and their awareness of the expectations that others had of them as women. In the words of one Scholar:

*When I was a prosecutor I had a male supervisor, most of them were male, who said to me my rating would be higher if I was a man because men can be aggressive in the courtroom, but women need to be little bluebirds of happiness. Now if anyone knows me, a little bluebird of happiness has never been in my job description [group laughter]. And I was doing more trials than every man [at the firm], I was winning trial after trial, but I wasn’t a little bluebird of happiness and therefore my rating was lower.*

This Scholar had held a high-level position on a national security committee and was an experienced trial lawyer, but she was expected to be little, birdlike, and happy – just because she was a woman. Another participant said:

*Women think that if you’re dutiful and you’re a good girl you will be rewarded. And you know what? That is just not true [group laughter]. And the truth is, I don’t think there’s any over-arching conspiracy. I think the way the world works is if you want something you have to ask for it, whether it’s clients, or business, or money. The fact is you have to assert yourself.*

The Rhodes Project aims not just to celebrate women Rhodes Scholars: we also hope to offer alternative versions of what it means to be a woman. Young women today still suffer from a dearth of desirable role models and we believe that women Rhodes scholars
– with their diverse backgrounds and broad range of experiences – represent a vibrant resource. With this in mind, the Rhodes Project created a Profile Series, where we make some of the Scholars’ wisdom and life lessons available to the public. Most recently, we are working with current women Rhodes Scholars, engaging them on issues relating to our research and providing a space for them to discuss the topics that arise. Through our research and our outreach, we hope not only to support the community of Rhodes women, but also to shed light on gender inequality and work towards a fairer world for women.

Professor Susan Rudy is Director of the Rhodes Project and a Visiting Scholar at Said Business School.

Menopausal Women Fear Discrimination in the Workplace
By Natalie Cargill | 30th October 2014

According to new research, women of menopausal age fear age-based discrimination in the workplace and face a total lack of menopause-specific support from employers. Interdisciplinary research resulting from a collaboration amongst academics from Monash, La Trobe, and Yale Universities has found that many women were reluctant to speak with their managers about menopausal symptoms for the fear of being stereotyped as “old”.

The report found that menopause is a “silent issue” for most organisations, and older women represent a group whose working lives, experiences and aspirations are poorly understood by employers, national governments and academic researchers alike.

The study recommended that policy makers:

• Develop the business case approach to older women in the workplace surrounding resilience, knowledge and collegial labour as a significant factor in organisational success;
• Develop later-life work policies that take into account how changing personal circumstances and opportunities may reconfigure (which may be both challenging and positively related to career development) women’s employment perspectives;
• Promote career models that recognise and foster second or third career stage development;
• Provide resources for organisations to use that will facilitate and support, rather than ‘manage’, menopause, such as information sheets and examples of best practice;
• Consider the visibility of different working bodies and the subliminal messages that visual communication, figureheads and initiatives targeting particular groups (e.g. only images of young female workers or older females workings who ‘look’ young) may send.
The right to freedom from discrimination is internationally recognised as a human right, and older women are often the subjects of compounded forms of discrimination within and outside of the workplace. As one participant in the study said, “I think it should be a time of recognition of a different age of a woman but I think it’s more a disappearing of women […] I have had thoughts that maybe I would be less able to be employed because of my age. […] I think that generally menopausal women are invisible” [Kirsty, 51].

The latest report of the UN’s Working Group on discrimination against women was the first to recognise the scarcity of attention that has been paid to the negative impacts of the business sector on women’s enjoyment of human rights. The report noted that women’s “quality of life in older age derives from the culmination of the earlier phases in their life cycle and bears their imprint”, and accordingly the treatment of older women “can be regarded as a litmus test for the quality of women’s economic and social life”.

To pass this litmus test, an inclusive workplace sensitive to the needs of older women is essential. Menopause is a significant life event that affects all women, and as workforces become older and more gender-representative, women’s health issues need to be increasingly mainstreamed in anti-discrimination and health and safety legislation.

However, as the interdisciplinary study shows, there is a long way to go, and progress will depend on a multi-stakeholder approach encompassing health and safety legislation, anti-discrimination policies, human resources management, government intervention, and international standards-setting bodies.

Natalie Cargill is a University of Oxford graduate and has worked with the United Nations and development NGOs in Geneva. She is currently a GDL student in London.

Pregnancy Discrimination in the Australian Workplace
By Dominique Allen | 24th June 2014

As part of its national review into pregnancy discrimination in the workplace, the Australian Human Rights Commission (AHRC) released data from a national phone survey measuring discrimination in the workplace related to pregnancy, parental leave and return to work following parental leave. The figures are staggering.

49% of mothers reported that they had experienced discrimination in the workplace. 27% experienced discrimination during pregnancy, 32% when they requested parental leave and 35% said they experienced discrimination when they returned to work.

Just as alarming is the type of discrimination experienced during pregnancy – 37% were threatened with dismissal, were dismissed or their contract was not renewed, and 49% were discriminated against in relation to pay, conditions and duties. More than a quarter of fathers and partners who exercised their legislative entitlement to 2 weeks paid parental leave reported experiencing discrimination either during the period of leave or when they returned to work.

These figures are even more alarming considering that federal law has prohibited pregnancy discrimination in the workplace since 1983.

Pregnancy discrimination is also unlawful under state and territory laws, so is workplace discrimination based on family or carer’s responsibilities. Since 2009, pregnancy discrimination has been unlawful under federal industrial relations legislation. Male and female employees who are the primary caregiver for a child are entitled to 12 months' unpaid leave and can request an additional 12 months and flexible working conditions when they return to work. They’re also protected from adverse action, such as threatened dismissal, for exercising these rights.

Yet this data clearly shows that workplace discrimination remains a problem and that employees aren’t turning to the law for a solution. Although 75% of women took action in response to the discrimination, only 13% sought legal advice and only 10% made a complaint to a government agency. 25% looked for another job and 24% resigned.

Given that it is challenging enough to utilise anti-discrimination laws (for reasons such as the burden of proof on the employee, low damages claims and high legal costs), it is not surprising that women who are pregnant or returning to work with a young family are choosing not to pursue legal action.

But that presumes they’re aware of their rights. Under federal industrial relations legislation, employers must give all new employees an information sheet outlining their minimum entitlements. There’s no reason information about unlawful discrimination couldn’t be distributed at the same time. The AHRC’s report and recommendations are due next month. It should recommend a national government funded advertising campaign to make employees aware of their rights and employers aware of their responsibilities. Governments do so for workplace safety, so why not for workplace discrimination?

Australia has used education as the primary means of encouraging compliance with anti-discrimination laws but education alone
is not enough. Modern regulatory theory says businesses are more likely to comply if there is a threat that action can and will be taken against them if they don’t.

This is the model the industrial relations regulator, the Fair Work Ombudsman (FWO), has used since it was established in 2009. As well as having education campaigns, such as its 2012-13 campaign targeting working parents, the FWO can investigate complaints about workplace discrimination and take action to enforce the law. It can reach enforceable undertakings in which an employer will agree to change policies and practices and the FWO will agree not to take further court action. By March 2014, the FWO had entered into 7 enforceable undertakings in discrimination matters. 3 were instances of pregnancy discrimination. The FWO can litigate on behalf of employees and seek the imposition of a civil penalty against the employer of up to $10,200 for individuals and $51,000 for a corporation. As at March 2014, 5 of the 7 discrimination matters the FWO had litigated were about pregnancy discrimination and in each the employer was ordered to pay a civil penalty.

There is no reason a stronger enforcement model like this couldn’t be adopted for the federal anti-discrimination Acts.

The previous federal government took the first step by asking the AHRC to gather the evidence about the degree to which discrimination remains a problem for parents in the workplace. The Abbott government must take the next step and give the AHRC the power and resources to do something to address this problem.

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Recognising Maternity Leave as a Human Rights Obligation
Meghan Campbell | 15th September 2014

Paid maternity leave is routinely argued as necessary to achieve gender equality in the workplace. Article 11(2)(b) of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) requires States “to introduce maternity leave with pay or comparable social benefits.” The six individuals in Elisabeth de Blok et al v The Netherlands (CEDAW/C/57/D/36/2012) argued the State violated this obligation by not providing maternity leave to self-employed women.

In 2004 The Netherlands passed legislation which disqualified previously eligible self-employed women from receiving public maternity benefits. These self-employed women were forced to take out private insurance to cover their loss of income during maternity leave. There were two problems with the private insurance model: (i) the policies “applied a two-year exclusion period for new subscribers during which no maternity benefits could be paid” and (ii) the premiums under the private schemes were cost prohibitive such that the claimants could not afford to take out insurance. For one of the claimants the monthly premium was equal to her income (para 2.14). In 2008, The Netherlands re-instated public funds to cover maternity leave for self-employed women but there were no transition provisions. The six claimants gave birth in the time before the re-instatement and before the end of the two
year exclusionary period for private insurance, so even if they could afford it they would have been barred.

The claimants argued CEDAW obligated The Netherlands to ensure “that all women who perform paid work are entitled to a period of paid leave” and this included women who were self-employed (para 3.6). The State countered that CEDAW only required them to take ‘appropriate measures’ which they interpreted as only requiring “a best-efforts obligation and does not lay down clear rules on how to pursue” maternity leave (para 4.10). They argued the margin of appreciation in CEDAW does not specify the forms or associated conditions with maternity leave. This means The Netherlands can restrict paid maternity leave to women in formal employment and “can introduce a public scheme or leave it to the private sector.” (para 4.13).

The Committee correctly rejects the State’s arguments. It adopts an expansive or living tree interpretation of Article 11(2)(b) which covers self-employed women (para 8.4). This is important for the evolution of CEDAW as it ensures Article 11 is interpreted to protect new and different kinds of employment relationship. The Committee concludes that failing to provide maternity benefits is a direct form of gender based discrimination and violates CEDAW (para 8.9). It is recommended that the State compensate the six complaints and other women who are in a similar position.

This is an important development in women’s human rights. The Committee firmly establishes that State’s have a legal obligation to provide women with maternity leave. This case is also an important contribution to the jurisprudence of the Committee, as they reject an interpretation that treats the obligations in CEDAW as policy directives. The substantive provisions require more than best efforts. There are human rights obligations that can be monitored and evaluated against standards of gender equality.

At the same time, however, the Committee misses out an opportunity to fully flesh out the obligation to provide maternity leave. This case raises a challenging question: does Article 11(2)(b) allow the State to use the private sector to provide maternity leave? This is a pressing question because public services are important in meeting women’ needs and there is a growing trend towards privatization. The Committee does not explicitly prohibit using private insurance to provide maternity leave. If the State has put in place “an adequate alternative maternity leave scheme to cover loss of income” it will have satisfied its CEDAW obligation (para 8.9). The decision could have done more to explain what counts as adequate. The evidence before the Committee was that private insurance was too expensive. This could be due to many factors such as gender job segregation, the low valuation of women’s work and the continuing gender pay gap. Women may not have the economic resources to purchase private insurance. The Committee could have reminded States that they need to be more attentive to women’s disadvantage when crafting policies on maternity leave. Moreover, Article 2(e) requires the State to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. The Committee should have clarified this means the State could be obligated to place caps on private premiums or provide subsidies to low income self-employed women so they are protected from loss of income.

While the Committee could have done more to develop CEDAW, this decision is commendable because it ensures women are not financially punished for having children, which is an essential step to ensuring gender equality.

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**Improving the Law for Pregnant Women and Working Parents**

By Dominique Allen | 6th October 2014

Earlier in 2014 I wrote about the preliminary data that the Australian Human Rights Commission (“AHRC”) had published which showed the high levels of workplace discrimination encountered by women who are pregnant, on parental leave and returning to work, and fathers and partners who take parental leave. This is despite the fact that Australian law has prohibited such discrimination for over 30 years, and men and women have statutory entitlements to unpaid parental leave and flexible working conditions when they return to work. They’re also protected from adverse action, such as threatened dismissal, for exercising these rights.

The AHRC has now published its final report which draws upon two national telephone surveys and consultations in every capital city and major regional areas with individuals who experienced discrimination, employers and industry groups, and representatives from community organisations, unions, health organisations and academics. It also received 447 written submissions. It is noted that the data captures the participants’ perceptions; what they experienced may or may not be held to constitute discrimination if a claim proceeded to court.

Data collected from the telephone surveys provides a snapshot of the characteristics of women who are experiencing discrimination:

- 58% of mothers who identified as Aboriginal or Torres Strait Islander reported experiencing discrimination on at least one
During pregnancy, one in two women aged between 18 and 24 reported experiencing discrimination compared to one in four of all other women; Mothers who are the sole income earner are more likely to experience discrimination than those who are not; Single mothers are more likely to experience discrimination during pregnancy than mothers who are in a relationship; Women who worked for large organisations (ie over 100 employees) were more likely to experience discrimination when they requested or took parental leave of returned to work following leave.

Many of the review’s recommendations for how to address this persistent problem relate to strengthening the existing law. The review recommends implementing recommendations made by a Senate Committee in 2008 to change the Sex Discrimination Act 1984 (Cth) to define ‘family responsibilities’ as including caring responsibilities, prohibiting indirect discrimination based on family responsibilities (only direct discrimination is currently prohibited) and giving the Sex Discrimination Commissioner power to launch own motion investigations.

It recommends strengthening s 65 of the Fair Work Act 2009 (Cth) which gives employees the right request flexible working conditions if they have child who is of school age or younger but allows the employer to refuse the request on ‘reasonable business grounds’. The refusal is not reviewable and evidence received by the review suggested that employers are grappling with what is meant by flexible working conditions and how to institute them in certain workplaces.

Australian law is reactive rather than proactive in how it addresses discrimination. The review recommends introducing two positive duties – one would require an employer “to take all reasonable and appropriate measures… to provide a workplace free of pregnancy/return to work discrimination” and a second would require an employer to reasonably accommodate the needs of employees who are pregnant or who have family or caring responsibilities except where those adjustments would cause unreasonable hardship.

The review also highlighted that employers are confused about the operation of federal, state and territory workplace laws. For example, they are unsure of how to meet their obligations under workplace health and safety laws while also ensuring that they don’t discriminate against a pregnant employee, such as by forcing her to change jobs unnecessarily.

The underlying message of the review is that we not only need effective law, we need to ensure employees are aware of their rights and that employers understand their obligations and comply with them. It was encouraging that immediately after the AHRC released the report, the federal government committed to giving it $150,000 to prepare a practical resource for employers and employees about their rights and obligations within one year. This resource needs to be disseminated widely and early to be effective.

Pregnant women are bombarded with information about their health during pregnancy yet expectant and new parents do not receive any information about the rights at work, nor are the physiological and economic harms caused by discrimination acknowledged. Information about an employee’s rights should be made available in a GP’s surgery, obstetrician’s rooms, birthing centres and maternity hospitals, along with information about government assistance for child care and government funded paid parental leave.

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The Family Agenda: Promoting Traditional Values in the Human Rights Council
By Frances Raday | 8th January 2015

On 23 June 2014, the Human Rights Council decided, through its Resolution 26/11, to convene a panel discussion on the protection of the family, “reaffirming that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State […]”. The sponsors of the resolution expressed their cardinal motive as being the protection of the family so that it can fully assume its responsibilities within the community. The resolution was passed by 26 votes to 14, with 6 abstentions.

The concept note for the work of the panel emphasized the role families play in development, expounding on the role of the family in “fostering social development, its strong force for social cohesion and integration, and … its primary responsibility for the nurturing, guidance, and protection of children”. It envisages “designing, implementing and promoting family-friendly policies and services, such as…campaigns to sensitize public opinion on equal sharing of employment and family responsibilities between women and men,…. as well as developing the capacity to monitor the impact of social and economic decisions and actions on the well-being of families, on the status of women within families, and on the ability of families to meet the basic needs of their members.” It emphasised the structural problems of care responsibilities and the need not only to redistribute them between
women and men, as required by CEDAW, but also between family and state, by provision of a protection floor for care services, which is a welcome departure and is in accordance with the recommendation of the Expert Group to the Council on 16 June 2014.

However, the resolution and the concept note raise grave concerns as they fail to reiterate women’s right to equality in the family, referring rather to women’s status within families. The author of this note, as Chair-Rapporteur of the Expert Group on Discrimination against Women, sent a letter to the President of the Council requesting his intervention, pointing out these documents produced a retrogression in women’s human right to equality in the family, guaranteed under the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Convention on Civil and Political Rights (ICCPR) and the 1980 Convention on the Elimination of All forms of Discrimination against Women (CEDAW) requires Article 16.

Silence in the Human Rights Council on the right of women to equality in the family is not innocuous. It is a denial of the crucial 20th century gain of women’s right to equality within families, which had constituted a dramatic departure from the prior cultural and religious norm of the patriarchal family. Indeed, many of the countries supporting the Resolution had made reservations to CEDAW’s Article 16, denying women the right to equality in the family on grounds of religion, and had also spearheaded the previous Resolutions of the Human Rights Council calling for restoration of traditional values in the interpretation of human rights. Opposition by some other states to the Resolution focused on the failure to recognize the diversity of families rather than on equality for women. In the key messages from a Human Rights Council panel discussion on 15 September 2014, an important human rights move was made in acceptance that diversity of families should be respected and that violence within the family should be countered. However, the right of women to equality in the family was still not mentioned.

In a statement on the 30th September 2014, the Special Procedures mandate holders took note of the developments in the Human Rights Council on the “protection of the family” and expressed concern regarding the fact that there had been no reference to women’s and girl’s right to equality within the family. The statement called on the Human Rights Council to ensure that in all future resolutions, concept notes and reports on the issue of the family, the right to equality between women and men, as well as between girls and boys, within the family must be explicitly included as a fundamental human right.

As stated in the Human Rights Council resolution, the family is indeed the “fundamental group unit of society”. Hence, it is for this very reason that the progress of women and girls depends on the recognition in law and practice of their right to equality with men in every aspect of family life. Furthermore, women’s contribution to the economic and social lives of their families and communities is a foundation stone of families’ role in development and development is only sustainable on a basis of their equality with men within the family.

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Burwell v Hobby Lobby – A Narrow Decision?
By Karl Laird | 2nd July 2014

At the beginning of July 2014 the Supreme Court of the United States delivered judgment in the eagerly anticipated case of Burwell v Hobby Lobby 573 U.S. ___ (2014), involving a challenge to a provision of the Patient Protection and Affordable Care Act (known colloquially as ‘Obamacare’). This provision requires nonexempt group health insurance plans (such as that of Hobby Lobby) to include access to all FDA-approved contraceptive methods and sterilization procedures.

The owners of Hobby Lobby objected to their company being required to facilitate access to four of the FDA-approved methods of contraception. They argued that their Christian beliefs dictated that life begins at conception and four of the contraceptive methods took effect after that point. They therefore challenged the contraceptive mandate on the basis that it violated the Religious Freedom Restoration Act (‘RFRA’).

The RFRA prohibits the Federal Government from imposing a “substantial burden on a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government demonstrates that the burden (1) is in furtherance of a compelling governmental interest; and (2) it is the least restrictive means of furthering that compelling interest. This is a test of strict scrutiny and in a 5:4 decision the Supreme Court held that it is one the contraceptive mandate failed to pass.

Delivering the judgment of the court, Justice Alito assumed that facilitating access to contraception was a compelling governmental interest but that the means the Government chose to further it were not the least restrictive available. The reason for this is that the Act itself provides an alternative way of ensuring access to contraception. Rather than making the employer pay for the coverage through its group health insurance plan, the insurance company can be made to shoulder the burden. In order for this to occur, however, the company must submit a form. While at first glance this might seem unproblematic, the issue, as the Government pointed out in its brief, is that the company can simply choose not to submit the form. If the company decides not to submit the form it is no longer under an obligation to provide contraception and neither is the insurance provider. It is plausible to assume that a company will not wish to facilitate access to contraception it finds objectionable by submitting a form, just as it would not wish to do so by paying for it.

The prior question for the court was whether Hobby Lobby and other for-profit entities could invoke the RFRA. It was held that they could on the basis that Congress had intended the statute to provide broad protection for religious liberty. Justice Alito did, however, seek to narrow the scope of the judgment to only ‘closely held corporations’. In future, therefore, only ‘closely held corporations’ may object to laws on the basis that they infringe their rights under the RFRA. So what is a ‘closely held corporation’? This is a corporation that has more than 50% of the value of its outstanding stock owned by 5 or fewer individuals and is not a personal service corporation. A recent study demonstrated that such corporations employ 52% of the American workforce. This leads one to wonder just how narrow the judgment really is.
In her dissent Justice Ginsburg (joined by Justice Sotomayor) objected to the notion that corporations could invoke the RFRA at all. All the court’s liberal justices joined the portion of Justice Ginsburg’s dissent in which she observes that there might be other laws that for-profit organizations object to and which they will now be able to challenge, in particular anti-discrimination provisions. Just as importantly, Justice Ginsburg points out that contraceptive coverage is essential to women’s health and reproductive freedom and that the judgment jeopardizes both of these interests.

Although Justice Alito sought to allay these concerns by emphasizing that the scope of the judgment is limited to closely held corporations, he does not point out that Hobby Lobby itself employs around 21,000 people. Whilst the passage of time may ultimately vindicate Justice Alito’s assertion that corporations are unlikely to bring religious freedom claims, this should not obscure the immediate impact this judgment has on Hobby Lobby’s female employees. The White House Press Secretary was surely accurate when he stated that, ‘women should make personal health care decisions for themselves, rather than their bosses deciding for them.’

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Breaking the Cycle of Gender Inequality
By Meghan Campbell | 17th June 2014

The UN Human Rights Council Working Group on Discrimination Against Women in Law and Practice (the WG) is to be commended for its in-depth report on discrimination against women in economic and social life.

The purpose of the report is two-fold: to identify persistent areas of gender discrimination and to share good practices in the advancement of women’s empowerment and equality in economic and social life. The report pays particular attention to how economic crises have affected women’s economic and social rights. The WG achieves these aims due in part because of the meticulous and through research that has gone into the report. Further, the depth of consultation has resulted in a careful examination not only entrenched aspects of economic and social discrimination, the gender pay gap and unpaid care work, but has opened up new facets, such as the role of corporations in perpetuating gendered disadvantage.

One of the over-arching findings of the report is that anti-discrimination legislative frameworks and guarantees on gender equality are important but alone they are not sufficient. The WG concludes that countries must focus on de facto equality and “it is essential to adopt a transformative agenda that eliminates the cultural and structural barriers to women’s equal opportunity.” However, the report spends very little time openly discussing what a transformative agenda or framework entails. Without specifying precisely what is meant by de facto or transformative equality the WG lapses back into the language of equality of results, criticized as a limited model of equality in relation to gender. While throughout the report the WG provides numerous examples of good practices that transform gender relations, without articulating a transformative framework it is challenging to translate these into new and different contexts of discrimination.

The analysis and recommendations of the WG are nuanced and sophisticated. The report follows the discrimination women experience throughout their life-cycle. For example, in times of economic crisis girls “are more vulnerable to being pulled out of school.” As a good practice countries needs to protect families from economic shocks and incentivize families to keep girls in school.

The report conceptualises gender discrimination against adult women are under two primary headings: labour force, both formal and informal, and care work. The WG addresses the classic sticky areas of gender inequality in the labour market: for example, the gender wage gap and the informal labour market. It strongly advocates for mandatory gender quotas on government companies and publicly listed companies, which, if adopted, have great potential to transform gendered power structures in the formal labour market. The other main source of discrimination against adult women is in relation to unpaid care work. The WG advocates a three ‘R’ approach: countries need to recognize the value of care work and include it in the gross national product, to reduce care work by increasing public services and they need to ensure an equal redistribution of care work between men and women.

The WG is innovative in paying attention to the role of corporations in perpetuating gender inequality. It notes “corporate governance has produced a dramatic increase in resources and income inequalities, with harsh implications for women.” These corporations rely on women home and sweat shop workers, who work under harsh and exploitative conditions. In general the connection between gender and corporate social responsibility is under-developed and the WG calls upon civil society organisations and women workers to unite and become agents of change.

Finally, the WG analyses how older women experience discrimination in economic and social life. Pension schemes are often connected to continuous employment in the labour market which negatively impacts women because of “the structural factors in their labour market and care work.” Good practices to empower older women include “continuing pension contribution during maternity and childcare leaves, unisex calculation of benefits.” The report concludes with an assessment of the impact of violence
on equality in economic and social life and recommends prohibiting sexual harassment at the work place and education.

The WG report is a comprehensive assessment of how women in the 21st century experience discrimination in economic and social life. Its compendium of best practices is a powerful tool and resource for academics, lawyers, NGOs and government policy makers to use when thinking of creative ways to eliminate discrimination against women.

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Thematic Report – Economic and Social Life with a Focus on Economic Crisis
By Frances Raday | 16th June 2014

The UN Human Rights Council Working Group on Discrimination against Women in Law and in Practice presented a thematic report on women’s economic and social life with a focus on economic crisis to the Human Rights Council on 16th June 2014. This post is a redacted version of the statement to the Council by Frances Raday, Rapporteur-Chair of the Working Group.

International human rights law guarantees a substantive and immediate right to equality for women in economic and social life and imposes an obligation of due diligence to prevent discrimination by private persons or entities.

Although most state constitutions guarantee equality and many have anti-discrimination legislation regarding employment and education, nevertheless, in some states, discriminatory legislation persists, particularly under personal law systems, denying women economic and social equality. While constitutional guarantees and anti-discrimination legislation are vital, they are not enough to produce equal opportunity for women in practice, in the face of negative stereotyping, multiple discrimination, gender-based violence and feminization of unpaid care responsibilities. To achieve de facto equality, it is essential to adopt a transformative agenda to eliminate cultural and structural barriers.

Although barriers to girls’ school attendance persist in some cultures, the education gap has been greatly reduced and disparities between girls and boys eliminated – even reversed – in some countries. However, gains in education have not consistently translated into equal economic opportunity or results.

Discrimination against women, especially in pregnancy and motherhood, exists globally. In employment, wage gaps persist, with
job segregation and women clustered in service sector jobs with inferior working conditions. Greater accountability for employment discrimination is needed. Women are disparately concentrated in informal work, particularly in low-income countries. Especially vulnerable are domestic workers and migrants. To secure decent work for women, it is necessary to reduce or reconstruct informal work.

In the business sector, the contribution of gender diversity to enhancing economic performance and increasing sustainability has been documented. Nevertheless, there is a severe gender gap in top economic leadership at both the international and national levels. Good practice includes mandating gender quotas for corporate boards and for procurement contracts.

In the emerging area of corporate responsibility, disparate harm to women resulting from business and trade policies has been largely invisible. Corporate governance has produced a dramatic increase in resource and income inequalities, with harsh implications for women, who are lower on the value chain. Moves to export processing zones, reliance on homework and sweatshops and land dispossession are a locus for violation of human rights, and most victims are women. The Group recommends gender-mainstreaming the principles of corporate responsibility, as regards participation and redress.

The fact that care functions are performed largely by women creates a major structural barrier to women’s equal economic opportunity. Failure to properly integrate the biological function of reproduction and the gendered function of unpaid caring into macro-economic policy perpetuates this barrier.

States must overcome the barriers to women’s economic opportunities resulting from feminisation of care functions to facilitate choice by women and men in allocating care duties in order to reconcile work and family. The Group commends good practices for recognition, reduction and redistribution of unpaid care work, by provision of paid care leave equally for fathers and mothers; subsidised childcare services, tax deduction for care expenses; improving environmental infrastructures to reduce care burdens; and synchronizing school and working hours. The Group endorses the call by UN Women to subsidise affordable childcare as a social protection floor.

Women’s poverty and quality of life in older age derives from a culmination of stereotyping; precarious employment; informal labour; unpaid caring; interrupted careers and reduced labour force participation and provides a litmus test reflecting women’s economic situation throughout their life cycle. Good practices to reduce poverty of older women include non-contributory social pensions and reduction of contributory pension gender gaps by compensatory measures for childcare or joint annuities for spouses.

Gender-based violence is an obstacle to women’s equal economic opportunity, including domestic violence, violence and harassment in workplaces, schools, public services, the street and cyberspace. Good practice prohibits sexual violence or harassment in all these arenas.

In economic crisis, particularly under austerity measures, there is disparate impact on women, increasing their precarious employment and unpaid care work. Economic crisis accentuates existing structural economic disadvantages for women and may provide an opportunity to tackle entrenched patterns of gender inequality. Gender-sensitive strategies have been applied successfully in some countries to avoid labour market exclusion, loss of social protection floors and reduction of social services.

The right to gender equality must both be mainstreamed into all post-2015 development goals and remain a stand-alone goal to incorporate transformative structural change required for women’s de facto equality and empowerment. This requires inclusion of women in leadership in economic decision making; gender sensitive analysis of the principles of corporate responsibility; enhanced accountability for employment discrimination; reduction and reconstruction of women’s informal work, particularly migrant and domestic work; a carefully engineered social protection floor for care services; and special measures for older women. The Working Group flags in particular the need to recognise the disparate impact of austerity measures on women and to adopt gender sensitive strategies that avoid labour market exclusion, loss of social protection floors and reduction of social services.

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Girls with Books, Better Laws, Pave the Way Ahead
By Jeni Klugman | 14th May 2014

“The extremists are afraid of books and pens. The power of education frightens them,” Pakistan’s teenage activist Malala Yousafzai said in her speech at the United Nations. “They are afraid of women. The power of the voice of women frightens them.”

Supporting evidence, unfortunately, is everywhere.

In Nigeria just last month, the extremist Boko Haram group deliberately kidnapped more than 270 schoolgirls preparing for exams...
– possibly selling them into “marriage” as part of a campaign to purge the country of “impure” Islam. Once again, as UN Secretary General Ban Ki-Moon said of Malala after the Taliban nearly killed her for her activism on behalf of girls’ education, a brazen attack has shown what frightens extremists most: a girl with a book.

But while the attack on Malala and kidnapping in Nigeria rightly sparked an international outcry, women and girls from Pakistan to Papua New Guinea, Tunisia to Turkmenistan, endure pervasive violence, inequality, and bias that go largely unremarked, mostly unreported, and overwhelmingly ignored – around the world, ever hour of every day.

Appalling violations of their most basic human rights both reflect and reinforce discriminatory laws and powerful social norms, which together tell women and girls they are less entitled to health and hope, education and autonomy, freedom from violence and fear, than their fathers, husbands, brothers, and sons.

This major breach of human rights also carries enormous costs for development. We have estimated that the costs of domestic violence – solely in terms of lost incomes and reduced productivity – amount to about as much as what most governments spend on primary education.

The World Bank Group this week launches a new report showing that systematic disparities in voice and agency persist, affecting hundreds of millions of girls and women around the world. Voice and Agency: Empowering Women and Girls for Shared Prosperity focuses on several key areas: freedom from violence, sexual and reproductive health and rights, ownership of land and housing, and voice and collective action. It explores the power of social norms in dictating how men and women can and cannot behave, and what works to achieve change.

Here we are talking about girls and women who have no say whether, when and how many children to have, who cannot buy or inherit land, who have no say in major decisions at home and in their community, who cannot leave when their husbands beat them, who cannot ensure that their daughters attend school rather than being married off as children.

Our report distills vast data and hundreds of studies to shed new light on constraints facing women and girls worldwide, from epidemic levels of gender-based violence to laws and norms that prevent them from owning property, working, and making decisions about their own lives. It argues that expanding women’s agency—their ability to make decisions and take advantage of opportunities—is vital to improving their lives as well as the world we all share.
We present powerful new sets of results showing the powerful links between women’s agency and their education. We also highlight the power of laws – for better or worse – to shape gender norms and the lives of women and girls locally and globally.

Among countries with the most child marriages, for example, girls with limited schooling are up to six times more likely to marry young than girls who finish high school. In all regions, better educated women tend to marry later and have fewer children. Better educated women are less likely to live in poverty and less likely to be subjected to domestic violence. Enhanced agency is a key reason why children of better educated women are less likely to be stunted: Educated mothers have greater autonomy in making decisions and more power to act for their children’s benefit.

Governments clearly have a powerful role in ending legal discrimination: Well into the 21st century, some 128 countries maintain legal barriers to women in such basic areas of life as obtaining official ID cards, owning property, and getting a job. In 28 countries, mainly in the Middle East and North Africa and South Asia, more than 10 such discriminatory laws are on the books. But change does happen. The number of countries recognizing domestic violence as a crime has risen from close to zero to 76 in less than four decades. We present new analysis that shows that the longer the legislation is in place, the lower the tolerance of violence.

Expanding opportunities and amplifying the voices of women and girls isn’t a zero-sum game. Leveling the playing field for women and girls brings broad development dividends for men and boys, families, communities, and societies. The data and evidence are clear.

Ensuring that women and men, boys and girls, all have the opportunity to fulfill their potential and author their own lives is vital if we are to create more resilient, more prosperous world.

And while there’s no magic formula for getting there, sending more girls to quality schools, keeping them there, and passing progressive laws go a long way.

Dr Jeni Klugman is director of the World Bank’s gender and development group.

The Uneasy Decision in A and B v Secretary of State for Health
By Beth Grossman | 12th May 2014

Most women from Northern Ireland seeking an abortion will travel to England. This is expensive: in addition to travel costs, the woman will have to use a private provider rather than the NHS because she is not resident in an English Primary Care Trust. Thus, although citizens of the same country, women from Northern Ireland effectively face discrimination based upon where they live.

This formed one of the challenges brought by the claimants in A and B v Secretary of State for Health [2014] EWHC 1364 (Admin). At the time of her abortion, A was a 15 year old girl resident in Northern Ireland. The cost of her abortion came to £900 in provider fees and travel costs: it was born partially by her mother (claimant B) and partially by a Northern Irish charity. A and B argued that this amounted to discrimination under Article 14 of the European Convention on Human Rights (“ECHR”), in conjunction with her right to private and family life under Article 8.

The High Court dismissed A and B’s human rights challenge on three grounds. First, there is no right to abortion under the ECHR. Previous ECtHR jurisprudence only requires that, if a State does allow abortion, it must provide effective and accessible procedures; this is satisfied by the availability of fee-charging providers. Second, denial of services provided free elsewhere in the State due to place of residence did not amount to discrimination based upon status under Article 14. Third, any discrimination which did take place was objectively justifiable because it arose from a system of qualification for treatment based in residency, itself objectively justifiable.

The High Court’s conclusion – that the Secretary of State had fulfilled his obligation under Article 8 for ensuring effective and accessible procedures for abortion – can be criticised. If fees are prohibitive, and compounded by extensive travel costs, such procedures are not accessible. A’s case underlines this point. She relied upon family and charitable support, and possibly also the willingness of her private provider to reduce the fee in recognition of her travel costs. Insofar as the State assumed any responsibility for ensuring accessibility, it was abrogated in favour of private individuals and institutions, which by their nature will not provide a consistent means of support for the many women in A’s position.

The High Court dismissed A and B’s human rights challenge on three grounds. First, there is no right to abortion under the ECHR. Previous ECtHR jurisprudence only requires that, if a State does allow abortion, it must provide effective and accessible procedures; this is satisfied by the availability of fee-charging providers. Second, denial of services provided free elsewhere in the State due to place of residence did not amount to discrimination based upon status under Article 14. Third, any discrimination which did take place was objectively justifiable because it arose from a system of qualification for treatment based in residency, itself objectively justifiable.

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present in England, a State whose legislative provisions allow for free abortions on the NHS.

The Court’s conclusion that any discrimination can be objectively justified is most difficult to counter. If A’s case proceeds to the Court of Appeal, this will be the most likely reason for her appeal to fail. NHS arrangements for funding and the provision of services are complex and largely fall outside judicial expertise. Making a residency exception for Northern Irish women would set a significant precedent for people to assert their right to access expensive or controversial treatments not provided in their State or Primary Care Trust.

The decision which the High Court reached does not rest easily. It seems fundamentally unfair that a reproductive right long established in and enjoyed by women in every other country of the United Kingdom be logistically and financially restricted for those in Northern Ireland on relatively technical legal grounds. The alternative, however, requires the Court to make decisions which go to the core of highly contentious political matters: abortion, devolution and the NHS. The risks and ramifications of such decisions could be extensive. In this context, it is unsurprising that the High Court has chosen to uphold the status quo.

Beth Grossman is a BPTC student at Kaplan Law School and a pro bono legal caseworker at Sense, a national charity supporting deafblind people. She completed her undergraduate studies at the University of Oxford.

Northern Ireland’s Human Rights Commission Granted Leave for Judicial Review to Challenge the Country’s Near-Blanket Ban on Abortion

By Richard Martin | 9th February 2015

Unlike the rest of the UK, Northern Ireland is not covered by the Abortion Act 1967. If you are a woman living there who wishes to terminate a pregnancy, the law offers you almost no choice: you must give birth unless there is risk to your life or serious damage to your health. Against the backdrop of ongoing controversy, several high profile cases and a public consultation on the issue, the Northern Ireland Human Rights Commission (NIHRC) has just been granted leave by the High Court in Belfast to challenge the current law on abortion.

The NIHRC is tasked with reviewing the adequacy and effectiveness of law and practice relating to the protection of human rights under s.69(1) of the Northern Ireland Act 1998. Initiating proceedings “as a last resort” this week, the NIHRC challenged the legality of Northern Ireland’s abortion law on the basis that it fails to allow termination in circumstances of serious malformation of the foetus, rape and incest, making it incompatible with article 3 (prohibition on torture), article 8 (right to respect for private and family life) and article 14 (prohibition on discrimination) of the European Convention on Human Rights (ECHR).

As confirmed by Lord Justice Girvan in Society for the Protection of Unborn Children [2009] NIQB 92, the current legal position on abortion in Northern Ireland is governed by s.58 of the Offences Against the Person Act 1861, as interpreted in R v Bourne [1939] 3 All ER 615, and s.25 of the Criminal Justice Act (NI) 1945. It is unlawful to terminate a pregnancy unless it is necessary to preserve
the women’s life or there is a risk of real and serious adverse effect on her health.

This near-blanket ban has sparked heated, often bitter, debate amongst policy-makers and groups advocating the rights of women and of children. Last year the director of ‘Precious Life’ was convicted of harassing Dawn Purvis, director of the pro-choice Marie Stopes Clinic. Responding to the court’s grant of leave, the Social Democratic and Labour Party, Northern Ireland’s third largest party in the devolved parliament, has already boldly asserted that it is “unequivocally opposed” to changing the law, even in cases of rape or lethal foetal abnormalities.

The law was thrown into particularly sharp relief recently, though, by the high profile case of local women, Sarah Ewart, pregnant with a baby suffering from anencephaly, a lethal developmental condition that often results in a baby being born without the front part of the brain and skull. Having made the extremely difficult decision to abort the pregnancy, Sarah went public, appearing on local television to describe the trauma and stress caused by having to travel to England to have the procedure, leaving behind the support of her medical team, close family and friends when she needed them most.

Cases such as Sarah’s proved enough to encourage the Department of Justice to engage in a public consultation on reforming the criminal law on abortion in Northern Ireland, to consider allowing abortion in the “very narrow range of cases” where 1) there is a diagnosis during pregnancy of a fatal abnormality with the foetus and 2) where women have become pregnant as a result of rape.

In court, the Department of Justice was defensive of its consultation and critical of the “pre-emptive” legal challenge brought while the consultation process was still ongoing. The NIHRC, however, was not satisfied that the consultation was sufficient to protect the rights of women granted under the ECHR. It was argued that the consultation does not commit the Department of Justice to make the necessary changes to the law. Further still, it only seeks public opinion on cases of rape or incest, without setting forth legislative changes.

The NIHRC’s arguments found favour with Justice Treacy, who acknowledged that it raised issues of considerable public importance. The full hearing has been listed for June 2015. For now, women in Northern Ireland face the predicament of having to give birth to a child they might otherwise have terminated or, alternatively, to bear the considerable cost, stress and discomfort of travelling across the Irish Sea to exercise a right of choice protected elsewhere in the UK.

Richard is an editor of the Oxford Human Rights Hub Blog. He is completing his DPhil on human rights law and practice within the police based at the Law Faculty’s Centre for Criminology, University of Oxford.

Stereotyping as Direct Discrimination?

Stereotyping as Direct Discrimination?

Tamas Szigeti | 6th January 2014

The Hungarian Equal Treatment Authority (ETA) found that the entrance policy of a music club violated anti-discrimination legislation. The club in Budapest only charged men for entrance but not women. Whose equality was at stake?

The complaint to the ETA was submitted by a male consumer. The complainant argued the he had to bear a differential financial burden because of his sex. The club indeed only charged men with an entrance fee of 1000 forint (£2.5). As a secondary argument, the complainant also referred to the practice as discriminatory to women because the entrance policy relied on the sexist assumption that women are sexual objects that attract men to clubs.

Clubs in numerous European countries adopt this policy because it is profitable. However, profitability has no justificatory force for defending direct discrimination under the national anti-discrimination law (which is shaped by EU law). Nonetheless, a defendant-club can still prove that the directly discriminatory policy is inherently related to the service (e.g. as a call for exclusively women for female roles in a theater production) or that it is part of a measure aimed at fostering equality (which a government regulation must permit first). Neither of these defences was available in the instant case, so the policy was doomed.

But doomed for what reasons?

The ETA found against the club solely on the ground of discrimination against men. But I would argue that there were two avenues for challenging the policy and, ultimately, one was superior due to its basis in the concept of ‘substantive equality.’

First, one must construct the aim of the policy in relation to the ground of discrimination. The idea behind the policy is that, the more women present at a club, the more men turn up, thereby leading to increased consumption (the underlying assumption is that men consume more than women in these clubs). If the policy has this economic justification, then it seems to render women sexual objects used to attract male clientele (this is why the complainant labeled the policy ‘passive prostitution of women’). Therefore, the policy enhances crude gender stereotypes and inflicts harm upon women’s self-respect.


Second, we must examine any harm resulting from the differential treatment. On the one hand, men have to pay a fee, unlike women. This is a financial harm. On the other hand, women are compelled to participate in sexual stereotyping tantamount to an attack upon their self-respect (harm in stereotypes).

Both claims against direct discrimination are grounded in equality. But they are different claims even though they may lead to the same result (i.e., banning the policy). The Hungarian authority only focused on the financial harm to men, and – probably against the will of the complainant – remained silent about the harm caused to women. The decision led to a sexist puzzle for the general public: one kind of sexist commentator vindicated victory of the ‘oppressed’ men while another deplored the fact that such a nice rule of courtesy was overruled.

I would argue that we ought to conceptualize this case as one involving direct discrimination against women, in spite of the financial harm caused to men. We are used to the two harms inflicting the same group; financial and self-respect harms are often bundled. Not here, though. The entrance policy was discriminatory against men in a weak, ‘flat equality’ sense. Yet, the other harm inflicted upon women was a competing and arguably stronger claim grounded in ‘substantive equality.’ Only charging men an entrance fee is best understood as a policy that seemingly places women at an advantage, but at a considerable price: subjecting them to a crude gender stereotype. The well-intentioned male complainant publicly stated that he intended to make a case for the equality of women, but because only he was harmed in a legal sense, he based his argument on ‘flat equality’ rather than on ‘substantive equality.’ This may have been a successful litigation strategy, but in principle, there should be no reason against construing stereotyping policies as harms to self-respect in obvious cases related to differential treatment, and to attack them as such. In the instant case, the harm to women’s self-respect should trump the financial harm to men as justification for overruling the policy.

Tamas Szigeti is a Weidenfeld scholar and a DPhil candidate in law at Oxford University.

What Has the European Union Ever Done for Women?
By Simonetta Manfredi | 27th March 2014

As the 2014 European elections are approaching this is an appropriate time to pause and reflect on what the European Union has ever done for women. The EU was established in 1958 with the Treaty of Rome (formerly European Economic Community) by the so-called ‘founding fathers’. However, the EU also had a lot of mothers whose work and commitment was instrumental in developing EU social and employment policies which have directly impacted women’s lives.

The journey to gender equality for women in the EU started with the adoption of Article 119 of the Treaty of Rome, establishing the principle of equal treatment between men and women. Though this remained almost ‘dormant’ until the late 1960s, it was brought to life by the lawyer and academic Eliane Vogel-Pollsky. In a publication commemorating her work, she explained that “in 1967 I was still alone in believing in the direct application of this article”. She eventually had the opportunity to test her arguments in the landmark case of Gabrielle Defrenne, a female air attendant working for Sabena Airlines. Defrenne successfully claimed compensation for loss of earnings as a result, among other issues, of her employer rule which forced women to retire at 40, unlike their male colleagues who did identical work but could stay until 55.

Another woman who brought women’s participation in the labour market to the attention of EU policy-makers was the French sociologist Evelyne Sullerot. In her 1971 book on Women, Society and Change she highlighted that the average ‘working curve’ for women was becoming similar to that of men and that women, even when married with children, were increasingly spending more time in paid employment. Starting from the mid-1970s the EU began to adopt a series of Directives introducing legislation which established a floor of rights for working women in all of its Member States. These laws were designed to support women’s participation in the labour market and to advance gender equality in the workplace. Examples included the right to equal pay (1975); equal treatment between men and women in the workplace (1976 and reviewed in 2002); protection for pregnant workers (1992); and prevention of less favourable treatment for part-time (1998) and fixed term employees (1999).

More recently the EU has been focusing its 2010-2015 gender equality strategy on a series of goals, including that of increasing women’s participation in decision-making and tackling the existing democratic deficit. The latter has provided the context for a draft Directive promoted by Viviane Reding, Commissioner for Justice, Fundamental Rights and Citizenship, to achieve 40% women’s representation on the boards of listed companies across the EU.

There is no space here to examine the quality of the protection afforded by the EU to women and some may argue that EU equality legislation should be more far-reaching. However, in spite of its limitations the importance for women of EU equality policies and legislation in providing protection which may not exist at domestic level or in ensuring that protection at domestic level does not fall beyond a certain threshold, should not be underestimated. A recent report undertaken by the Business Task Force (2013), commissioned by the UK Prime Minister, has made a series of recommendations on the EU reforms, including a withdrawal of the EU Commission proposal to extend and improve provisions for maternity leave.
This example suggests that in spite of all the EU’s flaws women’s rights may after all be better protected by the European Commission and Parliament – which include respectively 33% and 36% female representation – than by large companies where women are barely represented at executive level.

Professor Simonetta Manfredi is Director of Centre for Diversity Policy Research and Practice, Oxford Brookes University.

### Older Homeless Women in Australia

By Eileen Web | 27th April 2014

Australia is often cited as an economic success story. Decades of growth fuelled by the resources and agricultural industries enabled it to navigate the global financial crisis virtually unscathed. Indeed, Australians enjoy one of the highest standards of living in the world.

Unfortunately, not everyone has reaped these economic benefits and concern has been mounting for some time about a deteriorating wealth divide within Australian society. Central to these concerns is the lack of affordable housing. The price of housing, and private rentals, has soared. The supply of social housing is limited while waiting lists for such accommodation extend for years. More people are resorting to marginal forms of accommodation and homelessness has increased considerably.

This post examines one aspect of this troubling national trend – an increasing number of women at or nearing retirement age are experiencing difficulty in finding affordable and secure housing. This ‘new’ group of women, for the most part, do not fit with society’s ubiquitous image of homelessness. Indeed, last week the *Older Women’s Pathways Out of Homelessness in Australia Report* noted:

“The largest proportion of older women presenting with housing crisis in Australia have led conventional lives, and rented whilst working and raising a family. Few have had involvement with welfare and support systems.”

As with the general homeless population, homelessness amongst older women cannot be singularly explained. The group is diverse in age, education, location, cultural background and life circumstances. It can be triggered by a single, traumatic event or a lifetime of personal disadvantage and misfortune.

Beyond the prescient issue of domestic violence, if there is insufficient superannuation, a partner dies, a marriage breaks down later in life or something goes wrong from a health or financial perspective, many older women are finding themselves in difficult circumstances. McFerran argues that the entrenched social and economic disparity faced by women places them at risk of homelessness. Changes in the life expectancy of women, the lack of affordable housing, the rate of divorce and separation (and the subsequent number of women living alone) has created a wave of homeless, older working women. One particular driver is persistent wage inequality and the fact that women tend to move in and out of the workforce (as a result of childcare
responsibilities), whilst earning less than men. Another study points to the growing gap between pension incomes and rents as a primary reason behind the increasing number of aged people (in particular women) seeking assistance from homelessness services.

So what can be done? More services directed towards, and accommodation appropriate to, older women at risk of homelessness is required. Homelessness services throughout Australia have identified, and implement, a range of solutions and service models targeting homeless older women. Unfortunately, there is concern about the funding of these services: the National Partnership Agreement on Homelessness only funded until mid-2015, and funding for further capital works under this program have been diluted.

It is also imperative that innovative approaches to accommodation – and necessarily more, not less, capital funding – are made available. A range of appropriate and innovative housing models must be considered. Organisations such as St Bartholomew's are constructing hostels for older homeless women, as traditional boarding houses, predominantly used to house men, are often inappropriate for women. Also, the supply of public housing must be increased with a view to constructing more transitional, staircase and permanent supported housing within the social housing sector. Nor is this the time to discourage innovative approaches to housing the homeless. As welcome and necessary as larger scale construction is, capital works funding need not be directed solely to new structures. Relatively minor renovations could cater for homeless older women, for example, by converting one public housing dwelling into several self-contained bedrooms with use of a common kitchen and lounge area. Such works are relatively inexpensive and provide the additional benefit of companionship and support.

Finally, it is worth noting that rising numbers of homeless older women is not a uniquely Australian problem. Worldwide, an ageing population, the virtual certainty of lifetimes of income inequality and a continuing lack of home affordability and availability will see numbers of homeless older women increase. Perhaps the Australian experience can act as a warning to others about this new ‘face’ of homelessness.

Dr Eileen Webb is a Professor and Co-Director of the Consumer Research Unit in the Faculty of Law, University of Western Australia.

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(In)justice Served? Lori Douglas Case Leaves More Questions than Answers for Canadians
By Ravi Amarnath | 17th December 2014

Since 2010, Canadians have been divided on whether Associate Chief Justice Lori Douglas was a victim of revenge porn or complicit in the harassment of a former client. In late November, the beleaguered jurist agreed to retire four years after leaked photos of her sex life made her the subject of a judicial investigation.

Justice Douglas' story mimics in some respect those of celebrities who have had intimate photographs released to the public without consent, but with the added dimension that she is a judge. Her decision to retire precludes an answer to a polarizing question – whether the existence of online sexual photographs, even if posted without a judge’s knowledge or consent, places them in a “position incompatible with the due execution of that office.”

Justice Douglas practiced family law with her late husband, Jack King, in the Canadian province of Manitoba. In 2009, Justice Douglas was appointed as the Associate Chief Justice of the family division of the Court of Queen’s Bench of Manitoba, making her the highest ranked family law judge in Manitoba.

In July 2010, Alex Chapman, a former client of Justice Douglas and Mr. King, filed a complaint against the couple with the Canadian Judicial Council ("CJC"). The CJC is an organization consisting of the chief justices, associate chief justices, and senior judges from federal and provincial courts across Canada.

Among other functions, the CJC handles complaints regarding the conduct of federally appointed judges. Mr. Chapman alleged that in 2003 Mr. King had provided him with sexually explicit photographs of Justice Douglas and had solicited him to have sex with the couple. Mr. King also posted these photographs online. In January 2011, the CJC appointed a five-person Inquiry Committee to determine whether to recommend to Canada’s Parliament to remove Justice Douglas from the bench.

The initial hearings focused on whether Justice Douglas had assisted Mr. King with soliciting Mr. Chapman to have sex with the couple. After numerous difficulties, these proceedings were stayed in July 2013 pending the resolution of various issues raised by Sheila Block, counsel for Justice Douglas.

In November 2013, the Inquiry Committee resigned en masse, stating in a joint letter: “In light of recent events, it has become apparent that this Committee as presently constituted will not be in a position to complete its inquiry and submit its report to the Council for a very extended period of time.”
A newly constituted Inquiry Committee ("Second Committee") was formed in March 2014. The Second Committee focused its proceedings on whether Justice Douglas was aware of the online photos prior to applying to become a judge, and whether the existence of the pictures could undermine the confidence in the Canadian justice system.

The scope of this inquiry drew sharp criticism from certain commentators, as Mr. King had denied Justice Douglas' involvement in posting any photographs. Many also see Justice Douglas as a victim of actions which the federal government is attempting to criminalize.

The photos also became a contentious aspect of the proceedings; another Federal Court judge determined that they could not be used as evidence.

Among other factors, Justice Richard Moseley agreed with Ms. Block's argument that an "emerging social consensus [exists] in Canada that intimate images should not be disclosed or disseminated against the will of the persons they depict unless it is absolutely necessary."

The proceedings were set to commence without the photos, when Justice Douglas offered to retire as a judge in May 2015 in exchange for avoiding further hearings. The Second Committee accepted her offer.

Ms. Block released a statement to the CJC which stated: "To withstand more weeks of hearing into intensely private matters and risk the viewing of her intimate images by colleagues and others is more than [Justice Douglas] can bear. So she is voluntarily giving up her constitutionally secure tenure at her right to use this process to fight for that and for her vindication in the process."

In 2011, Mr. King was reprimanded by The Law Society of Manitoba, the self-governing body for lawyers in Manitoba, but retained his licence to practice law. He passed away in April 2014.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

'GamerGate' and Gendered Hate Speech
By Thiago Alves Pinto | 19th November 2014

What is 'GamerGate'? Some say it is a movement demanding higher ethics in journalism, but this post will argue that it is yet another instance of sexism and hate speech online which remains unaddressed by States and online companies.

The whole GamerGate issue started when Zoe Quinn, a game developer in the United States, was unfairly accused by her ex-boyfriend of trading sex with journalists for positive reviews on her games. The ex-boyfriend posted on his blog a 9000 word document, which included intimate details, nude pictures, and supposed links between Zoe and journalists. This was rapidly spread on Twitter by gamers who argued that they were intending to promote ethics in journalism. However, GamerGate's first victim, Zoe Quinn, in an interview with the BBC provides a better categorisation of this conduct: "GamerGate will always be glorified revenge porn by my angry ex". In her interview it is very easy to see how far the consequences of such attacks can go, as a previous
Indeed, claims that GamerGate was about integrity were easily dismissed by an analysis done by Newsweek on 2 million #GamerGate tweets. The study found out that GamerGate “cares less about ethics and more about harassing women”.

The main victims of the hate speech attacks were Zoe Quinn, Brianna Wu (game developer), and Anita Sarkeesian (a critic of sexism in video games). The three women mentioned above received about 100 000 tweets altogether since this controversy started. They all claimed that they received several death threats and rape threats which were followed by the exposure of their home addresses online. Anita Sarkeesian was forced to cancel talks on sexism in the game industry at the University of Utah after threats that said: “This will be the deadliest school shooting in American history and I’m giving you a chance to stop it.” Game forums are riddled with vitriolic comments and most people can simply ignore them. However, #GamerGate threats are more than distasteful tweets, they are criminal acts.

From the outset it has been clear that the GamerGate movement is little more than a misogynistic group aiming at shaming women in new private online spaces. Victim blaming, stalking, and discrimination are taking a new shape in a space which allows for more anonymity, thus less accountability. Yet, online companies have a responsibility to respect human rights, which means that, according to principle 11 of the Guiding Principles on Business and Human Rights “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. Twitter could, for example, develop better algorithms, not to curtail freedom of expression of individuals, but to curb mass attacks of hate groups online such as #GamerGate. If Internet Service Providers can use this technology to protect copyrights, they can do the same to prevent online social spaces to become a “megaphone for haters”.

States also have their share of responsibility, as there are several international treaties that impose positive obligations on them to address discrimination (see Articles 2, 26 and 27 of the ICCPR; Article 2 of ICERD and Article 2 of CEDAW). The Human Rights Committee makes it clear in General Comment 28, confirming that “States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17 (right to privacy), and on the measures taken to eliminate such interference and to afford women protection from any such interference”. More can be done by online companies and States to prevent these issues, because once hate speech spreads online there is the potential for it to proliferate in an uncontrollable fashion. Sadly, right now there is nothing that the victims can do, as Zoe Quinn mentions in the end of her interview: “there is no ‘out’ for me, this isn’t just going to go away (…) being able to live somewhere would be a nice start”.

Thiago is a DPhil candidate in Law at the University of Oxford.

Harassment Against Women Goes Online: The Problem of Revenge Porn

By Ann Olivarius | 1st December 2014

As the internet takes a more significant place in our culture, its flaws become more evident. While social media, blogs and forums provide a space for minority groups to find community and discussion, the same platforms can also breed bigotry and hatred. While each group faces its own challenges in the online space, the problem seems to be particularly acute for women: barely a week goes by without a new story of a woman discussing the abuse and threats she has encountered on social media. The journalist Amanda Hess struck a chord when she called the internet the “next civil rights frontier”.

Perhaps the most concerning part of this trend is the phenomenon of non-consensual pornography, or “revenge porn”, in which ex-partners (or hackers) post explicit photos or videos online without the consent of the person depicted, frequently including personal
information such as their email address or telephone number. An offshoot of selfie culture, revenge porn was unforeseeable a generation ago. Now, according to the McAfee Love, Relationships and Technology Report, nearly 40 per cent of Americans send intimate content to their partner, and one in ten ex-partners have threatened to publish explicit photos or videos. It’s a strongly gendered form of abuse, with women making up 90 per cent of victims.

My law firm represents victims of revenge porn and other types of online harassment and abuse, so I know firsthand the damage that this can cause. Experiencing such a public violation of trust is traumatic, and often leads victims to depression and anxiety. Because the images or videos will often come up in a Google search of the victim’s name, they can lose their jobs or be shunned by judgemental friends and family. Most importantly, because of the tendency of the perpetrators to post personal details, it can put the victim in real danger: it is not uncommon for them to face threats or stalking after the publication of explicit material.

Existing laws are inadequate to regulate harmful behaviour on the internet, and revenge porn is no exception. Both civil and criminal causes of action in the UK, as they currently stand, are largely not fit for purpose. Defamation doesn’t apply, because unless the pictures are doctored, they are still substantially “true”. A prosecution under the Protection from Harassment Act can’t be pursued, because posting revenge porn doesn’t constitute a “continuing pattern”. A similar lack of recourse exists in the United States. As a result, the best option for many victims is copyright law, which they can use to help take the content down – but only if they took the pictures or video themselves and thus own the copyright. Otherwise, with few exceptions, they’re out of luck.

Thanks to the efforts of victim advocates and campaigners, things are slowly changing. Lawmakers around the world are realising that the laws must evolve to meet the needs of the internet age: thirteen US states have passed laws banning the practice, and federal legislation is in the works. The UK Government has recently committed to criminalise revenge porn with prison sentences of up to two years. Other countries, from Israel to Japan, have implemented or are considering criminal sanctions against the posters of offending content.

It’s encouraging to see that politicians are taking this issue seriously, but there is more to be done before we achieve justice for victims of revenge porn. For one, criminal sanctions focus on the perpetrator, but they do not address the damage done: the depression, the job loss, the humiliation. For this, we should be looking at civil remedies, so that victims can claim compensation for what has been taken away from them by the cruelty of the act.

We should also look beyond the individual perpetrator, to the structures that allow this content to flourish. There are a large number of dedicated revenge porn sites which actively solicit pictures and videos, and make a great deal of money, via advertising revenues, by hosting them. The revenge porn “mogul” Hunter Moore boasted that he was making as much as $30,000 per month from his revenge porn site isanyoneup.com. Moore was later indicted on federal charges – not for running the site itself, but for hacking and extortion. In addition to the specialist sites, there are general pornography websites that also host and make money from revenge porn videos. They are under no obligation to remove content even if the person depicted objects to its publication.

Right now these websites are protected by laws like the Communications Decency Act in the United States, which protects websites from liability for content posted by third parties. That makes sense for neutral websites like Twitter and Facebook, which have functioning complaints policies, and can’t be held responsible for the actions of hundreds of millions of users. But these laws don’t make sense for sites that brazenly promote the violation of women’s privacy and exist solely to make money off of it. Victims of revenge porn should be able to claim compensation from websites that profit from their humiliation.

The growing trend towards the criminalisation of revenge porn, then, is a positive one. It will demonstrate to potential perpetrators that our society takes the privacy of women seriously. I hope it will make some think twice before they put the photos and videos online. But from the victim’s perspective, criminal sanctions are not enough: sending the perpetrator to jail by itself doesn’t rebuild their lives. They deserve damages, even though those too cannot really make up for the harm caused. In the long run, the most important goal is to drain the swamp of a virtually lawless internet that permits this sad and vindictive subculture to fester.

Dr Ann Olivarius is Senior Partner of McAllister Olivarius, an international law firm based in London.

UK Efforts to Criminalize Revenge Porn: Not a Scandal, but a Sex Crime
By Laura Hilly | 31st October 2014

International headlines were made in August when hackers stole from private devices and online accounts naked images of celebrities such as Jennifer Lawrence, Rihanna and Kate Upton and published them for the world to see. This intrusion shines a spotlight on a growing form of gender-based violence: revenge porn. Age-old misogynistic exploitation of women’s bodies and shaming female sexuality is re-fashioned for the digital age. Legislative reforms are to be introduced in the UK, but are they enough to really see revenge porn for what it is: a sex crime?

Revenge porn involves the distribution of explicit photos or videos of individuals without their consent. These images are usually
consensually created and shared with a partner during the course of a relationship. However, when the relationship turns sour, disgruntled ex’s have taken to the internet in order to try and shame and embarrass their ex-lovers. This practice is frighteningly common. Recent statistics suggest that one in ten ex-partners threaten to post sexually explicit images of their former partner online, and 60% of these actually go through with it. The UK Safer Internet Centre has identified between 20 and 30 websites displaying revenge porn available in the UK. This is also a particularly gendered wrong – as many as 90% of all victims of revenge-porn are women.

Lawrence, in responding to the online publication of these images was clear on how this violation should be characterized: ‘[i]t is not a scandal. It is a sex crime…It is a sexual violation. It’s disgusting. The law needs to be changed, and we need to change.’ Up until now, victims in the UK have been able to seek limited redress for the harm caused through current laws, ranging from actions against perpetrators for harassment, communications offences, blackmail and voyeurism. However, expert practitioners note that ‘the law does not provide easy answers’ and ‘stronger legal tools are needed’.

Fortunately, for those in the England and Wales (and Scotland hopefully soon to follow), enhanced legal protection may be imminent. On 20 October 2014 the House of Lords debated a new offence, punishable with up to two years’ imprisonment, criminalizing the disclosure of photographs or films which show people engaged in sexual activity or depicted in a sexual way, where what is shown would not usually be seen in public. For the offence to be committed the disclosure must take place without the consent of at least one of those featured in the picture, and with the intention of causing that person distress.

However, there were suggestions that the new laws do not go far enough. Baroness Thornton highlighted that the requirement that the publication causes or intends to cause ‘distress’ is problematic. Will the new law provide a remedy for victims who are not distressed by the publication, but angry? Does the inclusion of the word ‘distress’ send a broader message, that the only valid response to such publication should be distress? Does this reinforce the shaming of female sexuality and stigmatize women who, as was the case for Lawrence, have no desire to apologise for their decision to take the private photographs in the first place? Furthermore, would the requirement of an intention to cause distress be capable of capturing situations where the images are motivated by purely by commercial gain?

Experts in the field contend that ‘the mental element of the offence should be the intentional act of posting private sexual images, without consent, including for the purpose of financial gain.’ This formulation more closely mirrors that adopted by other jurisdictions. For instance, in Australia, Victorian legislation passed earlier this month criminalizes conduct where a person intentionally distributes, or threatens to distribute, an intimate image of another person and the distribution of the image is contrary to ‘community standards of acceptable conduct.’ This formulation has the potential to provide more comprehensive protection to those falling victim to these practices.

Finally, why won’t the new law be characterised as a sexual offences? Lord Faulks opined that ‘we do not think that it is appropriate to view it as a particular sexual offence in the same way as [an offence under the Sexual Offences Act 2003]. Research in previous cases has shown that “revenge” porn is perpetrated with the intention of making a victim feel humiliated and distressed rather than to obtain sexual gratification, which is what defines an offence as sexual.’ This characterisation is suspect, as feminist scholars have long emphasised that sexual offences often have more to do with power than sex, in the same way that those falling victim to these practices.

The draft provisions are generally a welcome development, but hopefully the devil in the detail will not prevent these new laws from being an effective tool to combat this new and noxious form of gender-based violence.

Dr Laura Hilly is a Postdoctoral Fellow and Deputy Director of the Oxford Human Rights Hub.

**CEDAW Issues a Historic Ruling in a Gender Violence Case**

*By Gema Fernandez Rodriguez de Lievana | 28th August 2014*

In its recent ruling on the case of Ángela González, a Spanish gender violence survivor who fought for years to protect herself and her daughter Andrea, the CEDAW Committee found the Spanish State responsible for violating the CEDAW Convention.

For 20 years, Ángela was in a violent relationship with her partner, the father of her daughter Andrea. In 1999, after three-year-old Andrea witnessed a violent attack on Ángela, she decided to flee the home with her daughter and break off the relationship. However, the abuser’s violence against her and her daughter continued after the separation.

Ángela reported each assault to the police and the courts, but the assailant was never convicted, and no measures were taken to prevent him from violating the no contact orders that were in place. She was also unable to obtain an order requiring that any visit be supervised by a social worker in order to protect Andrea, who did not want contact with her father, against physical or psychological harm. Over the course of proceedings marked by gender stereotypes, the court gave precedence to the father’s
rights over Ángela’s rights and against the best interests of Andrea, whose right to be heard was also violated. In 2003, during an unsupervised visit, the abusive father murdered Andrea and then took his own life.

After this failure of the authorities to act on the multiple complaints and legal actions that she had initiated, Ángela went to the Spanish courts to seek justice. In 2012, seeing that her efforts had not borne fruit, she decided to take the case to the CEDAW Committee. Women’s Link Worldwide represented her in this action.

Women’s Link’s legal strategy focused on showing that the failures of the system to protect victims of gender violence occurred, and continue to occur, because of ineffective enforcement of existing laws by judicial and administrative authorities. Their communication to the Committee detailed the role prejudices and gender stereotypes played in the failure to protect Ángela as a victim of gender violence and Andrea as a child affected by the same pattern of violence.

In its ruling, the Committee found that Andrea’s murder did in fact occur against a backdrop of domestic violence and structural violence against women. It went on to indicate that the proceedings to set visits, which the abuser took advantage of in order to continue inflicting violence on Ángela and Andrea, reflected “a pattern of conduct that reveals a stereotyped concept of visitation rights based on formal equality and which […] granted clear advantages to the father, notwithstanding his abusive behavior, and which minimized the mother and daughter’s status as victims of violence, which placed them in a vulnerable situation.” (§ 9.4)

For the Committee, by ruling to allow unsupervised visits without giving sufficient consideration to the background of domestic violence, Spanish authorities failed to fulfill their due diligence obligations under the Convention. (§ 9.7)

A particularly important part of the Committee’s ruling for Ángela and her quest for justice was the recognition of the extreme hardship and irreparable harm that she has suffered as a result of the loss of her daughter, as well as the finding that the State’s failure to provide her with restitution constituted a violation of its obligations under the Convention.

The Committee issued recommendations to the State in its ruling, including adequate restitution for Ángela and an exhaustive, impartial investigation of state structures and practices to identify the flaws that led to this lack of protection.

The Committee established two particularly interesting structural measures that have great potential for the Spanish context. First, the need to consider any history of domestic violence when determining visitation schedules in order to ensure that they do not endanger women or children, and second, mandatory training for judges and administrative personnel on domestic violence, including training on gender stereotypes.
At Women’s Link, we are proud of Ángela for her persistence and courage over the course of this eleven-year quest for justice, and we are ready to continue working to ensure full implementation of the Committee’s ruling, the first of its kind issued against Spain for a gender violence case, in order to prevent more cases like that of Ángela and Andrea.

Gema Fernández Rodríguez de Liévana is a Senior Attorney at Women’s Link Worldwide. Gema has a law degree and a postgraduate degree from the Faculty of Political Science and Sociology from the University of Complutense, Madrid. She is author of the research project “Women in Morocco and their Contribution to Changing Dynamics”.

Mega Event Tactics: Brazil’s Sex Industry During the World Cup 2014
By Janine Ewen | 10th July 2014

On 23rd May 2014, police from the 76th Police Precinct in Niterói, near Rio de Janeiro, invaded (without judicial authorisation) a building occupied by 300 sex workers and other residents. Around 100 sex workers were taken for investigation at police stations. It is believed to be a part of mass hygienisation (social cleansing) in the city centre of Niterói, aimed at enforcing a new “image of Brazil” for the FIFA World Cup 2014 which began on 12th June. Sex workers, those living in the apartment, and surrounding residents of the area faced displacement and closed businesses. Sex workers reported acts of rape, theft, and physical violence by the police officers, with further claims that the police planted evidence of false crimes in their belongings to purposely make matters worse.

On returning to the apartment complex, sex workers found little left or nothing at all. Windows were smashed, door locks destroyed, personal items and money were taken. The presumption was that illegally escorting sex workers to the police station allowed police to take everything and to shame sex workers and allies. Having the law on their side paves the way for countless acts of corrupt police action against the sex worker community. The laws on sex work in Brazil are conflicting and can cause confusion; sex work is not illegal, but the law criminalises any third party who profits from the sex industry, whether they are a brothel owner, or private bodyguard. This causes a huge problem as public authorities like the police have mechanisms of control over sex workers and take advantage of this.

A public hearing was held on 4th June at the Rio de Janeiro state legislature examining violations of the rights of prostitutes in Niterói. It was organized by the Human Rights Commission and the Commission for the Defence of Women’s Rights. Surrounding residents spoke of their attempts to make complaints against the police, however they were disregarded. Those present (sex workers, lawyers, the general public) highlighted the persecution of these women, the lack of information, illegal and violent actions of the police, and their incessant attempts to prevent the lawyers who support prostitutes from monitoring their cases. Clara Prazeres Bragança from the Women’s Rights Defence Nucleus of the Public Defender’s Office, stated: “Either the state no longer controls its police, or there is a deliberate policy of human rights violations”. Due to the absence of police representatives at the hearing, it was decided that another will be organised. The Head of the Civil Police, the Civil Defence, and the Public Ministry of the State and residents of Niteroi will be invited.

Research has found that sex workers are particularly vulnerable to police violence during international sporting events. This includes harassment; violence; displacement from areas of work and problems in meeting clients. Health risks, due to an inability to access medical services, also increase. Although these might occur in any case, mega sporting events have been found to cause countries to prioritise their international image; this brings issues such as sex work more readily to the surface. Further,
police forces often adopt a militaristic approach during mega events. Conflated claims of human trafficking and organised crime lead to major crackdowns on the sex industry, despite limited evidence to suggest these crimes take place.

I conducted primary research in Rio de Janeiro in 2013 demonstrating that sex workers were in already in fear of police violence before the World Cup 2014. The research also found that sex workers experienced discriminatory behaviour from healthcare professionals and questioned the health entitlements and rights of Brazil’s sex working community. Mega events are consistently demonstrating a global trend: the sex worker community will face adverse effects when its country hosts an international event. Social cleansing and exit routes out of the industry are enforced to reduce the rights of sex workers who want to work. Police brutality is experienced by sex workers across the world, but this is intensified further during mega event preparation. What is required is an immediate revision of policies on the health and safety of sex workers.


Male Rape in Armed Conflicts: Why We Should Talk About It
By Saipira Furstenberg | 1st July 2014

Sexual violence represents one of the most serious forms of violation of an individual’s human rights. Although statistics for sexual violence against women are significantly higher than for men, it should not be forgotten that rape not only affects the female population, but is also a concern for many men and boys who have been exposed to it, particularly in warfare conflicts.

The issue of sexual assault of men and boys on the current global agenda is not raised nearly enough, and remains largely under-reported. The cultural barriers to recognising and addressing male sexual abuse are currently under-researched, and remain primarily a taboo topic. In addition, the lack of widespread institutional recognition of male rape, combined with feminist movements, defining sexual violence as exclusively a women’s issue, has resulted in the failure to include this section of the population in policy and research agendas of governments, donor agencies and academic institutions. This framework has created a lack of attention to male victims in sexual abuse scenarios. Most of the international and national institutions barely acknowledge sexual violence against men that occurs in armed conflicts.

Because the topic of male rape in our often male-dominated culture remains largely unaddressed, there is little understanding about the issue and hence it is considered for many to be an unmentionable subject. As a result, cases of reporting such abuse remain rarer than those for women, mainly because of shame and fear of stigmatisation.

Research focusing on male sexual violence also reveals that there is a lack of adequate services in place to respond to the victim’s needs. A study carried out in 2002 notes that out of 4076 non-governmental organizations that worked in the area of war rape and other forms of political and sexual violence, only 3% mentioned sexual violence against men and boys ‘in their programs and informational literature’. Similarly, there are reports that many international initiatives, while addressing the issue of war rape, lack clear understanding and consensus around the topic in general, and as such remain poorly designed for addressing war rape abuses against men and boys in particular. In the United Nations (UN) Declaration of Commitment to End Sexual Violence in Conflict (September, 2013), there is only one line mentioning that men and boys are also subject to sexual violence. In many of the UN’s key documents, sexual violence is considered solely as a gender issue involving only women and girls. This reflects the lack of mobilisation and understanding by the UN agencies, governments and NGOs on the topic of sexual violence perpetuated against men and boys in conflict zones.

There is a need to address causes of sexual violence and to create greater emergency responses. For our society to end sexual violence around the world, organisations such as the UN should first recognise that men can be as vulnerable as women. It should not be forgotten that although there is a higher prevalence of sexual violence against women in war zones, ultimately both forms part of the gender dimension of conflict. The need to put more emphasis on men and boys as victims of sexual violence in the UN Declaration of Commitment to End Sexual Violence in Conflict can perhaps be the first starting point. It is insufficient simply to state that ‘men and boys are also subject to sexual violence’. There is indeed a need to create awareness not only about women’s rights, but more generally about human rights. Only then can we start to break down the wall of silence and adopt proper strategies to bring change in this field.

Saipira Furstenberg is a Doctoral Researcher at the Research Centre for Eastern European Studies at the University of Bremen, Germany. Her current research is focused on the topic of transparency within authoritarian regimes.
Rape and the Failure of the Criminal Justice System
Jayna Kothari | 19th June 2014

With the national outrage witnessed in India after the gruesome gang-rape of Nirbhaya in December 2012, one truly thought that the country was taking violence against women seriously.

The shocking incident led to the Justice Verma Committee being set up to review the criminal law relating to violence against women, the Verma Report and the passing of the Criminal Law Amendment Act 2013 which included many forms of sexual violence against women as criminal offences.

Now, less than a year after these amendments, we are witnessing shocking incidents of rapes and murder. The most violent incident was in Badaun, UP where two girls aged 14 and 15 were raped, murdered and their bodies were hung publicly in the village. Caste was a major factor in the crime. There have been several other incidents of rape in UP and other parts of the country and the situation is not improved with ministers making statements such as “rape is sometimes right and sometimes wrong”, “boys will be boys” among others.

Sexual violence against women in India is increasing with the National Crime Records Bureau showing that incidents of rape in India have gone up tenfold in the last 40 years. From 1971 to 2012 recorded cases shot up from just under 2,500 to almost 25,000, and activists believe only 10% of cases are actually reported to the police.

What is really chilling is that almost every story of rape is similar. When victims or their families complain, the police do not respond. This is what happened in the case of the Badaun rapes – the girls’ parents complained to the police when the girls had gone missing but the police refused to take any action. Had the police taken the complaint seriously, they may have found the girls and prevented their deaths. After the crime has taken place, there is continuing inaction on the part of the police and a First Information Report (“FIR”) is rarely filed immediately. If an FIR is filed, there is harassment of the survivors or their families, defective investigation and highly inadequate prosecution, leading to acquittals of the accused. No part of the criminal justice system signals to women and their families that sexual abuse, rape and any form of violence against women will be taken seriously. In fact, the signals are just the opposite – that sexual violence and rape will be tolerated and women just have to deal with it.

This is the reality that women are faced with when they approach the police with complaints of sexual harassment, rape, domestic violence, sexual assault or any other crime. The story is not very different in the courts with judges often protecting the accused instead of the victim. In a recent case of sexual harassment alleged by a legal intern against a former judge of the Supreme Court, the Delhi High Court passed a gag order on the media restraining it to report any of the proceedings, in order to protect the reputation of the accused judge.

While sexual violence against women is situated in India’s patriarchal, feudal society, it is clear that the criminal justice system is failing women. Unless there are strong police accountability measures to monitor and punish inaction on the part of the police and measures to monitor investigation and prosecution, it is unlikely that there will be any change in the mindset of the people who commit these crimes. The criminal law amendments would make no difference unless efforts are taken to implement them seriously and policing reforms are put in place to ensure accountability of the police.

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Sexual Violence in Modern Myanmar
By Myanmar Zoya Phan and Phyllis Ferguson | 5th June 2014

Ongoing Sexual Violence in Burma
For many decades, the Burmese Army has been using rape as a weapon of war against ethnic women and girls. Even though ‘reforms’ began 3 years ago, women continue to be subjected to rape and other forms of sexual violence committed by the Burmese Army. This continues to this day with impunity.

The United Nations Special Rapporteur on Burma has documented cases of rape and sexual violence by the Burmese Army for the past twenty years. Community-based women’s organisations have also been documenting rape and sexual violence for decades. The latest report of Women’s League of Burma, Same Impunity, Same Patterns, highlights more than 100 rape cases where the Burmese army’s soldiers have sexually abused ethnic women and girls.

The Burmese government has repeatedly denied sexual violence is taking place. Therefore, it is clear that it is unwilling to address this issue. This is why an international investigation into sexual crimes in Burma is important.
Despite these abuses clearly violating international law, the British government has yet to take any steps to tackle impunity, despite saying this is a priority for Preventing Sexual Violence Initiative, in which Burma is included. The international community cannot continue to ignore the abuses suffered by women in Burma.

**Sexual Violence in Transitional Settings**

Sexual violence by the military and the police with impunity in conflict situations against vulnerable citizens can be part of a concerted campaign to assert their absolute exercise of power. It can also include illegal detention and torture, as in the cases of Cambodia, in the Khmer Rouge period and in Timor-Leste during the Indonesian occupation.

Any ethos of protecting citizens may be disregarded, absent comprehensive adherence to a rights-based constitutional regime and the rule of law. Will the draft law on “religion” recently promulgated in Burma abrogate rights?

Post-conflict, the transition to peace-building, economic and social reconstruction is predicated on a strong rights-based constitution and respect for the rule of law – international and domestic – and equal justice. These are necessary preconditions.

Such transitions are fraught with often unrealistic expectations. If physical security is to be achieved in the domestic sphere, it requires civic education to alert children and adults that there is a human rights basis that can sustain them. Civic education can teach children, teachers and parents that beating, as a punishment, is unacceptable. If there are community specialist support centres for those who experience rape and sexual violence to have forensic testing, psychosocial and legal support, impunity can be foreclosed. Access to pregnancy termination in rape cases is required in law.

Often in post-conflict situations, sex- and gender-based violence leaves the public sphere and becomes entrenched in the less visible but unacceptable reality of domestic violence. Here, empowering women politically to serve their communities as councillors with listening ears, paralegal training and holistic connections for health, legal support and advice on call can improve the process of community knowledge and understanding. Grass roots organisations need to build support with men convicted of rape and SGBV during their time in prison and on return to their communities. Building gender equality, reversing arbitrary violence and patriarchal attitudes must start in the home, in schools and in communities. Achieving non-violence is very complex, it does take time. But it can be achieved.

Zoya Phan is a political activist, Campaigns Manager at Burma Campaign UK (BCUK) and author of the memoir ‘Little Daughter’. In 2010 she was recognised by the World Economic Forum as a Young Global Leader.

Dr Phyllis Ferguson works with Oxford Transitional Justice Research and is a founding member of the Oxford International Human Rights Law Group. She served on the Truth and Reconciliation Commission in East Timor, has conducted research in Nigeria, Ghana, Kenya, Tanzania and Zimbabwe.

Are Women’s Rights Really Human Rights?

By Gertrude Fester | 13th May 2014

At the second World Conference on Human Rights in June 1993, the statement, ‘women’s rights are human rights’ was first coined and accepted due to vociferous lobbying on the part of women’s rights activists. It was at the African regional meetings in 1994
and 1995, culminating in Dakar, Senegal, that African women, in preparation for the Beijing Fourth UN World Women’s Conference in August to September of 1995, reached consensus that the African region would strongly recommend a specific article on girl children. Hence, Chapter IV. L. of the Beijing Platform for Action unambiguously calls for the promotion and protection of girl children and provides for the appropriate education necessary to empower them.

The abduction and disappearance of about 230 schoolgirls on 14 April 2014 from Chibok, Nigeria, poignantly highlights the vulnerability of this group. Many unanswered questions remain, and Nigerian women have raised them to their government. These questions include: how is it that, following the murder of 59 children in the Federal Government College of Buni Yadi on 25 February 2014, security at schools had not been increased? How can it be explained that, in this era of digital technology, drones and sophisticated aerial surveillance, the girls have simply disappeared?

In addition, the Nigerian International Federation of Women Lawyers (FIDA) has asked how it is that in an area (Borno State) apparently under a state of emergency, this abduction could take place. There were four trucks together with many motorbikes that travelled in convoy, arrived at the school in Chibok, and traumatised and terrorised the pupils and staff. Where were the security officers or any other officials of authority when the abductors then fled with over 200 girls?

There is much speculation and snippets of information about what may have happened to the kidnapped girls. Allegedly, the militant Islamist group, Boko Haram, took them to Chad and Cameroon. It is purported that they were to be forcefully married to Islamist extremists. A local source, Halite Aliyu, of the Borno-Yobe People’s Forum, informed the Associated Press that the girls were being ‘sold’ for 200 naira ($12) each.

In Nigeria, millions have been mobilised as a result of the kidnapping. On 30 April, a million women assembled in the capital, Abuja, calling on the Nigerian government to leave no stone unturned in the effort to bring the girls back safely.

Nigeria has ratified all major international instruments. Many of these, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Article 16), the African Charter on Human and People’s Rights (Article 18(3)) and the African Charter on the Rights and Welfare of the Child (Article 27) prohibit girl child marriages. In addition, Nigeria has instituted various legislative and institutional measures at all levels to address forms of violence against children. No fewer than eight recently-enacted pieces of legislation have been promulgated in order to incorporate the demands of international treaties into domestic law. Furthermore, institutions have been established to protect children, such as the National Agency for the Prohibiting of Traffic in Persons.

But there may be conflicting agendas in populous and multicultural Nigeria. On 5 August 2013, Azubike Onuora-Oguno argued that in failing to revoke section 29(4)(b) of the Nigerian Constitution, child marriages remained legal. Section 29(4)(b) contradicts Section 22 of Nigeria’s Child’s Rights Act of 2003 in stating that upon marriage, female children are considered adults. This section of the Constitution reflects interpretations of Sharia law that justify child marriage. However, according to interpretations of the Qur’an, child marriage is illegal. Yet, it is important to remember that Nigeria is a secular state. But could it be that there is a lack of political will to stop these abductions?

In the light of the above, what does it mean for women and girls’ human rights? Today it is Nigeria; tomorrow, who knows where? As long as these conflicting situations regarding women and girls’ rights continue to exist, powerful religions, patriarchal elite and governments will pay lip service to the noble principles to which they have pledged themselves. How is it that religions, which are supposed to enhance lives, can be so exploitative and harmful to women? ‘A luta continua.’ Like the women activists who advocated for women’s rights to be considered human rights, we must enter the next battle to ensure the praxis of this principle.

Gertrude has held various positions in post-apartheid South Africa, including being an MP for the African National Congress and a Commissioner on Gender Equality (a constitutional position). She currently lives in Kigali, Rwanda where she works with grassroots women’s structures and does consultancy in gender issues.

Omnipresent in the EU: Violence Against Women
By Amy Weatherburn | 16th March 2014

The results of the world’s largest survey on women’s experiences of psychological, physical and sexual violence have shown that violence against women is a problem which exists at home, at work, in public and online.

Following 42,000 face-to-face interviews in all 28 EU Member States, the survey, conducted by the European Union Agency for Fundamental Rights (FRA) is the first of its kind. It provides comprehensive data which outlines the scale and nature of violence against women thus enabling policy makers to respond to the problem using a reliable evidence base.

The UK results show that 44% of the women interviewed had experienced physical and/or sexual violence by a partner and/or a
non-partner since the age of 15. Similarly, 46% of women interviewed had experienced psychological violence by a partner.

Despite the high prevalence of violence against women, the survey highlights that women are less likely to report the incident to the police, with only 16% contacting the police to report an incident – despite 36% of respondents indicating that the incident had a long term psychological impact.

The UK could be categorised alongside other European countries where gender equality is considered to be advocated by government and policy makers, however the survey results indicate that the prevalence of violence against women is nevertheless higher than in other European countries with more traditional cultural attitudes towards women. As such, the survey results show that the UK (44%) is one of the EU Member States with the highest prevalence of violence against women alongside Denmark (52%), Finland (47%) and Sweden (46%). The possible reasons for these somewhat surprising results were outlined by Joanna Goodey, Head of the Freedoms and Justice Department at the FRA:

“If you have higher gender equality, it could lead to higher rates of disclosure about violence, women saying it is not acceptable, you could also potentially have men, a backlash against women being in high positions, wanting equality, wanting lifestyles that are equal to men’s.”

The report outlines a number of key proposals that are essential to improving the situation. These include the need for member states to review their legislative and policy responses to violence against women, to implement training of frontline professionals who are required to understand and recognise the impact of abuse on victims and to direct campaigns to both men and women.

The launch of the EU survey results coincides with a number of significant policy developments from the current Coalition government which impact directly upon the response to violence against women in the UK. Following a successful pilot, Clare’s Law has now been rolled out nationally, which provides access to a Domestic Violence Disclosure Scheme where the police are able to disclose information about a partner’s previous history of domestic violence. In conjunction with this, the Domestic Violence Protection Order enables law enforcement agencies to provide protection to victims in the immediate aftermath of a domestic violence incident.

On 8 March 2014, to mark International Women’s Day, the UK’s A Call to End Violence Against Women and Girls Action Plan 2014 was announced reinforcing the government’s commitment to ensuring early intervention and risk reduction; developing partnerships working with other government departments; and engendering a victim focused approach by police, children’s and adult services, and health professionals.

The recent policy developments within the UK are vital to eradicating violence against women; however the EU survey results demonstrate that there is still more that needs to be done to ensure that women and girls are free from abuse in all aspects of their
lives. Kerry Sullivan, Co-Manager of Equation, a domestic abuse charity, supports this view by commenting that:

“Violence against women, including domestic abuse, is tragically under-reported and often hidden from sight. Equation welcomes the publication of this survey, which provides clear evidence that violence against women in Europe persists on a massive scale and demands a co-ordinated and holistic response from member states.”

Amy Weatherburn is Research Assistant at the University of Nottingham Human Rights Law Centre (HRLC). HRLC is a member of FRANET, the FRA’s multidisciplinary research network.

**The Women Empowerment and Gender Equality Bill: Can It Live Up to Its Name?**

*Olivia Bliss | 26th February 2014*

The Women Empowerment and Gender Equality Bill (WEGE) is currently before Parliament in South Africa. One of its main aims is to ‘give effect to the letter and spirit of the Constitution’ by promoting gender equality. Such legislation might be considered a welcome step for a country infamously struggling to grant its women their constitutionally-guaranteed rights to equality, freedom from violence and security of the person. But instead, WEGE has provoked fierce and almost universal criticism from women’s rights organizations. At a workshop on WEGE last December, many participants regarded the Bill with outrage, declaring its provisions paltry and insignificant in the face of the huge injustices perpetrated against women on a daily basis. Some even called for civil society to refuse to engage with the government on the bill.

WEGE’s key provisions are found in Chapters 2 and 3. In summary, Chapter 2 deals with the ‘social development’ of women, via education and training aimed at eradicating gender-based discrimination and violence and increasing education around access to healthcare. Chapter 3 deals with equal representation and empowerment of women through the progressive realization of a minimum of 50% representation and ‘meaningful participation’ of women in public and private decision-making structures, including businesses and political parties. This chapter also addresses the socio-economic empowerment of rural women and women with disabilities.

All of these aims sound laudable. But on closer inspection, the legislation is far too vague. WEGE lacks real detail as to how it will realize its ambitions for South African women. Each section follows the same pattern: ‘designated’ public and private bodies must submit plans for realizing the bill’s goals to the Minister, followed by further plans for their implementation if the Minister so requests. But the bill is silent on the form that such plans and measures should take, and there is no detail offered on the selection process for the designated bodies or the capacity of the relevant government department to embark on such a wide-scale project.

More fundamentally, the mere creation of a plan is not a guarantee that it will be adhered to. The lack of enforcement mechanisms in the bill is one of the main reasons why it has been widely discredited. In its first draft, the bill envisaged the creation of a ‘super-ministry’ to enforce its provisions, but this was later removed for fear that it would usurp the powers of the Commission for Gender
Equality, an independent body created by the Constitution. The bill now lacks any enforcement features whatsoever, and many are concerned that this will result in its provisions being disregarded.

Amongst the other criticisms in the public submissions to the government on WEGE are its overly broad definition of gender equality, the lack of serious engagement with both patriarchal structures in society and the root causes of the very high rates of gender-based violence, and the lack of consultation carried out with women living in rural parts of the country, where roughly 80% of the population lives and works.

Another problem is the huge overlap between WEGE and existing legislation. A large proportion of the provisions in WEGE can be found elsewhere, most evidently in Chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, which still has not been brought into force. As the submissions made by the Women’s Legal Centre note, should both pieces of legislation be brought into force, a lack of harmonization would ensue, which is undesirable from a policy point of view.

Recently, feminist critics have questioned why WEGE reiterates the ‘existing rights and protections [for] . . . some women’ whilst simultaneously ignoring the ‘equality rights of other groups of women,’ pointing out the 20-year delay on the government’s part in recognizing Muslim marriages or reforming the law on sex work. The answer is that those issues are simply not vote winners. WEGE, on the other hand, with its grand, albeit vague, goals to improve the lot of South African women, and due to be rushed through Parliament just before the national election in May, is far more politically palatable if ultimately toothless.

Olivia Bliss is a BPTC graduate from City Law School and co-authored the Women’s Legal Centre’s submissions on WEGE to the Portfolio Committee on Women, Children and People with Disabilities with Jennifer Williams.

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RACE AND ETHNICITY

Concerns about Greece from the European Commission against Racism and Intolerance

By Menelaos Markakis | 6th March 2015

The European Commission against Racism and Intolerance (ECRI), a Council of Europe body monitoring problems of racism, xenophobia, intolerance and discrimination, has delivered its fifth report on Greece on 24 February 2015. The report paints a rather discouraging picture of these problems in Greece and contains a wealth of information and valuable recommendations.

The ECRI notes that “progress has been made in a number of fields” since its previous report on the country. The positive developments set out in the report primarily concern the introduction of special units within the police to tackle racist violence, the appointment of a Public Prosecutor for the prosecution of acts of racist violence, the establishment of local integration councils, and the adoption of a new anti-racism law. Hate crime legislation in Greece has previously formed the subject matter of a comparative hate crime research report prepared by Oxford Pro Bono Publico.

The ECRI further notes that “despite the progress achieved, some issues give rise to concern” and requests that the Greek authorities take action in a number of areas. First, the ECRI recommends that Greece ratify Protocol No. 12 to the European Convention on Human Rights, which prohibits discrimination “in the enjoyment of any right set forth by law”, as well as discrimination “by any public authority”. Second, the ECRI highlights the need to create a Task Force to develop a “comprehensive” and “multisectoral” national strategy to address the root causes of racism and intolerance and to involve civil society partners in the fight against racism. Third, it is suggested that the Greek authorities offer more training to police officers, judges and prosecutors on the application of criminal legislation on hate motivated offences.

The ECRI report further makes a number of more detailed policy suggestions to the Greek authorities, most notably in relation to the vulnerable Roma community and LGBT persons. As regards the Roma population, the ECRI recommends that the authorities “develop an effective strategy to put an immediate end to racial segregation affecting Roma children in schools.” In this connection, it will be recalled that in the case of Sampanis and Others v Greece [2011] ECHR 1637 the European Court of Human Rights found a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education), because the applicants’ children had been placed in special classes, in an annexe to the main school building, on grounds of their ethnic origin.

As regards the LGBT community, the ECRI report notes that “all educational staff should be encouraged and supported to assist victims of bullying”, and recommends that the authorities issue “a clear instruction to all police officers that transgender persons should not be fined for alleged prostitution offences merely due to their identity and appearance”. It is surprising that no specific recommendation is addressed to Greece in relation to the perceived need to extend the availability of civil unions to LGBT couples, following the Strasbourg Court’s judgment in Vallianatos and Others v Greece [2013] ECHR 1110, which has been previously reported on the OxHRH Blog.
Regrettably, most of the issues highlighted in the ECRI report are common knowledge in Greece. Both the previous and the newly-formed coalition government have stepped up the efforts to combat racism and intolerance, but important challenges remain in a number of areas. The ECRI report covers developments up to 18 June 2014. Latest developments include the appointment of a Deputy Minister for Migration Affairs, and the Deputy Minister of Home Affairs’ pledge to shut down the migrant detention centre in Amygdaleza. It remains to be seen whether these reforms will serve to ameliorate the situation experienced by “irregular migrants” in Greece, as well as by other vulnerable communities. It is almost definitely the case that the ongoing economic crisis, public and national security concerns, and the country’s geographical position as a gateway to Europe will continue to present unique challenges in this context.

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Recognising Travellers’ Needs: The Courts Begin to Move
By Helen Mountfield | 26th February 2015

Are courts beginning to recognize the duty of equality law to respect and protect the rights of minorities to be different? An important High Court decision in Moore & Coates v Secretary of State for Communities and Local Government (Equality & Human Rights Commission intervening) [2015] EWHC 44 (Admin), suggests that they may.

Research repeatedly shows that gypsies and travellers’ needs for culturally appropriate obligation are overlooked during the planning process, so in many areas there is a failure to allocate adequate land for travellers’ needs for regular stopping sites. The failure to include the needs of gypsies and travellers in local plans makes it easier for planning authorities to refuse planning permission, often under local pressure to do so. But planning inspectors, deciding whether to make exceptions to policies against permitting housing in the Green Belt, were sometimes prepared to take steps to mitigate this, by taking into account the absence of a supply of suitable land allocation for gypsy sites.

Eric Pickles, Secretary of State for Communities and Local Government, resolved to put an end to what he perceived as an over-emphasis on exceptionalism in the cases of gypsies and travellers. Ministerial Statements of July 2013 and January 2014 announced that he would consider for recovery all traveller site appeals in the Green Belt for the Minister to determine them himself. Those statements set out that the Secretary of State “wishes to give particular scrutiny to traveller site appeals in the green belt, so that he can consider the extent to which Planning Policy for traveller sites is meeting this government’s clear policy intentions”. The evidence was that at first 100% of gypsy and traveller applications were called in and then 75%.
This use of the policy creates particular, and disparate, disadvantage for gypsies and travellers. It results in serious delay in determination of applications for planning permission (1-2 years), and the policy approach which the Secretary of State has taken in determining these appeals means that fewer are succeeding.

The policy was the subject of a judicial review in the case of Moore & Coates. The Claimants were gypsies whose appeals against refusal of planning permission for small sites to pitch caravans in the Green Belt had been called in and refused. Mr Justice Gilbart decided that the application of the Ministerial Policy to recover all travel pitch appeals, or an arbitrary percentage of them, constituted unlawful indirect race discrimination in the performance of a public function, contrary to sections 19 Equality Act 2010, and also involved a breach of the Public Sector Equality Duty. Although it was a matter for the Minister if he wished to recalibrate the policy approach to special circumstances and to encourage more effective provision for traveller sites in local plans, the means he had chosen was disproportionate, given the extent of detriment it imposed and other means of achieving those objectives which had been drawn to his attention by his own officials.

The judge quashed the decisions to recover the Claimants’ appeals, though he did not quash of the Ministerial Policy itself. This judgment is an important landmark, countering the suggestion that singling out applications for planning permission by gypsies and travellers for scrutiny is not discriminatory because they are asking for something different from the settled community rather than symmetrical ‘equal treatment’. Although the judgment does not expressly rely on the Council of Europe Framework Convention on Minority Rights, it chimes with its overarching policy purpose, that members of minorities should not have to choose between respect for their differences and equal enjoyment of the social advantages enjoyed by the majority, and that proper reasons are needed before a policy particularly affecting the lifestyle of a protected minority group is singled out for special attention.

Despite the determination that the application of Ministerial Policy was unlawful, there is no evidence that the Minister has changed his approach to the recovery of traveller appeals. Unless and until he does so, we can expect further challenges to refusals of planning permission, building on the logic of the Moore & Coates case.

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A House Divided: Grappling with Affirmative Action in South Africa
By Andrew Wheelhouse | 3rd October 2014

It doesn’t require much imagination to see that affirmative action policies implemented for the good of society exact a toll on the individuals who lose out. This is especially true in South Africa, which enshrines the use of such measures within section 9(2) of the Constitution. But what is the standard of review to be applied when challenging the implementation of a measure that is otherwise constitutionally compliant? On 2 September 2014 the Constitutional Court of South Africa handed down a fractured, frustrating judgment on this topic in the case of South African Police Service v Solidarity obo Barnard [2014] ZACC 23, though perhaps for understandable reasons.

Ms Barnard, then a captain in the SAPS, applied twice for a post carrying a promotion and, despite being by some measure the best candidate, was unsuccessful. She challenged the second refusal which was made by the National Commissioner on the basis that her appointment would not enhance racial representivity at that particular salary level, where white women were already over-represented. The finding of the Labour Court for Ms Barnard was overturned by the Labour Appeal Court, who were in turn overruled by the Supreme Court of Appeal.

Previously, Ms Barnard had argued that she had been subject to unfair discrimination. Then, before the Constitutional Court, she changed tack, instead arguing that by declining to appoint her the National Commissioner had made an unlawful decision, shifting the focus from constitutional compliance to the measure’s implementation in administrative law. An entirely new line of attack. A more united court might have been able to navigate a path to a unanimous judgment. Instead, dismissing the appeal, the bench produced four separate concurring judgments.

Jafta J considered that this shift in Ms Barnard’s argument was sufficiently radical that it should not be dealt with, as the question of appropriate standard “was not canvassed at all on the papers”. Moseneke ACJ, writing for the majority, concurred but decided to press on anyway.

His view was that reasonableness was the correct standard and that the reasons given for the refusal were not so scant as to justify a finding of unreasonableness. He noted that the over-representation of white women at that salary level was “pronounced”. That Ms Barnard had since received promotion to the rank of Lieutenant-Colonel. She knew the score and accepted and even supported the SAPS’ employment equity plan.

The majority judgment is hard stuff and some may claim that when affirmative action is successfully invoked minorities will be given short shrift unless the other side’s conduct has been outrageous. This would explain the tone of the joint concurring judgment.
of Cameron J, Froneman J and Majiedt AJ. Ms Barnard’s case was squarely before the Court because it raised the question of whether the implementation of the plan was “so rigid as to constitute the use of quotas” (which are prohibited).

Affirmative action is akin to “fighting fire with fire” and raises the prospect of infringing the right to human dignity under section 10 of the Constitution. This need for “heightened scrutiny” therefore justifies “fairness” as being the appropriate standard of review. An open-ended norm, but one which the minority argued was no less open-ended than “reasonableness”, “negligence”, “public policy” or other common concepts in law. Under their analysis the result is the same, but it is a much closer call.

Van der Westhuizen J’s judgment expressed scepticism of the fairness standard but gave further consideration to the question of human dignity as part of the rights-balancing exercise that the Court was engaged in. An individual must not be treated as “a mere means to achieve an end” to the extent that their “place in society and in the Constitution is denigrated”. However, he concluded that “the impact on [Ms Barnard’s] dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure.”

So a fragmented decision reflective of the controversy of the subject matter in South African society in general. The push for a heightened standard of review when scrutinising the implementation of affirmative action measures has been clearly defeated, but it will be interesting to see if the dignity analysis is taken up in subsequent cases.

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Unfortunately, however, it does not apply to the legislative and judicial branches, but only to the executive. In addition, the new law establishes that this percentage of seats must be reserved for Brazilian ‘negros’ only when more than three employment positions are open for public selection. The bill will expire in ten years with a possibility of renewal.

These legal changes were preceded by a Senate resolution passed on 13th May, which implemented a racial quota system for future selections of civil servants working for the Senate. Going a bit further than the presidential law, the resolution holds that private companies providing services to the Senate must also implement a 20 percent quota system in their employee selection process. This Senate resolution is one of the few regulations of its kind in Brazil, as it governs hiring policies of private companies. Now, private contractors must consider race in the hiring process if they want to keep their contracts with the Senate. Brazilian states, such as Mato Grosso, Paraná, Rio de Janeiro, and Rio Grande do Sul, and cities, including São Paulo, have enacted similar affirmative action policies for their civil servants. These developments are related to racial quota programs implemented at Brazilian universities since the 2000s. In spite of these programs, Brazil has not managed to overcome structural racism and as a result, unlike their white peers, many ‘negro’ students who graduated from the best universities have not found employment positions in their areas of expertise. In this context, it has become unreasonable to continue to justify the employment disparity between white and ‘negro’ graduates on the grounds that ‘negros’ have poor educational qualifications. The case of ‘negro’ graduates from top universities highlights the shortcomings of quota programs in public universities, which, if implemented alone, ignore the pervasive, structural nature of racism in Brazil, which is not limited to the educational context. Consequently, in order to end racism, institutional interventions for structural change should be mainstreamed throughout society.

Despite these laws and judicial recognition of affirmative action policies, the fear of ‘alibi’ legislation still remains. ‘Alibi’ legislation are laws declared by states to fulfill their international commitments, but deliberately improperly designed to guarantee their own inefficiency at the domestic level. The government and social movements in favor of race-based affirmative action often fail to monitor the implementation of these policies due to fear that such scrutiny would jeopardize their continued existence. Notably, these policies employ a self-identification approach with respect to race without a way to challenge individuals’ purported racial status. This leads to claims from a substantial number of whites that they are pardo in an attempt to increase their chances of gaining entry into universities and now, their access to public jobs. As a result of this new bill, the number of white applicants seeking benefits from quota programs is likely to increase significantly.

Another example of alibi legislation is the 2011 adoption of a quota system by the Ministry of Foreign Affairs in its selection of new diplomats. The system was rendered ineffective in June of 2013, when the criteria used to calculate candidates’ points for the diplomatic admission exam changed and, as a result, the quota candidates are at a disadvantage with respect to points in relation to the other candidates. The recently-approved law is also flawed. Most of the seats in the executive branch are positions of ‘trust’, which are filled by appointment rather than by public selection. The new law does not reach the number of public positions that are actually available because the quota system enshrined in the law does not apply to positions of trust.

The new quota law is a historic achievement in the long struggle for true inclusion of racial minorities in a post-slavery society. However, it is important that we do not repeat Brazil’s history by celebrating the enactment of laws as though they are the final outcome of a deeply-rooted, historic struggle. There is still a great deal of work to be done in order to truly achieve a racially equal society. Brazil must commit to the effective implementation of polices that combat racism and promote equality.

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Schuette v BAMN: a Need to Rethink Equal Protection
By Julie Suk | 22nd May 2014

While allowing Michigan to ban affirmative action, the majority in Schuette v Coalition to Defend Affirmative Action 572 U.S. ___ (2014) has preserved the political process theory of Equal Protection, which requires judicial scrutiny when political majorities attack antidiscrimination policies and which invalidated legislative efforts to dismantle existing antidiscrimination and integration policies in the past. Concurring in Schuette, Justices Scalia and Thomas expressed their willingness to discard the political process doctrine altogether. Dissenting Justices Sotomayor and Ginsburg framed Michigan’s affirmative action ban as functionally similar to historical efforts by democratic majorities to repeal fair housing and school integration policies.

The Schuette plurality refuses to acknowledge similarities between the antidiscrimination and integration policies that were protected over three decades ago, on the one hand, and affirmative action in university admissions in Michigan in the 21st century, on the other hand. If the Court relied on the political process doctrine to invalidate the Michigan affirmative action ban, it would be implicitly acknowledging affirmative action’s family resemblance to antidiscrimination law. Such a move would destabilize the Court’s Equal Protection jurisprudence, which has spent an entire generation declaring race-conscious affirmative action to be itself
discriminatory in most forms. Under this logic, banning affirmative action is an affirmation of antidiscrimination law, not an attack.

Six Justices still embrace the political process doctrine, but they disagree about what it prohibits. Justice Kennedy’s plurality is troubled by the suggestion that Equal Protection prevents democratic sovereigns from burdening minorities’ pursuit of policies that are primarily in their interest. Saying that a policy like affirmative action is primarily in the minorities’ interest can become racial stereotyping. After all, the Court has only permitted affirmative action to the extent that it’s narrowly tailored to achieve diversity, which benefits everyone. But if minorities don’t have a special interest in affirmative action, their burdens in pursuing it will be unproblematic, or at least no more problematic than everyone’s difficulties in changing the will of the democratic sovereign. Thus, Justice Kennedy concludes that the political process cases “were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.” If the absence of affirmative action does not inflict injury by reason of race, the Michigan ban is consistent with the political process doctrine. In her dissenting opinion, Justice Sotomayor argues that the Michigan ban especially burdens minorities by requiring them to amend the state constitution in order to pursue a policy that is in their interest.

Everyone else can simply lobby a University board to pursue a university admissions policy in their interest, such as legacy admissions or preferences for athletes. But even Justice Sotomayor’s application of the political process theory to invalidate Michigan’s affirmative action ban would not lead to the conclusion that Equal Protection protects race-based affirmative action in public universities from the political process. Suppose that Michigan voters had passed a constitutional amendment requiring that university admissions be based solely on SAT scores. Now, everyone – not only minorities – would have to amend the constitution to pursue policies in their interest. Given the well-known black-white test score gap, this hypothetical SAT-only policy would produce a decline in black enrollment at public universities. But the political process theory of Equal Protection would not prohibit it. Under the approach embraced by Justice Sotomayor, a ban on affirmative action that banned other purported privileges simultaneously would be consistent with Equal Protection, even if it had the effect of reducing minority enrollment at elite universities.

The Schuette decision is a reminder of the battles that are not being waged. No litigant or Justice argued that the Equal Protection Clause requires public universities to achieve integration through race-conscious affirmative action. Such arguments are not made seriously in the United States. Yet, Justice Scalia is correct in observing that the political process doctrine, even in the limited formulation preserved by the plurality, “leaves ajar an effects-test escape hatch” that would permit an “equal protection violation where there is no discriminatory intent.” If Justice Kennedy’s plurality opinion unwittingly creates an escape hatch from the shackles of established Equal Protection precedents, Justice Sotomayor’s dissent demonstrates the jurisprudential gymnastics required to navigate one’s way through it. What is as necessary as it is implausible is a more straightforward reconsideration of the Court’s four decades of restricting affirmative action and disparate impact liability in the name of Equal Protection.

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The New Barbarians: Bulgarians and Romanians at the Gate!

Galina Kostadinova | 3rd February 2014

Joseph Goebbels, Reich Minister of Propaganda in Nazi Germany, is reputed to have said: ‘If you tell a lie big enough and keep repeating it, people will eventually come to believe it.’

His words echo the current hostile campaign waged against Romanians and Bulgarians. During 2013 the British government repeated ad nauseam that come 1 January 2014 the country would be flooded by Bulgarian and Romanian hordes intent on living off the British taxpayer.

Cameron and his ministers enacted measures that would prevent EU arrivals from claiming unemployment benefits within the first three months. The problem is that these ‘new’ measures bring nothing new. Throughout the EU, Britain included, migrants cannot possibly claim unemployment benefits from their host country within their first three months. The EU’s very own free-movement rules are rather explicit. They do not allow for what the tabloids call “benefit tourism”. Eligibility for welfare throughout the Union is linked either to (1) past social security contributions; or (2) residency. In the UK one can obtain contributory benefits only after having paid social security contributions over two years: new arrivals are thus automatically disqualified during their first three months in the country. Non-contributory benefits are linked to a requirement for long-term residency, available only to those who work, are students, or are self-sufficient.

It is true that a jobless person from Romania or Bulgaria is in fact entitled to seek employment in Britain and even register at a JobCentre. But the benefits they receive come from the Romanian or Bulgarian budgets. Under Article 64 of Regulation 883/20 EU citizens can export their unemployment benefits from one country to another for a period of three months.

A Neo-Colonial Approach

Why all the political fervour then? Some have argued that the cabinet used East European migration to divert attention away from its failure to handle the economic crisis, joblessness and social disadvantage. Rules on intra-EU migration are decided outside Westminster and criticising Brussels can win Tories votes from the likes of UKIP. The British Prime Minister wants to have the cake and eat it. He does not mind East European markets remaining open for UK goods and capital, despite competitive pressure on local small and medium enterprises there. But freedom of movement of people is treated differently from free movement of goods and capitals.

Indeed Mr Cameron does not mind Romanians and Bulgarians working hard to earn a livelihood the UK. But if they happen to become sick or have children they should leave the country or stay out of benefits. The coalition government is happy to abolish a long European tradition of labour protection.

East Europeans are Soft Targets for Racist Attacks

The systematic rhetorical attacks against East Europeans in the public sphere are easy to explain. They are European, white, and predominantly Christian. Denigrating them is not a big concern, nor are blanket characterisations as beggars and criminals.

Such statements vilify these communities and violate the dignity of all their members. The campaign has resulted in a ‘intimidating’, ‘hostile’, ‘degrading’, ‘humiliating’ and ‘offensive’ environment for Bulgarians and Romanians in the UK within the meaning of racial harassment, as defined by Article 2 (3) of the EU Equality Directive. A study this week revealed that many Bulgarian and Romanian medics, who had lived and worked at the NHS for years, have experienced an upturn in hostility.

Last autumn, student loans were frozen only for Romanian and Bulgarian recipients, including those who had habitually lived in the UK for years. This was as part of an investigation into a “suspicious” number of beneficiaries from those two countries. In other words, the authorities deemed it was sufficient to be a Bulgarian or a Romanian to be considered “suspicious.” As a result these two student communities were stigmatised as cheaters because of wrongs committed by individuals who happened to be their compatriots.

Further, politicians and journalists rarely avoid prejudicial or pejorative references. They refer to ethnicity or nationality any time they report an offence committed by Romanian or Bulgarian individuals.

Double Standards

Yet, most disappointingly, the vilifying campaign never brought the outcry it could have triggered, had it targeted any other migrant community, especially those linked to Britain’s colonial past. Britain perceives itself as a tolerant nation with a rich tradition of diversity and multi-culturalism. This certainly cannot be denied. But the recent wave of discrimination against East Europeans reveals that tyranny, as well as tolerance, can be conveniently selective.

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Mainstreaming Disability in Development: The need for a Disability-Inclusive Post-2015 Development Agenda

By Rahul Bajaj | 4th March 2015

As a report by the World Health Organization indicates, around 15% of the world’s population, roughly 1 billion people, live with some form of disability, making them the world’s largest minority. That people with disabilities remain culturally fragmented, economically confounded, and socially isolated in large parts of the world is a platitude. The three transformative human rights instruments, which constitute the International Bill of Human Rights, belie the values of social justice and equality that they espouse by not making any explicit reference to the disabled.

However, in 1994, the Committee on Economic, Social and Cultural Rights in General Comment No.5, noted that any denial to provide reasonable accommodation to the disabled that results in the impairment of their rights runs counter to the Covenant on Economic, Social and Cultural Rights and delineated concrete steps that countries must take for the welfare of the disabled. Further, the declaration of the period from 1983 to 1992 as the UN Decade of Disabled Persons helped galvanize global efforts to create an enabling legal architecture for facilitating the societal integration of persons with disabilities. As a result, many general human rights instruments such as the Convention on the Rights of the Child (Art. 23), the African Charter on Human and Peoples’ Rights (Art. 18 (4)) as well as special instruments such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) and Biwako Millennium Framework for Action (2002) unequivocally recognize the importance of protecting the human rights of the disabled.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the most comprehensive human rights convention to date on disability. It calls upon all member countries to take substantive steps to ensure full and effective inclusion of persons with disabilities by viewing disability not as an individual pathology but as a social construct. The raison d’être of this Convention can only be achieved if the hopes and aspirations of persons with disabilities are regarded as an integral component of the consultative processes and deliberations that result in the formulation and institutionalization of international development programmes and are not merely included as an afterthought. To this end, the UN Post-2015 Development Agenda can play a pivotal role in concretizing the principles that the UNCRPD espouses. The Development Agenda can put an end to the invisibilization and ostracization of the disabled that the Millennium Development Goals have helped perpetuate by completely ignoring the needs of 1 billion people.

There are two principal reasons why the Post-2015 Development Agenda must focus on the empowerment of the disabled. First, Article 32(1)(a) of the UNCRPD imposes an obligation on all States Parties to ensure that international development programmes are inclusive of persons with disabilities. Further, Article 4(1)(c) calls upon States Parties to promote the human rights of the disabled in all their programmes. Therefore, a failure to address disability-based discrimination would eviscerate one of the most important strands of all the aforementioned human rights instruments. Second, that disability is inextricably intertwined with poverty, unemployment and countless other social malaise is a fact which is founded on irrefutable empirical data. It has been clearly established that 1 in every 5 impoverished people has a disability. The Development Agenda cannot truly herald an era of inclusive growth unless it focuses on breaking this mutually-reinforcing cycle by putting in place a framework that unequivocally and vehemently promotes the progress of this historically deprived minority.

In sum, a disability-inclusive Development Agenda can act as the ideal starting point to bring about the paradigmatic shift in the societal conception of disability that the UNCRPD envisages and to build international consensus on the need to tackle disability-based discrimination. More important, it can provide a moral and legal foundation to efforts that are aimed at prioritizing disability issues in development discourse and can go a long way in validating the rhetoric of diversity and inclusion.

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Indian Lip Service to the UNCRPD: Examining the Persons with Disabilities Bill 2014

By Devarshi Mukhopadhyay | 11th August 2014

Having ratified the United Nations Convention on the Rights of Persons with Disabilities in 2007, India was legally as well as constitutionally obligated to bring its domestic laws in line with the spirit and purpose of the same.

Although draft legislation was formulated and deliberated upon in 2011 as well as 2012, the latest parliamentary proposition concerning disability rights in the country was introduced earlier this year. It is disappointing however, to see the high degree of insensitivity and political haste which characterizes the new Bill. This has resulted in the absolute lack of engagement with the
purpose and spirit of the Convention. From the parochial conceptualization of “disability” and “discrimination”, to the shabby drafting of the legislation, there are multiple issues which have caused widespread dissent amongst the disability sector in the country.

At a very fundamental level, Article 1 of the Convention seeks to ensure the guarantee of the complete enjoyment of human rights to persons with disabilities, paving way for their introduction into the social mainstream. The formulation of this article also signifies a completely different paradigm for the conceptualization of disability, as being the inability to equally participate in society, rather than being a medical issue. The proposed Bill, however, fails to recognize the need to adopt a social conceptualization of disability, to allow for this inability to equally participate in society to be overcome. Rather, it focuses entirely on the impairment of the person, and not existent social barriers. The definition of a “person with disability” contained in Section 2(q) of the Bill also restricts the respect for differences and shifts the model of approach from what the Convention seeks to achieve.

Further, in direct contravention of the purposes of Article 5 of the Convention, which prohibits all discrimination on the basis of disability, Section 3(3) of the proposed Bill allows discrimination against persons with disabilities “if it can be shown that it was appropriate to achieve a legitimate claim”. This inherent right to equality under the Convention is further denied by the statutory provisions relating to accessibility (contained in Article 9 of the Convention) in Section 40(1) of the proposed Bill. According to the proposed regime, accessibility is sought to be increased through public transport designed specifically for persons with disabilities. However, this too, is subject to these designs being “economically viable” and “technically feasible”, automatically allowing for subsequent justification in the event of non-fulfillment.

Further, the proposed regime completely ignores the issue of “punishment”. Article 15 of the Convention prohibits “torture” and “cruel, inhuman or degrading treatment or punishment”. Section 5 of the Bill makes references to “torture” or “degrading treatment”, but does not explicitly prohibit “punishment”. This fails to provide the same coverage as the Convention because the purpose of Article 15 of the Convention is to ensure that persons with disabilities are not made the subject of any form of torture, cruelty or punishment, in any manner whatsoever. The police force in India is notoriously known for its third degree methods of punishment (which can be both cruel as well as degrading). Therefore, an explicit prohibition would be necessary to ensure that such acts against persons with disabilities are not condoned. Further, by virtue of the fact that Section 13 empowers legal guardians to take all decisions on behalf of persons with disabilities, the right to be protected against experimentation or testing without consent is also heavily compromised.

Taking into account all these considerations, it becomes evident that the proposed legislation contains lacunae which are inherently dangerous to the rights of persons with disabilities, and may provide institutionalized avenues of discrimination, torture and degrading treatment. Although the Convention proposes a regime that seeks to foster respect for differences, the conceptualization of Indian parliamentarians falls far short of what it is bound to do, under its international legal obligations. The lack of sustained engagement coupled with expediency has defeated the very purpose of bringing in national laws in consonance with the spirit of the U.N.C.R.P.D.

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Jamaica boasts of being the first country in the world to both sign and ratify the United Nations Convention on the Rights of Persons With Disabilities, on March 30, 2007. Seven years later, the Disabilities Act has been tabled in Parliament. This is an important step, but there are questions about whether the proposed statute’s actual impact may fall short of expectations, especially when it comes to implementation in a small, developing country.

One example is public transport, which is currently insufficient for the disabled. The announcement that four of 73 new public passenger buses were equipped to carry the disabled was noted as inadequate by a disabilities advocate. Jamaicans living outside of the capital Kingston have even less access to disabled-friendly public transport.

The Disabilities Act deals shortly with the issue of public transport stating only at s. 40 that:

“The Minister with responsibility for public passenger vehicles shall ensure as far as is practicable, the provision of public passenger vehicles that are accessible to and useable by persons with a disability.”

The Act uses the “progressive realization” language familiar to economic, social and cultural rights, so it will be important to see how it is interpreted. What will “as far as is practicable” mean in a country where, as of March 2014, the national debt stood at 140 percent of GDP, growth for the past 20 years has averaged 0.6%, and where GDP per capita for 2012 was US$5294?

The UN Convention also provides for progressive realization of the rights of the disabled, stating at Article 4 (2):

“With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights...”

Creating space in tight budgets to realize economic, social and cultural rights is a problem faced by all developing countries, as exemplified by the South African case Government of the Republic of South Africa and Others v Grootboom [2000] ZACC 19, where the issue before the courts was how the constitutional right of access to adequate housing should be interpreted in the context of limited government resources.

The proposed legislation provides in s. 25 that “a person with a disability shall not by reason of such disability be subject to any form of discrimination.” When s. 25 and s. 40 are taken together, it appears that the Minister responsible for transport will be able to rely on the proviso “as far as is practicable” in countering any claim of discrimination. This will be especially important as Jamaica’s Charter of Fundamental Rights and Freedoms 2011 does not cite disability as a ground on which one can claim a constitutional right to freedom from discrimination, confining itself to the grounds of being male or female, race, place of origin, social class, colour, religion or political opinion. There is therefore no clear textual basis on which the Jamaican court may read in additional grounds of protection.
However, there is dicta to suggest that the wider provisions of the Charter may be invoked in discrimination cases even if the litigant’s status is not among the grounds protected. In Tomlinson v Television Jamaica, CVM and Public Broadcasting Corporation of Jamaica [2013] JMFC Full 5, a gay man claimed his right to freedom of expression had been infringed due to the refusal of three television stations to air a commercial promoting tolerance.

Supreme Court Justice Williams noted that Tomlinson could not seek redress for allegations of discrimination on the ground of sexual orientation, as that specific protection was not provided. “This may be viewed as a significant deficiency in this Charter but it is to be noted that the first paragraph of the Charter is comprehensive enough to point to a view that it be interpreted to embrace all the rights and responsibilities of all Jamaicans,” she stated.

Her dicta therefore suggest that the disabled community may have a constitutional leg to stand on. However, the absence of express constitutional protection for disability discrimination remains a major obstacle and renders the proposed statute all the more significant. It remains to be seen how rigorously the courts will interpret the state’s obligation of progressive realization in the face of limited economic resources.

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**A Successful First Instance Challenge to Bedroom Tax**

**By Sarah Smith | 3rd June 2014**

The Liverpool first tier tribunal (“FTT”) has overturned the decision of a Local Authority to reduce the housing benefit of Mr Carmichael, the husband of one of the claimants bringing judicial review proceedings against the UK “bedroom tax”. The “bedroom tax” came into force on 1 April 2013 following amendments to the Housing Benefit Regulations 2006 (the “regulations”). The regulations are designed to reduce payments of housing benefit to tenants with more bedrooms than those deemed appropriate for their needs, encouraging tenants to move to smaller properties.

In this particular case, Mrs Carmichael suffers from spina bifida, with the result that she requires her own bed. There is no room for a second bed in her bedroom, so Mr Carmichael has to sleep in a second bedroom. As the calculation of housing benefit only allows for one bedroom per “couple”, Mr Carmichael was considered by the local authority to be under-occupying his property, and his housing benefit was therefore reduced by 14% from May 2013.

The regulations have been widely criticised on many grounds, including for their impact on disabled people. An estimated two-thirds of those affected by the bedroom tax are disabled, according to the equality impact assessment undertaken by the Government before the regulations came into force. The FTT decision is particularly interesting as Mrs Carmichael and other claimants lost their judicial review proceedings against the regulations in the Court of Appeal in February (R. (on the application of MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13). The Court of Appeal found that that the regulations were discriminatory, given their disproportionate impact on disabled people, but that this discrimination was justified. Its decision was partly influenced by the fact that disabled people subject to the bedroom tax could apply to their Local Authorities for “discretionary housing payments” to alleviate the impact of the bedroom tax. The Government had previously announced that additional funds would be made available to Local Authorities to make these payments. These payments are however temporary, and, as the name suggests, made at the discretion of the Local Authority, leaving disabled tenants in a comparatively precarious position as they are forced to apply for payments made from a limited pool of resources.

Mrs Carmichael had argued in the Court of Appeal that her case could not be distinguished from that of Burnip v Birmingham City Council [2012] EWCA Civ 629, in which the Court of Appeal found that the Housing Benefit Regulations 2006 discriminated against certain classes of disabled people (including disabled children forced to share a bedroom with a sibling) with no reasonable justification. The regulations were subsequently amended to provide exemptions for these groups. The Court of Appeal rejected Mrs Carmichael’s comparison, however, finding that there was objective and reasonable justification for affording children greater protection than adults. The claimants in the judicial review proceedings are currently waiting to hear from the Supreme Court whether they have permission to appeal.

There has been no public statement of reasons from the Liverpool Tribunal, with the result that we are to some extent left guessing as to how it came to such a different conclusion to that of the Court of Appeal. However, Giles Peaker, writing in Nearly Legal, has reported that counsel for the Carmichaels argued for a different approach to be taken to the justification of the discrimination. As the first tier tribunal case was a statutory appeal, rather than a judicial review, the tribunal could focus on the discrimination suffered by the Carmichaels in particular as opposed to that suffered by disabled people in general.

An obstacle to this approach was the fact that the Court of Appeal had specifically addressed Mrs Carmichael’s situation, finding that treating a disabled adult differently from a disabled child was justified, so distinguishing her case from that of Burnip. However,
the Court of Appeal had not directly considered whether Mrs Carmichael had been discriminated against in comparison with someone without her disability, leaving room for the FTT to decide this point.

The FTT’s decision is only a first-instance decision, and may be appealed. In the meantime, we await the Supreme Court’s decision on permission in the judicial review proceedings.

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Schuette: The Latest in the Affirmative Action Saga
By Christina Lee  | 15th May 2014

On April 22, 2014, in Schuette v. Coalition to Defend Affirmative Action U.S. ___ (2014), the Supreme Court of the United States held that Michigan’s amendment to the State constitution, prohibiting the use of race-based preferences as a part of the admissions process for State universities, did not violate the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.

The case arose in the wake of two key Supreme Court cases on this issue. In those cases, Gratz v. Bollinger 539 U.S. 244 (2003) and Grutter v. Bollinger 539 U. S. ____ (2003), the Supreme Court invalidated the explicit use of race and upheld the more limited use of race, respectively. In response to Gratz, Michigan voted to adopt an amendment to its State constitution prohibiting, inter alia, race-based preferences in State university admissions.

On appeal, the Sixth Circuit of the Court of Appeals had held that the amendment violated the principle in Washington v. Seattle 102 S.Ct. 3187, that the Equal Protection Clause guarantees more than just equal treatment under existing law but a meaningful opportunity to participate in the political process.

The majority of the Supreme Court found the Court of Appeals’ reasoning to be overly broad, particularly in its interpretation of past precedent and Washington v. Seattle. In particular, it rejected the argument that Seattle required it to determine which political policies serve the interests of racial groups. The Court cautioned that such an expansive mandate would take the power to choose policies ranging from tax policy to highways out of the hands of voters. It held that it would not disempower voters to choose a particular policy simply because that policy avoided race, and it noted similar policies which had been upheld in California.

From the very beginning of the opinion, Justice Kennedy, writing for the Court, explicitly stated that this case was not about the constitutionality of using race in affirmative action policies in higher education. Indeed, Justice Kennedy ended the opinion emphasizing that this case was “not about how the debate about racial preferences should be resolved,” but “about who may resolve it.” The majority resoundingly held that the voters would resolve the debate. However, in a fifty-eight paged dissent, Justice Sotomayor took the ban on racial preference head-on.

Fundamentally, Justice Sotomayor disagreed with Justice Kennedy and believed that the case was about how the debate on the use of race could be resolved. According to her, the Constitution forbids the majority from rigging the political process against minority groups. Sotomayor compared this case to other instances in the equal protection context where minority groups were protected from majoritarian policies, such as Romer v. Evans 517 U.S. 620 (1996), where the Supreme Court struck down a Colorado ordinance that precluded any government action protecting gays or lesbians. Moreover, for Sotomayor, the discussion of the amendment cannot be separated from the affirmative action doctrine, discussions of equality.

Affirmative action was undoubtedly the elephant in the room throughout the majority’s opinion. Justice Kennedy sought to distance this opinion from the recent case of Fisher v. University of Texas at Austin 133 S.Ct. 2411 (2013) in which the Court did not significantly change Supreme Court jurisprudence on affirmative action. In doing so, Justice Kennedy in fact did reveal much about the delicate existence of affirmative action in the Supreme Court’s equal protection jurisprudence. The first observation is the extent to which Justice Kennedy took pains to frame this case as a case about the power of voters to choose policy, not one about the use of race in government decisions. By not touching on affirmative action jurisprudence, affirmative action as it currently stands – allowing race-based preferences in certain forms – lives to see another day.

While this kind of avoidance may indicate that the Court is not yet ready to speak definitively about affirmative action, the Justices undoubtedly know that these opinions will be immediately dissected in the affirmative action lens. By advancing this very small move of leaving such decision to the voters and States, the Court may be laying the stepping stones for the next major chapter regarding affirmative action and the Equal Protection Doctrine.

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Nigerian Standup Comedians and Differently Abled Persons from a Human Rights Lens
Azubike Onuora-Oguno | 26th March 2014

The Nigeria popular art space came to life about a decade ago with the coming of Nollywood. Standup comedy followed closely with various shows in Abuja, Lagos, Port Harcourt and other major cities.

The impact of the industry on the corporate image of Nigeria is not one that can be underestimated. The success stories of Nigerian standup comedy have been taken beyond the shores of Nigeria via movies, YouTube, print media and even physically.

Despite the good nature of the industry, I reflect in this piece on the impact that it has had on a class of people. More often than not, a large chunk of the jokes during the shows depict the nature and life style of differently abled persons. People who are hard of hearing or blind; who stammer; who are polio victims/crippled and albinos; have all suffered some form of jokes and caricature based on their abilities and circumstances of birth.

Disability simply put is inability of an individual to perform certain tasks or relate with people because of some form of impairment. It is widely accepted that no one is to be subjected to any form of torture based on any grounds whatsoever. The frequent recourse to disabled people by stand-up comedians in Nigeria amounts to discrimination, mental torture and a deprivation of their dignity.

The question therefore is, to what extent are the Nigeria Standup comedians violating the rights of disabled people? What respite exists nationally or internationally for the disabled in these circumstances? The Constitution of the Federal Republic of Nigeria provides for the dignity of the human person. In addition, it prohibits all forms of inhuman and degrading treatment. In my view, this section prohibits any form of attitude and comment that is capable of being considered derogatory of an individual’s perception in the public view. Section 42(2) prohibits mistreating any Nigerian on the basis of birth circumstances and subjection to any form of disability. The 1993 Disability Decree of Nigeria provides for legal aid services. It also provides that the National Commission on People with disability must ‘Work towards total elimination of all social and cultural practices tending to discriminate against and dehumanise the disabled’. Presently, the National Assembly is working towards securing disability rights legislation.

On the regional front, the African Charter on Human and Peoples’ Rights prohibits ‘all forms of exploitation and degradation of man’ (article 5). While disability is not specifically mentioned, the use of the words ‘all forms’ is sufficient to cover the exploitation that disabled people suffer at the hands of the comedians. As a signatory to the Convention on the Rights of Persons with Disabilities, Nigeria has an obligation under article 8: ‘States Parties undertake to adopt immediate, effective and appropriate measures: To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life’. Furthermore, all forms of degrading treatment (article 15) and exploitation and abuse (article 16) are expressly prohibited. Consequently, expressly outlawing the reference to disabled people in comedies for economic reasons will be a step in the right direction towards the fulfilment of the obligations under the Convention.
The present indulgence of stand-up comedians constitutes a violation of the human rights of people with disabilities in Nigeria. The prohibition can be realised by civil society and NGOs working on disabled people’s rights by testing the judicial waters in Nigeria to pursue the development of jurisprudence in bringing an end to the acts of discrimination against people with disabilities. Aside from the courts, the Nigeria National Human Rights Institution can also be approached. Finally, artists should be encouraged to use their skills in fostering the integration of the differently abled in Nigerian society.

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POVERTY

First Lady of Rwanda – Women and Poverty: A Human Rights Approach

By Jeannette Kagame | 2nd May 2014

We celebrate the great strides made in advancing women’s roles and rights: I speak for Rwanda, when I say that the government has established an environment for women to thrive. At the same time, we are mindful of our responsibility to keep fighting for the rights of women and girls; the journey ahead is still long.

There is no more appropriate time to reflect on our experience before and during the 1994 genocide. We came from a society defined by alienation, oppression and separation. Women had no rights to inherit any property. A woman was prohibited from conducting business without permission from her husband. Our society was purely patriarchal: women were considered movable assets, with the primary purpose of bearing children.

As women were conveniently perceived to be helpless, it appeared to be the perfect excuse for men to make themselves stronger. In this process, poverty for women was perpetuated. They had no access to resources; their opportunities were extremely limited.

Today we live in more dynamic times. The level of ambition is much higher as individuals, families, communities and countries. There is competition to be better and in order to satisfy these demands, one must work extremely hard. Gone are the days when women stay home to cook, clean and have children.

With a population of 52% women, freeing the productive energies of women was fundamental to the much-needed transformation of Rwanda. There was no alternative: we had just emerged from genocide. And so women became a powerful force for change, from the smallest village council to the highest tiers of government. It became, and still is, a constitutional requirement to have 30% women in decision-making positions in the public sector.

With this in place, Rwanda managed to enjoy the highest female legislative representation worldwide. 40% of the cabinet and the judiciary are women. Discrimination or exclusion for any citizen is punishable by Rwandan law. Rwandan women have been given a chance to contribute to nation building.

Allow me to highlight some of the good progress we are experiencing.

Education

Not only has Rwanda achieved universal education; but girls’ enrolment rate at primary school is at 98%. Primary education is compulsory and free in public schools.

Between 1960 and 1990 only 2,500 students graduated from university; over the last 20 years around 84,000 students have graduated from tertiary institutions. Today’s Rwanda promotes education for every single child.

Employment

Article 37 of the constitution states that ‘persons with the same competence and ability have the right to equal pay for equal work without discrimination.’ In the late 90’s an inheritance law granted equal rights to sons and daughters.

Poverty Reduction

Between 2008 and 2012 Rwanda was able to lift 1 million people out of poverty.

Healthcare

HIV+ pregnant women and their children have access to PMTCT services in 85% of our health facilities. Because of the success of Prevention of Mother to Child Transmission of HIV, we have managed to take the next step and eliminate the transmission.
Rwandan women are now delivering their babies in health facilities, and this has contributed significantly to a reduction in maternal mortality; putting Rwanda on track for MDG4 (reducing child mortality) and MDG 5 (improving maternal health).

Rwanda has also instituted a system of maternal death audits, which investigates the circumstances surrounding a death and recommends solutions for preventing future fatalities.

These modest improvements make us optimistic. The positive contributions women have made to different aspects of society have won them the confidence of Rwandan men and society at large. However, I challenge each one of you here to think about what we are doing with this space and support? We still have work to do. Allow me to share some of my thoughts on this:

My 21-year-old daughter had had a tough week at school; she came home and complained that it was all too much to manage. Her younger brother responded: ‘You women asked to be empowered; do you want to get an education and work, or do you want to stay at home?’

This amusing exchange is a reminder that we should make the best of the opportunities. We have to choose either ‘to be looked after’ or ‘to be active partners’. We cannot have the best of both worlds.

This is an edited version of the opening address delivered by the First Lady of Rwanda, Her Excellency, Mrs Jeannette Kagame at ‘Women and Poverty: A Human Rights Approach’ on 28 April 2014.

Jeannette Kagame is the The President of Imbuto Foundation and the First Lady of the Republic of Rwanda.

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**Equality Interrupted: The Rajasthan Panchayati Raj Act, 2nd Amendment, Ordinance, 2014 and the Selective Disqualification of Candidates**

*By Jhuma Sen | 5th January 2015*

The Rajasthan Panchayati Raj Act, Second Amendment, Ordinance, 2014 was approved by the Governor of Rajasthan, Kalyan Singh on 19th December 2014, only a few days before the election code of conduct was to be released. The amendment introduced sets minimum educational standard for contesting Panchayat (local government) polls. According to the newly introduced provision a contestant should have the prescribed minimum qualification of secondary education (varying between a qualifying Class 10 from the state board or any approved institution or board to having passed 5th Class, depending on the electoral post).
The case of P v Cheshire West and Chester Council [2014] UKSC 19 considered whether living arrangements for mentally incapacitated people necessarily constitute a deprivation of their liberty. Its significance lies in the fact that, where such a deprivation is found, deprivation of liberty safeguards (“DOLS”) must be put in place.

DOLS are intended to ensure that individuals are protected and that State actions conform with Article 5(4) of the European Convention on Human Rights.

The three individuals who were the subjects in this case are mentally incapacitated by virtue of Down’s Syndrome, moderate/severe and moderate/mild learning disabilities. They live in NHS and local authority facilities and a foster home respectively. These environments come as close to “normal life” as might be possible under the circumstances, but none of the individuals reside in a “family home”. All three are closely controlled and supervised (involving the occasional use of restraints for two of them) for their own safety; none can leave at will, although MIG and MEG go to college every day. In all three cases, placements were initially authorised by the court: a subsidiary consideration was therefore whether such authorisation, once given, could continue indefinitely. No decision involving mental capacity emanating from the European Court of Human Rights has involved a directly
The Supreme Court decided, by a majority of four to three, that these living arrangements constitute a deprivation of liberty.

In the leading judgement, Baroness Hale rejected the Court of Appeal’s finding that there was no deprivation of liberty because of the “relative normality” of the environments or their essential benevolence: “a gilded cage is still a cage”. She determined the main features of a deprivation of liberty to be:

- The objective extent of the individual’s liberty. P, MIG and MEG are confined within their placements and as such restricted. This has been for many years and will be ongoing: the period of time is “not negligible”.
- The subjective extent of the individual’s liberty. Lacking mental capacity, none of the three individuals could themselves consent to their placement or the restrictions placed upon them.
- The “concrete situation”. This followed the ECHR jurisprudence (Stanev v Bulgaria). P, MIG and MEG cannot go anywhere without close supervision.

Baroness Hale’s analysis was underpinned by the assertion that human rights are universal in their very nature. From this perspective, physical liberty must be given the same for everybody regardless of their mental or physical disabilities. The positive nature of P, MIG and MEG’s placements did not override the fundamental principle that no-one should be subject to a deprivation of their liberty without safeguards.

In supporting judgments, both Lord Neuberger and Lord Kerr considered the implications of comparing these placements to “normal” home life. Children who live with their parents may be subject to an equivalent degree of control and supervision. However, in Lord Neuberger’s opinion this was not directly analogous because this situation does not involve the state assuming control. Lord Kerr considered that for most children, control and supervision diminishes as they grow older. For these individuals, the restrictions upon them would be a “constant feature” of their lives and as such amounted to deprivation of liberty.

Lords Carnwath, Hodge and Clarke dissented. Lords Carnwath and Hodge rejected Baroness Hale’s position that there should be a “universal test” of deprivation of liberty. The case law emanating from the ECtHR has emphasised that deprivation of liberty is “a matter of degree” and that individual decisions must focus upon the “concrete situation”. It follows that there cannot be a universal test.

Moreover, cases in which the ECtHR has determined that there is no deprivation of liberty (such as Neilsen v Denmark 11 EHRR 175 and HM v Switzerland [2002] ECHR 157) suggest that the comparison with a “normal home life” is an important consideration. P, MIG and MEG do leave their respective placements, for example to go to college during the day. This may restrict their liberty but it does not deprive them of it. Their lives are restricted through their “cognitive limitations” and not from arbitrary decisions by people in authority. Although two of the individuals are restrained, this does not create a deprivation of liberty because it is occasional and for therapeutic purposes only.

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Cheshire West and the Repugnant Conclusion
Simon Burrows | 31st March 2014

The Supreme Court’s judgment(s) in Cheshire West [2014] UKSC 19 stirred up the expected storm. By siding with the approach urged upon it by the Official Solicitor, the Court has inevitably increased the numbers who will fall within the category of persons “deprived of their liberty”.

Not only will this increase the numbers of people like P, MIG and MEG – those in independent supported living arrangements where the Court of Protection will need to authorise their detention – it will also increase the numbers in care homes and hospitals falling within the administrative detention procedure known as the DOLS. No one yet knows how great the numbers will be. It is also unclear how the legal procedures will be streamlined to reduce cost and delay. There is undoubtedly a lot of work to be done. In the week since the judgment there has been a great deal of discussion, debate and hurried training. The Government is expected to issue its response shortly. Whether what has resulted is panic, hysteria or plain fear, or perhaps only the sort of adjustment that always follows a significant legal development – whether it is a Supreme Court judgment, or a ground-breaking statute – remains to be seen.

As someone who watched this litigation develop at close quarters, it has taken me some days to reach a position on what has happened. The problem with this case (or these cases) is that they created a clash of instinctive reactions. Where a person is disabled, vulnerable and in need of support and supervision as P, it would be bizarre, would it not, to attach the label “deprived of liberty”? Borrowing the language of Mostyn, J in another similar case, the framers of the European Convention, designing a “bulwark against tyranny,” would never in their wildest dreams have anticipated Article 5 being used in the sorts of cases that came before the Supreme Court.

On the other hand, were a person with capacity to be kept under constant supervision and control, in a place which he could not leave without permission, the instinctive reaction would be equally indignant – that he is deprived of his liberty, and this is exactly what Article 5 is for.

In the final analysis, the case is about discrimination, about equality. As Munby, L.J. rightly observed in the Court of Appeal, the case is about whom one chooses to use as a comparator for the mentally incapable person. If one chooses as a comparator person of “sound mind” who finds himself subject to supervision, control and unable leave, we will rightly conclude there is a deprivation of his liberty. The only way to escape that conclusion is to modify the comparator to a person with similar disabilities and needs as the person concerned. That removes the counterintuitive conclusion that very disabled people are deprived of their liberty. But it is replaced with an uneasy feeling that by modifying the comparator something has been lost. The Convention does not protect the most vulnerable people any more. Worst of all, different levels of rights have been created for – dare I say – different levels of people. And that can’t be right.

It was that repugnant conclusion that seems to have led the Supreme Court to the profound judgment it reached.

Simon Burrows is a barrister who acted for P (by his litigation friend, the Official Solicitor) in the Cheshire West case from first instance to the Supreme Court. The views he expresses here are entirely personal.

LGBTIQa

Searching for the “T” in LGBT Advocacy
By Peter Dunne | 10th September 2014

On August 30, 2014, the prominent UK lesbian, gay and bisexual (LGB) rights group, Stonewall, held a workshop with representatives from Britain’s transgender community to consider whether that organization could, and should, incorporate gender identity advocacy within its current body of work.

For many people, the fact that Stonewall does not already address transgender concerns may come as somewhat of a surprise. Given the growing visibility of sexual orientation and gender identity issues, and the leading role which Stonewall has claimed in many recent policy and legislative debates, members of the public could perhaps be forgiven for assuming that Stonewall is the unofficial mouthpiece for all LGB and “T” matters in the United Kingdom.

Yet, reviewing the organization’s website today, Stonewall clearly self-identifies as “the lesbian, gay and bisexual charity.” Indeed, Stonewall’s often troubled relationship with the transgender community is symptomatic of wider difficulties which have historically undermined the creation of a cohesive and united movement for sexual orientation and gender identity rights. While well-publicised coalitions between “gay rights” and transgender activists have existed for more than forty years, the relationship has frequently not
been one of parity and good faith. On many occasions, transgender advocates have struggled to have their voice heard within the wider LGBT rights movement. The result has been successive agendas, driven by gay men, which, at best, have neglected the needs of the transgender community and, at worst, have expressly compromised gender identity rights to promote greater equality for gay men and lesbians.

Perhaps the most high profile example of the inter-LGBT schism arose in 2007 when the Human Rights Campaign (HRC), one of America’s most influential LGBT advocacy groups, decided to support Representative Barney Frank’s Employment Non-Discrimination Act (ENDA), even though the proposed bill omitted protections for transgender persons. The ENDA controversy has haunted the HRC ever since, and continues to be a major stumbling block in that organisation’s efforts to build a truly “rainbow coalition.”

In recent weeks, a number of events have recalled the fractious relationships which exist within LGBT coalitions. On August 19, 2014, the Guardian newspaper noted that Mariella Castro, daughter of Cuban President, Raul Castro, had cast a rare dissenting parliamentary vote, protesting the passage of employment non-discrimination legislation which, although protecting LGB individuals, made no provision for transgender persons. Similarly, on August 21, 2014, the Daily Mail reported on the first openly transgender serviceperson to see frontline action with the UK army. The article highlighted that the fact, while the 2011 repeal of “Don’t Ask, Don’t Tell” was hailed as an historic victory for the entire LGBT community, transgender persons are, in fact, still denied access to America’s armed forces.

In the recent case of Hämäläinen v Finland [2014] ECHR 787, the applicant, a married transgender woman, challenged Finland’s requirement that she dissolve her marriage before accessing legal gender recognition. Ms Hämäläinen had sought to distinguish her case from the wider same-gender marriage debate, arguing instead that, having contracted a valid marriage, she and her wife could not be made to divorce without a pressing justification. For some gay and lesbian commentators, Ms Hämäläinen’s strategy was tantamount to selling out sexual orientation equality. In trying to differentiate her case from same-gender marriage, Ms Hämäläinen was accused of relying upon her former “heterosexual privilege” in order to access a marital institution which is not available to any other same-gender couples. However, such criticisms ignore the cultural context in which many transgender activists have struggled to advocate for basic equality rights over the past half-century. They implicitly suggest that, even when transgender persons break free of the restrictive binds of “LGBT politics”, they must still prioritise the well-being of gay men and lesbians.

It goes without saying that there are many LGBT groups which have successfully married sexual orientation and gender identity advocacy, doing so without compromising the rights and integrity of transgender individuals. The committed participation of Transgender Equality Network Ireland (TENI) at the recent March for Marriage in Dublin illustrates the powerful impact of united, mutually respectful, LGBT coalitions. Moving forward, as sexual and gender rights activists achieve further successes, they must be careful to maintain a truly inclusive agenda and to not lose sight of “T” concerns within the complicated forest of LGBT politics.

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In the western hemisphere, only 11 Caribbean states still criminalize private consensual adult same-gender intimacy. Among these countries, Belize and Trinidad and Tobago also ban the entry of homosexuals.

In a pending case before the Caribbean Court of Justice (CCJ), in which I am the applicant, AIDS-Free World (AFW) initially asked the Jamaican government to intervene on my behalf. I am required to work across the region, and was thus affected by the travel ban. Jamaica refused and special leave was sought to bring a private action before the CCJ, the region’s highest court. The claim was for violations of the rights to freedom of movement and national treatment found in the Revised Treaty of Chaguaramas (RTC), which established the Caribbean Community (CARICOM). On May 8, 2014 the CCJ granted leave and the matter is now set for trial.

The Immigration Act of Trinidad and Tobago was last revised in 1995. Section 8 of the statute lists groups of persons who are deemed “prohibited classes.” Included in this list are many individuals who UNAIDS has identified as being vulnerable to HIV and AIDS, including the disabled, homosexuals, and sex workers. The universal standard for designing and implementing anti-HIV interventions is the Greater Involvement of People with HIV/AIDS (GIPA). Yet, the UNAIDS Caribbean regional office is based in Trinidad, a country where many of the people the organization serves are barred from entering.

The Belize act, which was updated in 2000, is less discriminatory than its Trinidadian counterpart. However it similarly bars the groups of persons listed above.

Though rarely enforced, the travel ban on homosexuals has been invoked, particularly by Trinidad and Tobago. The most notable instance was in 2007 when church groups complained that Sir Elton John’s planned performance at a concert was illegal, and likely to convert impressionable youth.

Freedom of movement and national treatment are entrenched rights in the RTC. The CCJ has the exclusive jurisdiction to adjudicate on any breaches of the treaty, and in a 2013 decision, Myrie v Barbados, 2013] CCJ 3 (OJ) the court clarified the liberal interpretation of these rights.

The very political nature of CARICOM requires that citizens, like AFW’s Jamaican employee, must first ask their home state to bring a CCJ action on their behalf. Only if the state refuses can the national approach the court for special leave to pursue the matter themselves. As an international court, the CCJ is only empowered to act when actual harm has occurred.
An application for special leave was filed with the CCJ on May 31, 2013 (Tomlinson v Belize and Trinidad and Tobago [2014] CCJ 2(OJ)). Both Belize and Trinidad resisted the application, however, at the hearing on November 12, the court heard from both governments that there was no intention to enforce the laws. When the court then inquired as to the need for these unenforced statutes, the senior counsel representing the Republic of Trinidad and Tobago indicated that the law was necessary to keep out terrorists(!)

In a unanimous decision the 5-member panel found that the travel ban created an arguable case of prejudice. Specifically the court stated: “In relation to homosexuals, there is indeed international case law, in particular jurisprudence of the European Court of Human Rights and the UN Human Rights Committee which suggests that under certain circumstances the mere existence of legislation, even if not enforced, may justify a natural or legal person to be considered a victim of a violation of his or her rights under an international human rights instrument.”

On July 24 the CCJ gave the governments of Belize and Trinidad until September 16 to file their defences. The usual case management hearing will follow at which time a trial date will be set. This is not expected before 2015.

Although narrowly framed as a Caribbean case, the likelihood is that if successful, this action would strike down the anti-gay sections of the immigration laws. This would benefit citizens from every country in the world. The case also has implications for the decriminalisation debate across the Caribbean where several court challenges are seeking to repeal British colonially imposed anti-sodomy laws. The fact that the region’s highest court took judicial notice of the harmful impact of unenforced laws that discriminate against homosexuals will be significant in these cases.

Maurice Tomlinson is an Attorney-at-Law, law lecturer and facilitator with LGBTI Aware Caribbean, an organization providing LGBTI awareness training for Caribbean security forces. Maurice was the inaugural winner of the David Kato Vision and Voice Award.

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Uganda’s Anti-Homosexuality Law and Our Cultural Wars
By Dimitrina Petrova | 12th August 2014

Future historians will reference the developments around Uganda’s anti-homosexuality law as a textbook example of a proxy battle fought within the ongoing cultural wars of our time: a legal and political confrontation, in a remote African theatre, between local actors connected, through charts of socio-political reflexology, to global stakeholders.

It was an interim victory for equal rights when, on 1 August 2014, the Constitutional Court of Uganda struck down the Anti-Homosexuality Act 2014 as void on the procedural ground that the Parliament had violated quorum rules during its passage. But the Ugandan battle is far from over.

Having begun in 2009, five years later the story of the Ugandan anti-homosexuality law has epitomised the ideological clash between the West and the Rest. External actors have been supporting the key players inside Uganda. Through seemingly confusing moves on the surface, such as the negative reaction from many local and international LGBT activists to outspoken support from mainstream Western liberals, one can distinguish two sides militating against each other over global cultural values. On one side, LGBT rights activists and human rights groups around the world, aligned with liberal and humanist movements. On the other, American evangelicals and other conservative religionists, homophobic populists, assorted politicians from the global South, and China and Russia lurking behind the dust.

The infamous Bill envisaged the death penalty for “aggravated homosexuality” and severe punishments for broadly-defined activism in favour of sexual diversity. The global campaign against the Bill reached a volume that few local human rights scandals have achieved in the last decade: one more reminder that the ground shifts where law meets politics.

On the legal side, the Bill of course violated the Constitution of Uganda, as did the slightly milder law that entered into force in February 2014. As the Equal Rights Trust argued in a detailed legal brief in December 2009, it breached, inter alia, Articles 21 and 43 of the Ugandan Constitution, plus numerous provisions of international treaties binding on Uganda.

However, what mattered more was the dynamics of protest. Along with Ugandan campaigners, groups from around the world condemned the Bill, politicians and celebrities raised concerns, UN bodies put pressure on Uganda to change course, global leaders threatened aid conditionalities and sanctions, and US rights activists filed a law suit against the evangelical missionary Scott Lively of Abiding Truth Ministries under the Alien Torts Act. While this did not stop the new law, it may have impressed the Constitutional Court judges in Kampala.

But the political impact on the judiciary is deniable, as the honourable judges did not address the substance of the legislation and its compatibility with the Constitution. They just did their job as impartial jurists: striking down a law voted in violation of legislative procedure. We still have an occasion to raise a glass: procedure is important in a constitutional democracy, and so we celebrate a
victory for the rule of law, with its side effect of reducing the risk for gay persons in Uganda exercising basic rights, for the moment.

But there are two dark clouds on the horizon. First, homosexuality remains illegal in Uganda, under Article 145 of the Penal Code, and this continues to have immediate consequences. On 23 June 2014, the High Court delivered a ruling in Jacqueline Kasha Nabagesera and others v. The Attorney General and Hon. Rev. Fr Simon Lokodo [2014] UGHCCD 85, in which the applicants, an LGBT group, lost on all grounds. They had tried to hold a training workshop on human rights, but the authorities ordered it cancelled. The applicants complained that this was a breach of a number of constitutional rights, but the High Court dismissed their complaint, apparently on the basis that the workshop would encourage people to engage in gay sex – an offence under Article 145 of the Penal code.

Second, there is a danger that the government will try to re-adopt the Anti-Homosexuality law, while in the meantime LGBT persons in Uganda continue to suffer profound discrimination and gross inequality. Uganda does not have an established legal framework protecting people from discrimination on any ground, including sexual orientation. Without such a framework, progress toward equality is not sustainable.

Even if these two clouds drift away from the Ugandan sky, the forecast for the global ideological climate remains unsettling for human rights, at least in the mid-term. In the cultural wars between the West and the Rest, the lack of clear-cut geo-political combatants cannot conceal the ground being gained by homophobic, anti-liberal, conservative religious movements.

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the offence of gross indecency was created in 1885. This turned intimacy and affection between two men, whether in public or private into a crime. Writing in 1898, Oscar Wilde presciently asserted, “I have no doubt that we shall win, but the road is long, and red with monstrous martyrdoms.”

In post-war Britain life was impossibly bad for gay men. In the 1950s, there were 1,069 gay men in prison in England and Wales, with an average age of 37 years. Home Secretary, Sir David Maxwell Fyfe promised to “rid England of this plague”. Speaking in the House of Commons in 1953, Maxwell Fyfe enthused, “Homosexuals in general are exhibitionists and proselytisers and are a danger to others, especially the young. So long as I hold the office of Home Secretary, I shall give no countenance to the view that they should not be prevented from being such a danger.”

Yet barely a lifetime later, the UK today is the best place to be gay in the world; although with deep and profound remorse and regret this liberation has not been extended to our Commonwealth cousins. How in less than a lifetime did the UK go from the worst to the best?

LGBT equality emerged from three sources: legislation, litigation and cultural expression, including popular culture and films and TV. This short note will only focus on the role played by legislation. A catalyst for the changes in law was the Church of England. In 1954 The Problem of Homosexuality, was published by the Church of England Moral Welfare Committee. It concluded:

“It is the responsibility of society at large to see that those of its members who are handicapped by inversion are assisted to a constructive acceptance of their condition and are helped to lead useful and creative lives.”

his in turn led to the publication of the 1957 Wolfenden Report, which transformed the debate by, for the first time, permitting an evidence-based and objective debate on homosexuality, morality and the role of the state.

The crucial step towards actual equality began with Labour’s Roy Jenkins, who as Home Secretary permitted the Private Members Bill, sponsored by Lord Arran in the House of Lords and Leo Abse in the Commons, providing for the decriminalisation of homosexuality, to pass through both Houses of Parliament in 1967. Through the Sexual Offences Act 1967 Parliament granted partial decriminalisation: consenting men over the age of 21 who engaged in intimate sexual relations in private no longer committed an offence.

The 1967 legislation was consciously not promoting a gay identity. It was merely offering a refuge from the worst excesses of the criminal law. 1967 ushered in a new dawn, but it was one of toleration, not acceptance.

For the following quarter of a century the law remained silent. Prosecutions continued to blight the lives of gay men caught outside the scope of the ’67 Act. In 1994 the age of consent for gay men was lowered to 18; but other than this, the lifting of the ban on gay men and lesbians working for the Foreign and Commonwealth Office, and a decision of the European Court of Human Rights, permitting gay men and lesbians to serve in the armed forces, nothing much happened for LGBT equality. In 1988 section 28 of the Local Government Act was introduced, banning promotion of homosexuality as a ‘pretend family relationship’. A community that had been subject to discrimination now found itself persecuted once more.

By 1988 the AIDS crisis, which was decimating lives and spreading fear and hostility was at its height. There was little or no prospect of escape from the ravages of AIDS and yet the community that was most affected by it became the target of opprobrium justified by state sanctions.

This post-1967 settlement was maintained until the status quo was unbalanced by the election of New Labour. Between 1997 and 2010 New Labour kept to its word to get rid of unjustified discrimination. Backed by EU regulations, the Equality Act 2010 sealed LGBT equality. Prior to this there had been cross-party support for civil partnerships and the odious crime of gross indecency has been banished from the statute book in 2003. Section 28 of the Local Government Act was also eventually repealed.

David Cameron’s coalition government completed the picture in 2013. By providing for equal marriage, life for the lesbian and gay community became everyday. People in the UK are now no longer treated differently simply because their sexual orientation differs from that of the majority. But as Wilde had pointed out, the path to liberation was littered with martyrs.

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Scotland’s Gay Rights Journey
By Andrew Tickell | 10th February 2014

On 4 February 2014, MSPs passed the SNP government’s Marriage and Civil Partnership (Scotland) Bill into law, 105 votes to 18. Exemplifying the disunities of contemporary UK politics, the Scottish equal marriage debate has been largely insulated from the wider UK discussion. But this debate, and the new legislation, differs in important respects from the more cautious proposals agreed by Westminster last year.

Scotland’s relationship with gay rights has been decidedly ambivalent. In the 1960s, before devolution, Scotland’s dourer Presbyterianism, conservatism in matters of sexual morality and the influence of Scottish Labour politicians spiked the extensions of the liberalising influence of the Wolfenden Report north of the Tweed. While the Sexual Offences Act of 1967 did away with homosexual offences in England and Wales, Westminster did not pass equivalent legislation for Scotland until 1980.

With devolution in 1999, the Section 28 debate in Scotland was bitter and protracted. Stagecoach millionaire, Brian Souter, funded a private postal referendum on the Lib-Lab Scottish Executive’s proposals to eliminate the clause banning the “promotion of homosexuality” in schools, attracting around a million responses, just under 87% of them against scrapping the provision. While section 2A was eliminated from the statute book by the Scottish parliament in 2000, the experience was unpleasant and divisive one for Scotland’s LGBTQ community.

Perhaps reflecting this, in 2004 Holyrood avoided reopening a distinctively Scottish debate on the introduction of civil partnerships. Although family law is not a reserved matter, Holyrood gave Westminster consent to legislate on its behalf, and a pan-UK law was adopted. The recent free vote, in which 85% of Scottish law-makers endorsed the reform, exemplifies a quiet revolution in our attitudes towards sexuality.

Opposition to the proposals was largely cast in religious terms. Early on, the Scottish Catholic Bishops’ Conference emerged as the key voice opposing same-sex marriage, though their advocacy was characterised by its intemperance. The government’s announcement of its firm intention to legislate coincided with the revelation that the Archbishop-Elect of Glasgow linked, in public remarks at Magdalen College, the early death of Scottish Labour MP David Cairns with his sexuality. The Bishops’ spokesmen struck similarly inflammatory notes in their media appearances, struggling to articulate a comprehensible, populist case rooted in the theology of natural law.

Cardinal Keith O’Brien’s shock resignation in February last year represented a serious setback for opponents of the legislation, who struggled to recover their voice. It was left to a few scattered Tory, Labour and SNP parliamentarians to make the case against the legislation. It was a half-hearted performance.

So what will the Scottish legislation do? At its most basic, it provides for civil same-sex marriage and for religious and belief bodies to conduct ceremonies on an “opt in basis”. It also rationalises the classification of organisations empowered to conduct marriages. Under the status quo, for example, the law classifies weddings conducted by the Humanist Society as ‘religious’ in character (accounting for 15% of Scottish weddings in 2010, second only to Church of Scotland weddings, which made up 43% of the total). The legislation puts these atheistic and agnostic bodies on the more appropriate ‘belief’ footing.

It also extends the capacity of religious and belief bodies to register civil partnerships – an area where Scots family law has lagged behind England – and relaxes restrictions on where civil ceremonies can be conducted. For those organisations so minded, yesterday’s legislation represents a substantial extension of religious freedom to conduct legally effective marriage and civil partnership ceremonies.

Most significantly, the legislation also eliminates the iniquity of making gender recognition contingent on divorce or dissolution of an existing civil partnership, obliging trans people to make a brutal and unnecessary choice between legal recognition of their gender, and continuing legal recognition of their relationships.

But yesterday’s parliamentary session was also marked by its unfinished business, particularly with respect to civil partnerships. With the gendered nature of marriage being eliminated, how can limiting civil partnerships only to same-sex couples be justified? The Cabinet Secretary, Alex Neil, made it clear that more change is coming speedily down the line before the Scottish parliamentary election of 2016.

Should the two parallel schemes be done away with altogether, folding civil partnerships into marriage, or is there something distinctive about civilly-recognised coupledom, distinct from marriage, which is worth preserving and extending? Another controversy, for another day.

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The term “counter-majoritarian” has, more often than not, been used in a derogatory fashion – especially when it is used to describe an institution like the Supreme Court. However, after the Supreme Court’s ruling on S.377 of the Indian Penal Code, whereby it re-criminalized homosexuality after four years of it being decriminalized in India, it may be time for the Supreme Court to actively engage with the idea of being a “counter majoritarian” institution when required.

Judicial review has primarily arisen from the idea that in a functioning democracy, there is a need for a balancing institution to keep the majoritarian view in check. According to Dworkin, a counter majoritarian institution, like the Supreme Court, is tasked with the responsibility of protecting the rights of minorities and shielding them from the majoritarian voices not in consonance with a nation’s constitution as well as universally accepted norms of human rights.

In this context, a few points stand out in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013 which overturned the Delhi High Court’s decision decriminalizing homosexual conduct. In para 43 of its judgment, the Supreme Court categorically stated that the Delhi High Court, while decriminalizing homosexual activities, ignored the fact that members of the LGBT community form a miniscule fraction of the country’s population and, therefore, the High Court’s reasoning was misplaced in striking down the law.

Furthermore, in para 32, the Court held that the will of the legislature was reflected by the fact that the law remained unamended even after the passing of the 2013 amendments to the Indian Penal Code. (However, at the same time it conveniently ignored the fact the Government per se did not prefer an appeal and, in fact, accepted the legal soundness of the High Court’s verdict [para 21]).

Additionally, in para 52, by stating that the Parliament would be the final arbiter as regards the “so called rights” of the lesbian, gay, bisexual and transgender community, the Supreme Court has pushed this issue, a political non-starter, into the political realm: one which is inherently majoritarian in nature.

These observations by the Supreme Court highlight its misplaced approach to the recognition and protection of the rights of minority groups in this country. By taking such a majoritarian stance, the Court has not only ignored history (i.e when the will of the majority was disregarded to bring about progressive social change by allowing widow remarriage and also criminalizing the accepted social practice of immolation of a widow on her husband’s funeral pyre, to name a few instances). It has also ignored constitutional values so eloquently enunciated as “constitutional morality” by the Delhi High Court. It has put the dignity that the LGBT population is most certainly entitled to in the hands of a hetero-normative populace with deep-seated notions of gender norms and stereotypes rooted in tradition and religion.
By following an isolationist approach based on majoritarian views, and ignoring the ever evolving global rights movement, as well as comparative constitutional jurisprudence, the Supreme Court runs the risk of being a status quo-ist, and not a progressive, institution. This is simply not acceptable in a country which claims to be the largest democracy in the world.

The rule of law necessitates governance by law and not governance by the mere will of the majority. While this assertion may seem antithetical to the normative understanding of the "law", especially in a democracy, it can safely be said that sometimes the rule of law and the "rule of the majority" can be mutually exclusive. As highlighted above, there are, and have been, certain instances that require institutions to disregard majoritarian sentiments and turn towards higher constitutional principles. The Court may have tried to be counter-majoritarian in the past, but cherry picking its approach depending on how it feels on a particular issue (as evidenced by its treatment of LGBT rights as "so called rights"), and its misplaced deference to a majoritarian institution like the Parliament, especially in matters of civil liberties, not only delegitimizes its existence as an institution, but also questions the very meaning of the rule of law.

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Over to You, Parliament – The Significance of the Australian High Court’s Judgment on Same-Sex Marriage

By Katie O’Byrne | 14th January 2014

A striking feature of Australian High Court jurisprudence in recent years is the Court’s use of orthodox judicial analysis to decide issues of deep political controversy and high significance for individual rights.

This can be seen in the recent case of The Commonwealth v Australian Capital Territory [2013] HCA 55. In that case, the High Court considered the validity of the ACT’s Marriage Equality (Same Sex) Act 2013, which purported to legalise same-sex marriage in the ACT. The High Court unanimously found the whole of the ACT Act to be inconsistent with the Commonwealth Marriage Act 1961 and of no effect.

The Court reasoned that the Marriage Act is to be read as providing that the only form of “marriage” permitted in Australian law is that recognised in the Act. Following reforms introduced by former Prime Minister John Howard in 2004, the Marriage Act defines marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. That definition was taken from the English case of Hyde v Hyde and Woodmansee [L.R.] 1 P. & D. 130 (1886) (itself now superseded by legislative reform in the UK).

Despite the disappointment felt by many at this result, those who favour marriage equality should be heartened by the Court’s reasons. In order to determine whether there was inconsistency between the ACT and Commonwealth Acts, the Court examined the extent of the marriage power in s 51(xxi) of the Constitution. Through its orthodox treatment of well-established principles of constitutional law and statutory interpretation, the judgment has made several gains for marriage rights.

First, notwithstanding the definition currently in the Marriage Act, the High Court confirmed that the constitutional definition of marriage is not frozen in time and is not strictly confined to “the union of a man and a woman”. Rather, the constitutional term “marriage” is “a topic of juristic classification” that changes over time. The Court confronted cases from the nineteenth century including Hyde, explicitly debunking antiquarian definitions “which accord with a preconceived notion of what marriage ‘should’ be”. The effect of these findings is recognition by the High Court that there is no constitutional reason why same-sex marriage cannot be permitted in Australian federal law.

The Court’s clear finding that the Commonwealth has the power to enact same-sex marriage legislation dispels any doubts the Government might have had as to whether that power exists. It also discredits the deployment of any such ambiguity by the Government or lobby groups to justify political inaction or opposition.

Secondly, the High Court articulated the definition of “marriage” under s 51(xxi) of the Constitution as “a consensual union formed between natural persons in accordance with legally prescribed requirements”. Therefore, “[w]hen used in s 51(xxi), ‘marriage’ is a term which includes a marriage between persons of the same sex”.

This clear and unambiguous language, in a rare unanimous opinion on a constitutional question, carries the full weight of the Court’s authority and lends a particularly potent legitimacy to its decision.

Thirdly, the High Court referred to definitions of marriage in other jurisdictions, not to influence the content of Australian law, but simply to demonstrate that the social institution of marriage “differs from country to country” and is now more complex than the anachronistic conceptions of 150-year-old English jurisprudence. The High Court brings Australian constitutional law up to speed
with legislation in countries that have permitted same-sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage. The judgment may well come to influence courts in other jurisdictions when considering this issue in the future.

Having settled the constitutional principle, the judgment shifts the challenge to Parliament to decide whether to enact same-sex marriage legislation. It now remains for parliamentarians who support marriage equality to demonstrate the courage and expend the political capital necessary to effect legal change. Only then will Australia achieve the measure of equality that the High Court has confirmed Parliament has power to create and that a healthy majority of the electorate supports.

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Reviewing Koushal: Counting Down the Errors Apparent on the Face of the Record
By Shreya Atrey | 27th January 2014

The seven review petitions filed in the case of Koushal v Naz Foundation Civil Appeal No. 0972 of 2013 ("Koushal") are an exercise in drawing up the rather lengthy list of errors apparent on the face of the Supreme Court of India's record.

On 11.12.13 the Supreme Court in Koushal reversed the Delhi High Court decision in Naz Foundation v Government of NCT WP(C) No.7455/2001 ("Naz Foundation") which had declared section 377 of the Indian Penal Code unconstitutional insofar as it criminalised consensual sexual acts of adults in private. Each of the petitions painstakingly reminds the Supreme Court of the arguments which although it had heard and read during the long drawn litigation, chose to forget while writing the Koushal decision.

Error Apparent on the Face of the Record
The Supreme Court can quash an order for error apparent on the face of the record. The error must be one of law not fact, and it must be manifest or patent and not mere error. Errors can only be traced in ‘Speaking Orders’ of the Court, that is, those which enunciate the reasons in law on which a decision is made. The Supreme Court’s order in Koushal enunciates its reasons quite clearly, though incorrectly, for reversing the decision in Naz Foundation. The errors apparent on a bare perusal of Koushal reasoning are now being challenged before the Supreme Court.

Review Petition by Mental Health Professionals
The review petition in Dr. Shekhar Seshadri & Others v Suresh Kumar Koushal & Others, recounts forty-one errors apparent on the face of the record. The ground for challenge is the material error on the face of the record ensuing from the failure to consider
their contentions as the only party before the Supreme Court with professional expertise in the medical and mental health issues of LGBT persons. The Supreme Court in Koushal had reversed the Delhi High Court decision citing the petitioners’ failure to establish a factual foundation for the challenge to the constitutionality of section 377. The justices found the challenge “singularly laconic” and “wholly insufficient”, which “miserably failed” at establishing the particulars of the discrimination claim. In this petition, and in six others, the effort has been to remind the Court of not just the formidable factual foundation established before the Koushal Court, but in turn demonstrate the amnesiac outlook of the Court towards the case of review petitioners.

Two grounds covered by the mental health professionals are noteworthy. First, they show that the Koushal Court’s ruling on the lack of a factual foundation violates the doctrine of res judicata which debars litigation on an issue that has already been settled. The Delhi High Court had previously rejected the constitutional challenge to section 377 for lack of cause of action; but on appeal, the Supreme Court order dated 03.02.2006 remitted the case for adjudication before the High Court. The lack of cause of action had since not been contended at any stage. The issue of ‘lack of factual foundation’ had thus attained finality through the order of a four-judge bench on 03.02.2006 and its subsequent restitution in the Koushal decision is contrary to the doctrine of res judicata.

Secondly, the petition reiterates earlier submissions in the Supreme Court and those considered before the Delhi High Court, that: i) homosexuality was not a mental disorder but a normal and natural variant of human sexuality; and ii) the criminalization of LGBT persons adversely affected their mental health. These contentions were considered and reaffirmed in the Naz Foundation judgement at paragraphs 67-70. They were further submitted in detailed written and oral arguments along with authoritative scientific literature and remained uncontroverted in the Koushal Court. The Supreme Court’s failure to deal with these submissions is a material error that has resulted in a serious miscarriage of justice.

Error and Failure
Although the legal boundaries of a review petition simply require the petitioners to reveal an error apparent on the face of the record, the review petitions do this and more. They remind the Court to not just avoid an error, but to fix a colossal case of non-performance. The review stands for a reminder of the Court’s essential judicial function—to not abdicate its primary task of reviewing materials and making a decision based on the actual case raised before it. The review then asks the Court to not just do its job well, but perhaps simply to first do its job at all.

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Surrogacy, Same-Sex Couples and the Privatisation of Regulation in Israel
By Jonathan Berman | 27th February 2014

On 30 January 2014, the Israeli Government published a draft bill on surrogacy. This proposed amendment to Israel’s 1996 surrogacy law, which was based on a deeply entrenched heteronormative vision of the family, will allow same-sex couples to take part in surrogacy procedures in Israel for the first time.
The 1996 law defines the “parents to be” as a “man and woman”, and therefore excludes same-sex couples and single persons. In the past few years, same-sex couples were often compelled to choose between giving up their hope to have children or entering surrogacy arrangements abroad. India and Thailand became popular countries for Israeli same-sex couples who looked for alternative locations where they could become parents through surrogacy procedures.

This option raised several concerns. The high financial costs involved in these extra-territorial surrogacy proceedings rendered this option impossible for most people. But perhaps more importantly, the lack of regulatory oversight of these proceedings induced many to raise questions about the potential human rights violations of the women involved. In the past few years the LGBTIQ community in Israel, as well the feminist community, engaged in vigorous debates on the moral questions involved in “overseas surrogacy” (and surrogacy in general). Some pointed at the concerns of exploitation of women either by commercial companies involved in surrogacy or by other men, such as family members who may have control over some women’s choices. However, others expressed the view that questioning the free will of impoverished women who are attempting to improve their financial situation through surrogacy is paternalistic. Some opponents also conceptualised these practices of overseas surrogacy in terms of neo-colonialism, portraying the image of the white male who comes from a relatively wealthy country and uses the non-white woman’s womb as commodity.

The proposed bill will end the discrimination between heterosexual and gay couples. It will not, however, end the more general debate concerning the morality of surrogacy. Additionally, it will not render the concerns raised in relation to “overseas surrogacy” obsolete. Under the assumption that the demand for surrogacy procedures by Israelis will exceed the number of Israeli women willing to enter surrogacy agreements, the bill envisions a continuing use of “overseas surrogacy”, and purports to regulate it.

The regulatory arrangements presented in the bill (both in relation to “home surrogacy” and “overseas surrogacy”) purport to adhere to the middle ground between opposing poles – the belief that surrogacy entails no moral or practical problem and should be left entirely to the free market, and the belief that it is an unacceptable form of commodification of the female body, which should be disallowed altogether.

Unfortunately, the proposed regulatory measures seem to reflect a clear neo-liberal profit-based vision. The regulatory model which the bill adopts is loosely based on state supervision, and delegates several functions to privately owned entities. “Overseas surrogacy” will be made available only to persons using the services of profit-based corporations based in Israel.

This model of regulation raises a number of concerns. The involvement of another commercial agent in the chain of mediation might result in either an increase of the cost of surrogacy or, more likely, a decrease in the compensation the weakest link in this chain, the surrogate mother, will receive. But perhaps more importantly, once the challenging task of ensuring that basic principles such as appropriate medical conditions or guarantees against coercion and exploitation of women, is placed at the hands of institutions whose main consideration is profit, concerns should be raised about such entities’ inclinations to compromise over protection of basic rights in order to maximise their business potential.

Similar doubts should be voiced due to the fact that the bill confers the power to determine the competence and eligibility of potential parents upon these profit-based corporations. The privatisation and mercantilisation of a mechanism, which has a say in the realisation of a basic human right, the right to family life, raises serious concerns.

While state bureaucracies may not always be the ideal or most efficient agents for handling surrogacy agreements and procedures, it seems that privatised regulation of this delicate matter holds the potential of serious human rights violations. This model should therefore be reconsidered by the Israeli Government before the bill turns into binding legislation.

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What Next for LGBT Equality?
By Karl Laird  | 11th June 2014

It has been almost a year since the Supreme Court of the United States delivered judgment in Windsor v United States 570 U.S. ___ (2013) and in the intervening twelve months there have been an increasing number of cases considering the constitutionality of prohibitions on same-sex marriage.

As of June 2014, same-sex couples can lawfully marry in nineteen states and in the District of Columbia. Thirty-one states, however, still prohibit same-sex marriage, either by law or constitutional amendment. While it is important to appreciate that the increasing prevalence of same-sex marriage is not due solely to success in court, it is in the courtroom where advocates for marriage equality are having the most success. There are currently 30 same-sex marriage cases pending before federal courts and another 10 before state courts. The Supreme Court’s decision in Windsor has acted as a catalyst, and perhaps explains why
advocates of same-sex marriage have had such extraordinary success in court since July 2013. It appears that lower courts, at both state and federal level, have interpreted Windsor as a decision in which the Justices have given their imprimatur to same-sex marriage.

When Windsor was decided I welcomed the outcome but lamented the judgment’s questionable analytical quality, in particular the failure to address squarely the issue of whether LGBT people ought to qualify for heightened protection under the Equal Protection Clause of the Fourteenth Amendment. Should LGBT people be recognized as a suspect or quasi-suspect class? It could be argued that the tsunami of successful same-sex marriage cases undermines the validity of my concerns. An analysis of some of these cases, however, demonstrates the prescience of these concerns and indicates what the next issue for the Supreme Court to consider in relation to LGBT equality will be.

In Kitchen v Herbert Case No. 13-4178 the court held that Utah’s prohibition on same-sex marriage was subject to heightened scrutiny on the basis that it constituted sex discrimination, but that it ultimately failed even the most deferential standard of review. The court was unable to consider whether LBGT people constitute a quasi-suspect class as it was bound by an earlier precedent holding that they do not.

Interestingly, in Bishop v US No. 04-CV-848-TCK-TLW the court rejected the argument that prohibitions on same-marriage constitute sex discrimination. In DeLeon v Perry Cause No. SA-13-CA-00982-OLG the District Court found the argument that LGBT people constitute a quasi-suspect class ‘compelling’ but invalidated Texas’ prohibition on same-sex marriage on the basis that it failed to satisfy even rational basis review. In contrast, in Windsor v US 12-2335-cv(L) and Massachusetts v Dept. of Health and Human Services Civil Action No. 1:09-11156-JLT, two different federal courts held that LGBT people constitute a quasi-suspect class and therefore ought to be accorded the protection provided by a heightened standard of scrutiny.

More recently, in a case concerning whether LGBT people could be excluded from juries because of their sexual orientation, the Ninth Circuit Court of Appeals held in SmithKline Beecham v Abbott Laboratories that the Supreme Court in Windsor in fact established a standard of review for classifications based on sexual orientation higher than rational basis review. The court held that, “there can no longer be any question that gays and lesbians are no longer a group or class of individuals normally subject to ‘rational basis’ review.”

In that case the court purported to look at the substance of Justice Kennedy’s opinion rather than on simply what he said. It is submitted that the next issue for the Supreme Court to grapple with in relation to LGBT equality will be whether sexual orientation is a suspect classification. Given the divergence amongst lower courts, resolution of this issue ought to be considered a matter of urgency. In wading into this controversy the Supreme Court will have to face the difficult truth that much of its equality jurisprudence concerning standards of review lacks coherence and analytical clarity.

Rather than simply alluding to the status of LGBT people as a quasi-suspect class, the uncertainty currently prevailing in the lower courts demonstrates that the Supreme Court must state this explicitly. Recognition of sexual orientation as a suspect class will be essential to remedying the discrimination that LGBT people continue to face in the United States. Whether the Supreme Court is ready to grapple with this intractable controversy remains to be seen.

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Hämäläinen v Finland: The Transgender Divorce Requirement in Strasbourg

Peter Dunne | 31st July 2014

In the landmark 2002 decision, Goodwin v United Kingdom [2002] ECHR 588, the European Court of Human Rights (“ECHR”), citing an “unmistakable trend” among Council of Europe member states, established a general right for post-operative transgender persons (termed “transsexuals” in the judgment) to access legal gender recognition. In the absence of “concrete or substantial hardship or detriment to the public interest”, the UK’s failure to provide Ms. Goodwin with an amended birth certificate (which had also prevented her from entering into a valid marriage) was held to violate arts. 8 and 12 of the European Convention on Human Rights (“ECHR”).

While Goodwin acknowledges a general right to recognition, the European judges were careful not to set down any particular procedures or rules which a state must follow in granting such recognition. The result has been significant variation in gender recognition regimes across Europe, ranging from Denmark’s recent move towards a self-identification model to the requirement for invasive and irreversible surgical intervention, which is still enforced in certain European countries, such as France. While many of these “conditions of recognition” have been subject to legal challenge before national courts, there have been comparatively few cases of this kind before the Strasbourg court.

On July 16, 2014, the Grand Chamber issued an important decision concerning one of the most common conditions of recognition
– the requirement that an individual be single or divorced. In Hämäläinen v Finland [2014] ECHR 787, the applicant was a married transgender woman who sought to obtain legal recognition of her preferred gender in Finland. The Finnish authorities refused her request because the applicant was, contrary to national law, still married. The applicant and her wife, on the basis of their religious beliefs, were unwilling to automatically convert their marriage into a civil partnership, as provided for under Finnish law. The applicant argued that the conversion requirement set down in national law was a violation of her rights under arts. 8, 12 and 14 ECHR.

The Grand Chamber, affirming an earlier Fourth Section decision, rejected the applicant’s submissions. In its judgment, the majority noted that, although art. 8 ECHR does apply to a married post-operative transgender person in the applicant’s position, the current Finnish law does not violate her right to private and family life. While the applicant had not specifically argued her case through the lens of same-gender marriage, a positive decision for the applicant would have resulted in two persons of the same legal gender inhabiting a marital relationship. The applicant’s case could not, therefore, be divorced from the Court’s established jurisprudence on same-gender marriage, but rather had to be considered in the light of that case law. The majority, reaffirming earlier pronouncements in Schalk and Kopf v Austria [2010] ECHR 995 stated that art. 12 ECHR does not protect a right for two persons of the same gender to marry. Owing to the absence of a European-wide consensus, member states retain a wide margin of appreciation in regulating access to marriage and cannot be forced to accept same-gender marriage under the guise of legal gender recognition.

The Court concluded that there were a number of acceptable alternatives for the applicant and her wife, most particularly the possibility of automatically converting their marriage into a registered partnership. Under Finnish law, registered partners enjoy substantially the same rights as married couples. Similarly, the operation of the registered partnership would in no way effect the applicant’s legal relationship with her 12-year-old daughter.

There are numerous observations which can be made about the Hämäläinen decision (certainly many more than this short posting will allow). The dissenting minority (Judges Sajó, Keller and Lemmens) address a number of the most relevant critiques in their excellently-reasoned opinion. One such critique is that the majority should have given greater attention to the growing body of case law, epitomised by a 2008 judgment from the German Constitutional Court, which emphasises the unfairness of requiring individuals to choose between two fundamental rights – self-identification and marriage. Another critique is that the majority judgment has little regard for the extreme emotional hardship which marriage dissolution places upon many transgender persons, particularly when those persons, like Ms. Hämäläinen, have been lovingly supported through the difficult transition process by their spouse. Upon reflection, there may be much to support the minority’s conclusion that such marriage dissolution is not necessary or proportionate in a democratic society.

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Curing the Koushal Malady
By Danish Sheikh  |  30th April 2014

“We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error.”

With these words in Rupa Ashok Hurra v. Ashok Hurra Writ Petition (civil) 509 of 1997, the Indian Supreme Court articulated the notion of the curative petition. The final level at which the Court's jurisdiction might be invoked, the curative is a limited remedy enshrining the principle of *ex debito justitiae* – that any technicality should not outweigh the course of justice, even if the technicality here be something as significant as the finality of a legal decision.

On 22nd April 2014, the Court took an important step towards realizing this doctrine’s potential by agreeing to hear the curative petition filed against its decision in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013 in open Court. This is the final stage in the story of the constitutional challenge to Section 377 of the Indian Penal Code. By way of criminalizing “carnal intercourse against the order of nature”, the provision has been used as a tool of persecution against the LGBT community in the country since its inception in 1860. After a landmark 2009 victory in the Delhi High Court that resulted in reading down the section to exclude consensual same-sex intercourse, the matter was appealed by various private groups before the Supreme Court. With its Koushal decision in December 2013, the Court reversed the former ruling, effectively recriminalizing homosexuality. That it did so with devastatingly poor legal reasoning fuelled the strong backlash against it – and will prove significant for the hearing of the curative.

As mentioned, a curative petition is a limited remedy, one which may be invoked in instances where the judgment in question causes the perpetuation of irremediable injustice, where it would be oppressive to judicial conscience or where it shakes public confidence in the judiciary. These grounds are clearly applicable to Koushal. Amongst the notable omissions on behalf of the Court include its failure to accurately apply the constitutional test of equality under the law in a coherent manner; its complete non-consideration of the constitutional test of non-discrimination that was articulated by the Delhi High Court to include sexual orientation as protected category; and its inability to appreciate the voluminous evidence of persecution of the LGBT community and appreciate the link between the penal provision and its direct and inevitable oppressive effects. This last stand is one that another bench of the Supreme Court recently contradicted in National Legal Services Authority (Nalsa) v. Union of India Writ Petition Civil No. No.400 of 2012. Amongst its other findings, the Nalsa court noted that “Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras [biological males who reject their “masculine” identity in due course of time to identify either as women, or “not-men”, or “in-between man and woman”, or “neither man nor woman”] and was used as an instrument of harassment and physical abuse against Hijras and transgender persons”.

The importance of the curative may also be attested to by the manner in which the Koushal judgment has perpetuated a continuing state of injustice. The curative petition testifies to an increase in police harassment, a sharpening of social prejudice, individual suffering of psychological trauma and reduced self-esteem, and employment being jeopardized amongst its other adverse effects. J. Banerjee notes in his Ashok Hurra concurrence:

“Can it be said that the justice delivery system of the country is such that in spite of noticing a breach of public interest with a corresponding social ramification, this Court would maintain a delightful silence with a blind eye and deaf ear to the cry of a society in general or even that of a litigant on the ground of finality of an Order as passed by this Court ?”

The Koushal court’s silence in the face of this kind of suffering was deafening, tarnishing the legacy of the Supreme Court. It now stands to the curative bench to set the judicial record straight.

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India’s Third Gender and The Kaushal Problem
By Vishwajith Sadananda | 25th April 2014

As December 2013 drew to a close, the Indian Supreme Court inflicted the LGBT movement with a severe body blow by re-criminalizing homosexuality in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013.

However, on 15th April 2014, which will indeed be marked as a red letter day for human rights activists, and the transgender community in particular, the Supreme Court, in National Legal Service Authority v. Union of India (“NALSA”), has given legal recognition to the transgender community by mandating that they be treated as the third gender, thereby doing away with the binary understanding of gender.
The Supreme Court has primarily relied on Articles 14, 19 and 21 of the Indian Constitution to grant the transgender community recognition in the eyes of law. According to the Court, Article 14, dealing with the right to equality, uses the term “person,” which includes transgender individuals [para 54]. In other words, Article 14 does not restrict itself to binary terms like male and female and is applicable to all persons regardless of their gender identity. Furthermore, the Supreme Court went a step further to hold that under Articles 15 and 16 of the Constitution, which prohibit discrimination on the grounds of, *inter alia*, ‘sex’, the term ‘sex’ includes gender identity [para 59]. Articles 15 and 16 have widely been used to provide affirmative action and actualize economic and social rights in India. Therefore, the Supreme Court has taken a progressive step by not only mandating that transgender individuals should not suffer discrimination, but also ensuring that the State takes a positive role in their social and economic advancement.

As far as Article 19 is concerned, the Court was of the opinion that:

“Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender’s personality could be expressed by the transgender’s behavior and presentation. [The] State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality.” [para 66]

The Supreme Court also went on to hold that self-determination of gender is an integral part of personal autonomy and self-expression falling within the realm of Article 21, which guarantees the protection of life and personal liberty [para 69].

Relying on content-centric reasoning, the Court also used foreign judgments, as well as international instruments, to buttress its reasoning in recognizing the third gender. [paras 47 to 55]

However, even though the Court has issued directives to the Central and State Governments for the protection and advancement of the transgender community in line with the principles enunciated in the judgment [para 129], the effective implementation of the principles of the judgment does seem doubtful in the light of the decision in Kaushal.

It is axiomatic that sexual freedom falls within the ambit of actualization of one’s gender identity. At this juncture, it is interesting to note two observations of the Court in NALSA. Firstly, the Court observed that the transgender community in India was becoming more and more susceptible to AIDS as a consequence of lack of access to adequate health care due to rampant discrimination.
(attributable to draconian pre-colonial penal laws, as argued in Naz). Secondly, the Court highlighted how Section 377 of the Indian Penal Code has been historically used to “target certain identities” and as an “instrument of harassment and physical abuse” [para 18] (though it refrains from dealing with the constitutionality of that section).

However, as already stated, in Kaushal, the Supreme Court held that carnal sexual intercourse i.e, penile non- vaginal sex, is a criminal offence under Section 377. Under such circumstances, considering the fact that, regardless of its faulty reasoning, Kaushal is still the law of the land as far as the scope and applicability of Section 377 is concerned, the effective applicability and implementation of the Court’s Article 19 reasoning in NALSA – namely, the centrality of gender and identity expression and the State’s responsibility to refrain from infringing on this – is highly suspect.

It cannot be denied that NALSA is landmark judgment, with far reaching implications for gender justice in India, and possibly the world. However, for the effective realization of its principles, the “Kaushal Problem” has to be dealt with. Viewed in this context, the curative petition to be heard by the Supreme Court to reconsider Kaushal becomes all the more significant.

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INDIGENOUS RIGHTS AND HUMAN RIGHTS

The Right to Prior Consultation of Indigenous Peoples in the Americas (Part I)
By Ignacio de Casas and Lucas E Gomez | 21st June 2014

Neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights (ACHR) – the only treaties applied by the Inter-American Commission (IACHR) and the Inter-American Court – specifically enshrines the rights of indigenous peoples over their territories. Nonetheless, the interpretation given to these treaties by the Inter-American Human Rights System (IAHRS) organs is that these rights are protected by the right to property in article XXIII of the Declaration and article 21 of the Convention.

Thus, the IACHR has held, using an evolving interpretation, that “Article 21 of the American Convention recognizes the right to property of members of indigenous communities within the framework of communal property”; and that the right to property under article XXIII of the American Declaration “must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources”.

The right to consultation is, possibly, the most important development in this subject. Although it has not been contemplated as
such by the ACHR, the jurisprudence of the organs of the system has highlighted its importance as a vital requirement for the delimitation of the right to indigenous property, thus extracting it from the penumbra of articles 8 (which protects the judicial due process), 13 (access to information) and 23 (political rights) of the Convention.

Consultation is, indeed, contemplated in article 6 of the ILO Convention No. 169, which requires that consultation shall be made “through appropriate procedures”, “in a form appropriate to the circumstances”, and that it is necessary to “establish means by which the people involved may freely participate (…) at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programs which concern them”.

Within the IAHRS, Convention No. 169 is not applied. However, it is used as an interpretative frame, in accordance with the rule set in article 29 of the ACHR (as decided by the IACourtHR).

The main objective of the right to prior consultation consists in ensuring the effective participation of the communities possibly affected – whether directly or indirectly – in the decision making process that concerns them. In this way, consultation ensures the effective participation of the members of tribal or indigenous peoples or communities. It therefore requires that the State receive and provide information, as well as constant communication between the parties. It needs to be undertaken in good faith and should be carried out through culturally appropriate procedures, with the objective of achieving agreement or consent.

Therefore, it is the duty of the State to ensure the respect of the right to consultation, being in charge of ensuring its effective operation.

One might wonder whether the requirement to consult may be fulfilled where consultation occurs through private parties, whether the concessionaires of the exploitation/project themselves, or third parties. In principle, the answer may be no, since the duty of consultation is non-transferable, and may not be delegated by the State. The IACHR has expressed this fact when it held that “the making of consultation processes is a responsibility of the State, and not of other parties, such as the company that seeks to be granted the concession or the contract of investment”.

However, there are no objective reasons for denying the possibility of delegating part of the consultation (for example, the initial information process could be coordinated by the State and performed by companies, who are more familiar with the details of the project). This may occur, as long as the process of supervision and control is not delegated. In this way, States may ensure that the negotiation process takes into account a frame of respect to human rights and the particular needs of the communities.

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The Right to Prior Consultation of Indigenous Peoples in the Americas (Part II)
By Ignacio de Casas and Lucas E Gomez | 22nd June 2014

Contrary to what some would think, the fact that the right to consultation grants communities the possibility to veto any measures taken against their wishes emerges neither from the ILO Convention No. 169 nor from the jurisprudence of the IAHRS authorities.

In this regard, as to the right of consultation in general, the ILO has stated explicitly that the Convention does not give indigenous and tribal peoples the right to veto. Likewise, the ILO Manual on this subject states that “indigenous and tribal peoples do not have the right under the Convention to veto exploitation”.

However, the IAHRS authorities have disagreed with this statement and have declared that certain matters “legally require states to obtain indigenous peoples’ free and informed consent prior to the execution of plans or projects which can affect their property rights over lands, territories and natural resources”. Therefore, if consent is not obtained, this would grant indigenous peoples the power to actually veto any measure which does not meet their interests.

In this regard, the Inter-American Court emphasized that, in the context of large-scale development or investment projects that would have a major impact on the lands and territories or the natural resources of the affected indigenous peoples, the State has a duty, not only to consult, but also to obtain their free, prior, and informed consent, according to their customs and traditions. Yet, the Court was rather unclear about this.

In an attempt to clarify the issue, it has been declared that indigenous peoples’ consent shall be required only in the following cases:
1. Where the development of investment plans implies a displacement or permanent relocation of the affected indigenous peoples.

2. Where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.

3. Where there will be storage or disposal of hazardous materials in indigenous lands or territories.

In principle, the State has the duty to strive to adapt to the demands and proposals expressed by the affected peoples or communities during the consultation.

However, even in cases where consent is not required and where the State does not take into account the concerns and opinions of the affected communities, the Inter-American Commission has stated that "States have the duty to give due regard to the results of the consultation or provide objective and reasonable motives for not having taken them into consideration".

In this regard, the Commission has also declared that, "whenever accommodation is not possible for motives that are objective, reasonable and proportional to a legitimate interest in a democratic society, the administrative decision that approves the investment or development plan must argue, in a reasoned manner, which are those motives. That decision, and the reasons that justify failure to incorporate the results of the consultation to the final plan, must be formally communicated to the respective indigenous people".

We can conclude that the jurisprudence on this matter has evolved fairly well in the matter of the State’s duties regarding the right of indigenous and tribal communities. On the other hand, there is room for further development of the countervailing duties of communities. If this were to happen, there would be more security for every party involved in these cases: States, communities and private companies.

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Establishing Aboriginal Title in Canada: Tsilhqot’in Nation v British Columbia
By Jonnette Watson Hamilton | 17th July 2014

The declaration of Aboriginal title by the Supreme Court of Canada on June 26, 2014 – a first in Canada – is a momentous decision that should have long-lasting significance for the Tsilhqot’in Nation, other Aboriginal groups, and the rest of Canada.

The decision made new law in the areas of the duty to consult and accommodate, governments’ justification of infringements of Aboriginal title, and federalism. On the law of Aboriginal title – the focus of this post – the decision is important for at least two reasons. First, as part of its return to the basic principles set out in the Court’s 1997 decision in Delgamuukw v British Columbia [1997] 3 SCR 1010, Tsilhqot’in includes a return to an equal role for Aboriginal perspectives that incorporates Aboriginal laws. Second, Tsilhqot’in Nation clarifies an understanding of occupation that accords with a territorial approach to Aboriginal title, an approach that does not piece together intensive use of well-defined tracts of land.

The test for Aboriginal title
Chief Justice McLachlin, who wrote the unanimous decision, begins by noting that the central issue of pre-sovereignty occupation must be looked at from both the common law and the Aboriginal perspective (para 34), with the latter including the "laws, practices, customs and traditions of the group" (para 35). The test is a highly contextual one, with intensity and frequency of use to vary with the characteristics of the Aboriginal claimants and the nature of the land (para 37). Those characteristics include the claimants’ "laws, practices, size, [and] technological ability" (para 41).

The test for Aboriginal title, first set out in Delgamuukw, is a three-part test. In the Chief Justice’s words in Tsilhqot’in, occupation “must be sufficient; it must be continuous (where present occupation is relied on); and it must be exclusive” (para 25, emphasis in original). The sufficiency of the Tsilhqot’in peoples’ occupation was the main point of disagreement between the Tsilhqot’in Nation and governments and between the two lower courts.

The Chief Justice also spells out the standard for sufficient occupation as lying between the minimal occupation which would permit a person to sue a wrongdoer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner (paras 38, 40).
Indigenous Ecuadorians Bring Protracted Legal Battle Before the Supreme Court of Canada
By Ravi Amarnath | 29th November 2014

A 21-year legal battle that has made its way through the courts of Ecuador and the United States will arrive next month at the Supreme Court of Canada.

From 1972 to 1990, Texaco, an American oil retail brand, conducted oil drilling operations throughout the Amazon region of Ecuador. The operations allegedly caused substantial environmental pollution to certain provinces within the region.

In 1993, 47 individuals, representing thousands of indigenous inhabitants of the Lago Agrio region of the Amazon (the “plaintiffs”), commenced a lawsuit against Texaco seeking damages for this pollution. The lawsuit was initiated in the United States District Court and then moved to Ecuadorian courts. Over the course of two decades, the case wound its way through the legal systems of both countries before finally reaching the Supreme Court of Canada.

The plaintiffs are indigenous Ecuadorians brought protracted legal battle before the Supreme Court of Canada. Their claim is based on the alleged damage caused by Texaco’s operations. The court is expected to address the validity of the plaintiffs’ claims and determine whether Texaco is liable for the environmental harm.

The case highlights the ongoing challenges faced by indigenous communities in protecting their rights and environments against large-scale corporate activities. It underscores the importance of international law and the role of national courts in upholding environmental standards and protecting human rights.

The outcome of this case could have significant implications for future legal battles involving multinational corporations and indigenous communities worldwide. It serves as a reminder of the need for stronger environmental regulations and the enforcement of such laws to ensure the protection of natural resources and the rights of indigenous peoples.
The Ecuadorian proceedings began in 2004, by which time Texaco had merged with another American oil company, Chevron Corporation (“Chevron”). After seven years of litigation, on February 14, 2011, an Ecuadorian trial court found Chevron liable for US$8.6 billion in damages, with an additional US$8.6 billion in punitive damages if Chevron did not apologize within 14 days (the “Trial Judgment”). Chevron did not apologize, and was therefore liable for US$17.2 billion in damages.

After subsequent appeals within Ecuador, the country’s highest appellate court reduced Chevron’s liability to US$9.51 billion. Chevron subsequently initiated legal proceedings in the United States to contest its liability.

Meanwhile, the plaintiffs sought to have the Trial Judgment enforced against Chevron Canada, a subsidiary of Chevron, in the Canadian province of Ontario. A preliminary issue arose as to whether an Ontarian court has the ability, or jurisdiction, to hear the case.

On May 1, 2013, an Ontario judge ruled that while an Ontario court could adjudicate the case, the case had no hope of success because Chevron possessed no assets in Canada. Accordingly, the judge stayed the proceedings, thereby bringing the case to its end in Canada.

On appeal, the Ontario Court of Appeal determined that the trial judge overstepped his boundaries by staying the proceedings. The court held that the proceedings could continue in Ontario, stating: “After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction.”

The outcome of the proceedings before the Supreme Court of Canada will conclusively determine whether the plaintiffs may seek to enforce the Ecuadorian judgment in Ontario.

However, any future proceedings in Canada may be all for naught. On March 4, 2014, a judge of the SDNY ruled in Chevron Corporation v Donziger et al 11 Civ. 0691 (LAK), a 497-page judgment, that the Trial Judgment was a product of fraud and racketeering activity and therefore was unenforceable in the United States.

Amongst other findings, Justice Lewis A. Kaplan held that the plaintiffs wrote the Trial Judgment in its entirety and that the trial judge was paid US$500,000 to sign the judgment in the plaintiffs’ favour. Justice Kaplan concluded: “The decision in the Lago Agrio
case was obtained by corrupt means. The [plaintiffs] may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so."

While the findings of the SDNY do not bind a Canadian court, they are likely to be taken into account if enforcement proceedings begin in Canada. The Supreme Court of Canada will hear the Chevron appeal on December 12, 2014.

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Introduction
By Professor Sandra Fredman

Socio-economic rights are often regarded as an issue primarily for developing countries. As austerity policies bite deep into basic social provision for the poorest in society, the key role of socio-economic rights in developed economies is underscored. At the same time, their two central weaknesses are highlighted: the absence of effective implementation measures; and the continuing assumption that budgetary issues are matters of policy and not rights.

The focus of this year’s posts has been on the UK’s breaches of its international social rights commitments. Thus the Committee of the European Social Charter found that the UK was again in breach of its undertaking ‘to establish or maintain a system of social security’. The Committee found not only that the levels of social benefits were ‘manifestly inadequate,’ but that this had worsened since the previous reporting round. As Daniel Cashman points out (‘Not Reaping the Benefits: the United Kingdom’s Continuing Violation of Article 12 §1 of the European Social Charter’ p 322), this is particularly troubling as the report was before the swathing cuts which the recently established criteria for a certified class action might be justifiable in the context of the wider need to provide services for others. Nevertheless, as Stephen Cragg QC points out (‘McDonald v UK: The ECHR on Social Care Provision’ p 317), the case establishes that the provision and withdrawal of social and health services is a matter which falls within the avowedly civil and political rights in the ECHR. Similarly, Sebastian Koh describes a watershed decision of the Hong Kong Court that a seven year residency requirement for social welfare rights was ‘manifestly without reasonable foundation’ and therefore in breach of the right to social welfare in Hong Kong basic law (‘Kong Yuming v The Director of Social Welfare: Constitutional protection of social welfare rights in Hong Kong’ p 316). This is not, however, a route the Ontarian court has yet felt able to follow. As Ravi Amarnath shows (‘Right to Housing Debate Stalled by Canadian Court Ravi Amarnath’ p 310), when faced with the case arguing that there is constitutional obligation on government to provide citizens with affordable and accessible housing, the Ontario Court of Appeal struck out the claim on the grounds that the right to “life, liberty and security of the person” in the Canadian Charter had not yet been held to confer a standing right to adequate housing.

Although the spotlight in this chapter is on the UK, it is far from alone. In a separate post (‘The European Social Charter in Austerity Europe: Damning Conclusions on the Right of Access to Healthcare in Spain’ p 311), Rachel Clement notes that the report of the European Committee on social rights has delivered a ‘damning indictment of the impact of austerity measures on human rights across Europe’. Indeed, almost every state in Europe was found to be in breach of the right to social security under the European Social Charter.

Cuts in social welfare need not be characterised only as socio-economic rights. They can also affect an individual’s basic rights to dignity and private life. In McDonald v UK [2014] ECHR 492 (20 May 2014), the ECtHR found that the reduction in healthcare afforded to the claimant fell within the scope of Article 8 ECHR. However, because of the wide margin of appreciation afforded to states, rights violations might be justifiable in the context of the wider need to provide services for others. Nevertheless, as Shona Gadziz shows (‘Victory in first Certified Class Action’ p 324), alarmingly high increases in the levels of malnutrition, hunger and food bank usage can be largely attributed to the fall in the real value of wages and budget cuts specifically targeted at the working poor and the unemployed. This damming verdict on the UK’s record is underscored by the UN’s Special Rapporteur on Housing who found a clear breach of the UK’s international commitment to the right to housing, with the current housing situation described in crisis terms. As Rachel Clement points out (‘No Compromise on the Right to Adequate Housing: UN Condemnation of UK Austerity Measures Rachel Clement’ p 308), these conclusions disturbingly suggest that progressive realisation of the right to adequate housing is under threat.

Even when socio-economic rights are given equal constitutional status, as in South Africa, their enforcement remains challenging. Despite a robust constitutional right to education, conditions in the Eastern Cape remain dismal. Many schools were constructed by local communities out of mud, liable to be blown down in bad weather. Parents have to draw on their very meagre resources to pay teachers; and learners frequently sit on the ground, due to lack of desks and chairs. In the long-running litigation by the Legal Resources Centre, government recalcitrance to abide by court orders has led to increasingly imaginative remedies. Particularly important has been the development of the class action, which has been used to challenge the refusal by the government of the Eastern Cape to fulfil its obligations to appoint and pay teachers. As Shona Gadziz shows (‘Victory in first Certified Class Action Sees Teachers Appointed and Paid’ p 303), the Linkside v Department of Education Case No. 3844/2013case was the first case in which the recently established criteria for a certified class action were satisfied. This was not in itself sufficient: the order to reimburse teachers’ salaries and appoint educators in 32 schools was only complied with when the court resorted to the unusual step of attaching the amount as a debt to the Education Minister’s assets. But further pre-emptive action was needed to prevent non-compliance in relation to the outstanding salaries of the 90 schools that had opted-in to the class action. Following the example of foreign courts, the South African court made the novel order that a “claims administrator” be appointed to oversee payment of the R81 million. Equally robust was the judgment in Madzodzo, analysed by Chris McConnachie (‘South African Judge Lays Down the Law on the Right to a Basic Education’ p 302), holding that the provision of school furniture is an essential aspect of the right to education. In this case, the High Court held that mere assertions of budgetary incapacity did not justify watering down remedies. Instead, a credible timetable must be established, for which governments must be held to account.
From across the Atlantic, in Brazil, courts are taking similar steps to ensure the right to education is properly implemented. Oscar Vilhena Viera describes the process by which the courts in Sao Paolo came to the view that they needed to supervise implementation of the right to education in the Brazilian constitution (‘Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil’ p 304). Having held that the principle of separation of powers could not serve as a shield for the executive which failed to fulfil its obligations, the court went on to provide a remedy which, in Viera’s words ‘could not have been more creative.’ The court ordered the municipality to draft a plan for the provision of an additional 150,000 school places, as well as requiring educational quality standards to be adhered to. Responsibility for monitoring implementation remained with the court itself with the assistance of other public officers. The possibility of penalties for failure to comply remained open. On the other hand, proper implementation of the UN Guiding Principles on Business and Human Rights remains elusive especially in the financial sector. Caio Borges nevertheless shows that Peru might have a far more effective model than its neighbour Brazil (‘Finance and Human Rights: Developments in Brazil and Peru’ p 325).

This raises the difficult question of what added value a human rights based approach has, especially in the field of health. Professor Paul Hunt describes his path-breaking study for the World Health Organization (‘Women’s and Children’s Health: Evidence of Impact of Human’ p 312). A team of leading researchers found that in practice applying human rights to women’s and children’s health policies and programmes not only helps governments comply with their binding national and international obligations, but also contributes to improving the health of women and children.

On the whole, the blog posts that comprise this chapter demonstrate that budgetary considerations continue to be regarded by governments as a reason to roll back on basic human rights. There remains a pressing need for both a stronger assertion of the indivisibility of all human rights, and a more creative approach to remedies.

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South African Judge Lays Down the Law on the Right to a Basic Education
By Chris McConnachie | 25th February 2014

One of the most visible manifestations of the ongoing crisis in South African education is the severe shortage of desks and chairs in schools. Children in the Eastern Cape, South Africa’s poorest province, are among the worst affected. A government audit in 2011 found that 1,300 of the province’s 5,700 state schools lack adequate furniture, affecting over 605,000 children. Many sit on the floor, stand, or squeeze into desks shared with others, making basic reading and writing tasks virtually impossible. In Madzodzo v Department of Basic Education [2014] ZAECMHC 5, handed down on Thursday last week, Judge Glenn Goosen of the South African High Court declared that the government’s failure to address this problem is a violation of the section 29(1)(a) constitutional right to a basic education. He further ordered the government to deliver sufficient desks and chairs to all Eastern Cape schools by 31 May 2014.

Madzodzo is arguably the most significant judgment yet on the right to a basic education. At this stage, any judgment on this right is significant given the paucity of case law. What makes Madzodzo so significant is that Goosen J has offered one of the clearest accounts of the nature and content of this right and the most convincing demonstration yet of how to translate this right into appropriate remedies.

This judgment marks the end of three rounds of litigation over school furniture in the Eastern Cape. The first round resulted in a detailed consent order, handed down in November 2012, recording the government’s undertaking to complete a full audit of Eastern Cape schools’ furniture needs, to develop a comprehensive plan to address the shortage, and to deliver furniture to all schools in need by June 2013. The audit was completed three months late, its coverage was patchy, and there was no sign of the comprehensive plan or province-wide delivery. This non-compliance resulted in a second round of litigation in August 2013 and another consent order recording further promises of an independent audit and a comprehensive plan. The sticking point was whether the government should be bound to deliver furniture by a fixed deadline. This led to the third round of litigation heard by Goosen J in mid-February 2014.

In this round, the government readily conceded that its failure to provide sufficient desks and chairs was a violation of the right to a basic education. However, it argued that budgetary and logistical constraints meant that it would take an indefinite time to provide adequate furniture, requiring an open-ended court order. A complication was that the Eastern Cape budgeted a mere R30 million (£1.6 million) for school furniture in the 2013/2014 financial year, a tiny portion of the estimated R360 million (£20 million) needed to address the shortage.

Goosen J rejected the government’s arguments for an open-ended order. This was motivated, in part, by the government’s
consistent non-compliance with the previous court orders, which necessitated more stringent judicial control. Furthermore, Goosen J emphasised that an open-ended order would fail to vindicate the right to a basic education. In setting out this argument, Goosen J provided one of the clearest accounts yet of the nature and content of this right. First, he emphasised that the right to a basic education is distinct from other socio-economic rights in the South African Constitution as it is ‘immediately realisable’ (Madzodzo [17] citing Juma Musjid [37]). Second, Goosen J stressed that right to a basic education ‘requires the provision of a range of educational resources,’ including desks and chairs, and is not merely a right to a place in a school (Madzodzo [20]). This makes explicit a point that has long been implicit in other judgments. Goosen J concluded that an open-ended order with no deadline for delivery would fail to provide effective relief [36].

Underpinning Goosen J’s judgment and order is the important point that the immediately realisable right to a basic education cannot always translate into immediate relief. Resource and capacity constraints are always important considerations in determining the appropriate remedy. Nevertheless, immediate realisability does require, at minimum, that remedies must offer a clear timetable for relief.

Furthermore, Goosen J emphasised that mere assertions of budgetary incapacity cannot justify watering down remedies. Citing the Constitutional Court’s judgment in Blue Moonlight [2011] ZACC 33 [74], he emphasised that ‘it is not good enough for [government] to state that it has not budgeted for something, if it should indeed have planned and budgeted for it in the fulfilment of its [constitutional] obligations.’ Goosen J held that the government had been fully aware of the furniture crisis at least since 2011 and its budgeting decisions ought to have responded to this crisis (Madzodzo [35]).

The resulting order demonstrates how to balance the need for effective relief with the need for some flexibility to accommodate legitimate budgetary and capacity constraints. The government was ordered to provide furniture to all schools by 31 May 2014, but it may apply for an extension by giving ‘full disclosure’ of the steps it has taken, a full set of reasons for the delay, and a clear timeline for delivery (Madzodzo [41]).

The significance of Goosen J’s judgment is not its finality. The government will undoubtedly request an extension, leading to further rounds of litigation. Instead, its significance is that it injects greater urgency, transparency and accountability into the delivery of adequate school furniture. All Eastern Cape children may not have a desk and a chair of their own by 31 May, but Goosen J’s order ensures that the government will not escape its constitutional obligations lightly.

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Victory in First Certified Class Action Sees Teachers Appointed and Paid
By Shona Gazidis | 18th April 2014

A landmark settlement agreed on 20th March 2014 in Linkside v Department of Education Case No. 3844/2013 has consolidated the law regarding class action in South Africa, and is a significant victory in the fight to ensure children’s right to an education.

It is astounding to imagine that educators, who work so hard to ensure that children receive a decent education in accordance with the Constitution and their basic human rights, are not paid by the government for the work that they do. It is equally astounding to imagine that the government fails to fill vacant teaching posts. Yet this is the reality of the education system in the Eastern Cape, and it has taken lengthy court proceedings to effect change.

Linkside is a step toward that change, as the government was ordered to reimburse teachers’ salaries, appoint temporary educators to vacant posts and appoint existing temporary educators to permanent posts in respect of 32 applicant schools. Further, the court ordered that there be an ‘opt-in’ class of all schools in the Eastern Cape whose posts had not been filled or who had paid teachers out of school funds.

‘Post-provisioning,’ introduced in 1996, was designed to redeploy teachers from over-staffed to under-staffed schools in an attempt to establish a more equal education system. However, the Eastern Cape did not establish post-provisioning until 2004, and since then it has not been effectively implemented. Under the system, each public school is allocated a certain number of teaching posts based on the school’s resources, the number of learners etc. The Department of Education is then obliged to appoint teachers to each of these allocated posts and to pay them a salary. However, the Department has repeatedly failed to meet its obligations in this regard. Either the post is simply left vacant, or the parents of learners are forced to pay minimal salaries to temporary teachers through school fees. Inevitably, it is the poorer schools that suffer the most, as they cannot afford to use school fees to pay their own appointed temporary teachers.

Linkside makes clear that the problem is not a lack of educators, but their distribution. In 2014, it is anticipated that there will be
5,342 substantive vacant posts, yet up to 10,000 teachers in excess. The national Executive attempted to deal with the problem of the distribution of educators with an intervention in March 2011. A report was prepared, which identified post-provisioning as a major problem. However, although the intervention is still in place, the Minister has evidently failed to address the problem.

This is not the first time schools have had to resort to court action. The posts establishments for 2012 and 2013 were also challenged through the courts. An order was made in August 2012, resulting in an order that temporary educators be appointed to permanent posts, remunerated, and vacant posts be advertised and filled. However, once again, the order was not complied with.

Significantly, the case is the first certified class action in South Africa, an area of law that Oxford Pro Bono Publico played an important role in developing. Based on research carried out by Oxford Pro Bono Publico, the court set down that in order to bring a class action, there would need to be certification, i.e. that the matter involves definition of the class, identification of some common claim or issue, existence of a valid cause of action, suitable representative of the class, and that class action is the appropriate procedure. Linkside is the first case, which has implemented this guidance and satisfied the criteria to be a certified class action.

It remains to be seen whether the Department will comply with this order. One can only hope that we are a step closer to the day when every child in the Eastern Cape can sit on a chair, at a desk, with a textbook, in front of a teacher, in a concrete building, without having to make an application to court.

Shona Gazidis is a Solicitor from the UK who specialises in family law, with a specific interest in domestic violence and child law. Her father was imprisoned for his role in the anti-apartheid movement. She is currently an intern at the Legal Resources Centre, where she has assisted on cases such as Linkside.

Judicial Experimentation and Public Policy: A New Approach to the Right to Education in Brazil
By Oscar Vilhena Viera | 31st July 2014

Should judges interfere with the enforcement of public policies implemented by the executive? If yes, what would the best way to do so?

In December 2013, the Court of Appeal of the State of São Paulo, in an extraordinary decision, ruled that the city of São Paulo should provide at least 150,000 new spots in childcare facilities and elementary schools by 2016, for children aged five years old and under. This decision reversed the lower court’s ruling, which had accepted the municipality’s argument that the judiciary should remain silent in matters of public policy.

Yet, the main novelty of this case is not the decision of the court to interfere in public policy matters or even the forcefulness of the ‘obligation to fulfill’ imposed by the judiciary upon the executive. Rather, the most unique aspect of this case is the way in which the dispute, led by the NGO, Ação Educativa, was conducted and how the court ruled that its decision should be implemented.

After receiving the appeal, instead of issuing a final injunction order to put an ‘end’ to the proceedings without necessarily resolving the issue, the judges decided to convene a public hearing, with participation from public officials, experts, and representatives from civil society organizations. Therein, the court sought an agreement between the parties. As such an agreement was never achieved, the court then decided that the municipality, by failing to provide a sufficient number of school and childcare places for all children of elementary school age in the city, had violated the Constitution. If the executive does not fulfill its obligation to protect or promote a fundamental right, it is for the ‘Judiciary, when triggered, to act to protect it.’ The principle of separation of powers cannot serve as a shield for the executive administration to fail to perform its obligations, ‘violating rights.’

However, the dilemma in such cases is how to impose a complex obligation upon the executive without interfering with its role of designing and implementing a given public policy. After all, the mayor was elected to make these policy and financial choices, and the municipality has the technical staff necessary to implement them.

The solution in this case could not have been more creative. The court ordered the municipality itself to draft a plan, with a fixed deadline that has just expired, for the provision of 150,000 additional school places, while making it clear that the expansion of the school system must meet various educational quality standards established by law as well as by the National and the Municipal Councils for Education. Moreover, the judges ruled that the court’s section on children’s rights would be responsible for monitoring the implementation of the plan, along with civil society organizations, the Public Prosecutor’s Office, the Public Attorney’s Office,
among others, ‘in relation to the opening of new school vacancies, or in relation to the provision of quality education.’ The Court kept open the possibility of penalizing the failure of the executive to produce a consistent plan, or even adopting its own plan in the case of an unsatisfactory proposal from the executive.

Ultimately, the approach adopted by the Court of Appeal of the State of São Paulo strikes a balance between the judicial obligation to give meaning to substantive social rights, guaranteed by the Constitution itself, with the obligation to design consistent policy implementing those rights, which lies primarily on the shoulders of executive and legislative officials. In this way, the Court has addressed the increasingly complex challenges accompanying the implementation of social rights in Brazil. The success of this case will set a new standard of performance for the judiciary with respect to matters of public policy.

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Implementing the Right to Education Through the Courts: The Legal Resources Centre and Oxford University Host Workshop on Remedies and Enforcement

By Shona Gazidis | 19th January 2015

The courts are a very effective tool in enforcing socio-economic rights and filling gaps so often left by governments. The Legal Resources Centre (LRC) has litigated the right to education through the South African Courts for the past six years. In order to successfully litigate the right, there need to be appropriate remedies and enforcement mechanisms available.

As part of the Ford Foundation’s Investing in a New Era of Global Human Rights Leadership, the LRC’s aim is to share its experience of litigating socio-economic rights, with the overall goal being to reshape the broader framework and agenda of international human rights. Lawyers in Eastern European countries have been engaged in litigation surrounding the discriminatory practices regarding Roma children. Given the similar hurdles faced in those countries as in South Africa, the LRC and Oxford University invited delegates from Hungary, Slovakia and Bulgaria to attend the workshop, which took place in December.

Michael Bishop of the LRC gave a presentation on remedies and enforcement in South Africa, highlighting the importance of carefully drafting orders and settlement agreements in the most favourable manner. The courts in South Africa have a wide discretion when it comes to imposing remedies, and have begun to monitor the outcomes of cases by imposing a structural interdicts more frequently. This mechanism allows the court to supervise the implementation of the court order, meaning it can be a
very effective way of ensuring compliance.

Adel Kegye from the Chance for Children Foundation (CFCF) outlined the disturbing practice of segregation of Roma children, which takes place in Hungary’s education system. CFCF have been engaged in litigation against segregated schools, as well as against the Ministry of Education for the misdiagnosis of Roma children, wrongly placed in schools for children with special needs. Although the courts have declared that segregation is illegal, they have not been prepared to go as far as imposing a desegregation order.

Vanda Durbakova from the Centre for Civil and Human rights (Poradna) explained that Poradna litigated the first and only case regarding segregation in education in Slovakian Courts. The court declared that the segregation of children was a violation of anti-discrimination laws and ordered the school to rectify the situation. However, problems then ensued in implementing the order, with resistance from teachers and a lack of support from state institutions.

Daniela Mihaylova of the Equal Opportunities Initiative Association described the situation in Bulgaria, where cases have been more successful when brought before the Commission for Protection Against Discrimination. One particularly effective remedy the Commission can impose is to put inspection measures in place. Cases through the courts, though, have proven more difficult and so far been unsuccessful.

Delphine Dorsi of the Right to Education Project presented on remedies and enforcement under international law, which is much weaker than domestic law, consisting mainly of opinions and declarations. On an international level, the Human Rights Council and International Court of Justice provide avenues whereby complaints can be made, and UN treaty bodies can provide opinions on specific issues. UNESCO’s convention against discrimination in education provides a confidential procedure by which parties can hopefully reach agreement.

The workshop also included a presentation on regulatory theory by Professor Karen Yeung of King's College London, which set out a different approach, whereby delegates were encouraged to consider regulation as an alternative to litigation.

Jaakko Kuosmanen and Meghan Campbell discussed the proposed Sustainable Development Goals (SDGs). In terms of education, it is clear that the Millennium Development Goals focussed too much on primary education and enrolment numbers. Within the SDGs it is, therefore, essential to establish indicators, which measure the quality of education at different levels, rather than focussing on enrolment figures.

It was evident during the workshop that parallels can be drawn between the education systems in South Africa and countries in Eastern Europe. The event provided an opportunity to share experiences in different jurisdictions, and, more generally, to consider the role of education in the global development agenda. It is hoped that this discussion will continue through the Oxford Human Rights blog.

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**Court Makes Unprecedented Step Appointing “Claims Administrator” to Ensure State Compliance with Court Order**

By Shona Gazidis | 13th January 2015

A landmark judgment handed down on 12th December 2014 in the case of Linkside & Others v Minister of Education [2014] ZAECGHCC 111 sees a ‘claims administrator’ appointed to oversee the payment of outstanding teachers’ salaries (amounting to R81 million) in the first certified opt-in class action in South Africa.

The South African government has a duty to ensure that every child’s right to education, as set out in the Constitution, is realised. However, all too frequently the state fails to meet its obligations. The Legal Resources Centre (LRC) has launched extensive litigation over the past six years to force the Department of Education to rectify these failures. A major hurdle is that once court orders are obtained (mostly by agreement), the Department does not comply with them. Foreign courts have often made use of ‘special masters’ and ‘claims administrators’ to oversee the implementation of court orders, but South African courts have been slow to utilise this mechanism prior to Linkside.

Based on research carried out by Oxford Pro Bono Publico, Linkside was the first certified class action in South Africa. In brief, the case concerns the failure of the Department to appoint permanent teachers to vacant posts, and to pay their salaries, leaving schools having to raise funds to pay them. The initial case comprised of 32 applicant schools, salaries amounting to R28 million
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were finally paid, only after the court attached the amount as a debt to the Education Minister’s assets. This case did not, however, address the outstanding salaries of 90 applicant schools that had opted-in to the class action, and it was clear that a solution that pre-empted the State’s non-compliance was needed.

The LRC argued on behalf of the applicant schools that the appointment of a ‘claims administrator,’ i.e. a firm of accountants to verify and pay out each applicant school’s claim would be the appropriate remedy in this case. The LRC drew the court’s attention to foreign jurisdictions, including the USA, Australia and Canada, which have already been using such mechanisms. In the US, for example, a ‘master’ (defined by Federal Rule 53 as ‘including a referee, an auditor, an examiner, a commissioner, and an assessor’), is often employed to oversee a claim. In addition, in the Canadian case of Peppiatt v Nicol (SCJ, 27 Nov 1991), the Defendant was ordered to pay sum into court to be transferred into a trust held by the representative plaintiff’s lawyer for distribution to class members.

In South Africa, the recent Supreme Court of Appeal Judgment Meadow Glen Home Owners Association and Others v City of Tshwane Metropolitan Municipality and Another (767/2013) [2014] ZASCA 209 (at para 35), confirmed that courts need to be creative in forming remedies in socio-economic cases and should secure on-going oversight to ensure implementation of the orders. The court referred to the example of the supervisory measures used in US courts.

The Department of Education’s arguments were scrutinised and dismantled by the LRC. The Department’s claim that progress had been made in appointing teachers in accordance with a previous collective agreement signed, held little weight as, in reality, very little had changed. Their argument of budgetary constraints could not be accepted, given that previous judgements had confirmed that the right to education was not subject to budgetary constraints, and that failure to budget properly was not a valid defence. The Respondent’s final arguments that the Applicants should have referred to the Education Labour Relations Council (ELRC) and that trade union movements were opposed to the order were simply without merit. Not only were their defence arguments untenable, but the Department failed to support their arguments with sufficient evidence.

The court agreed with the LRC, and Judge Roberson made the novel and unusual order that a ‘claims administrator’ be appointed to oversee payment of the R81 million. The outcome of this case has extremely significant implications for future strategic litigation, where the South African government has so often failed to comply with court orders, secure in the knowledge that they were unlikely to be enforced. This judgment signifies that South African courts are willing to certify class actions, and to implement new and inventive mechanisms to monitor the compliance of the State. It will be possible to litigate future socio-economic cases based on a class of applicants and to obtain stringent measures to implement long-term solutions.

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No Compromise on the Right to Adequate Housing: UN Condemnation of UK Austerity Measures
By Rachel Clement | 21st February 2014

Statements made by the United Nations Special Rapporteur on adequate housing, following her visit to the UK in September, clearly indicated that her ultimate report on the housing situation would lay significant criticism at the feet of the Coalition Government. The formal report, published this month, does not disappoint. It castigates the Government for its regressive housing and welfare policies, which threaten the principles of dignity and equality underlying, and secured by, the right of access to adequate housing.

Raquel Rolnik, the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, made an official visit to the UK in September last year. The purpose of the visit was to examine the UK’s realisation of the right to adequate housing in light of relevant international human rights standards. Her report was published earlier this month. For those unfamiliar with housing related austerity policies, the report makes for a shocking read. But for those who have been following the housing situation, Rolnik’s observations are hardly surprising. Nevertheless, they provide formal UN condemnation of the UK’s current housing policy, and its disproportionate impact on certain minority groups.

Legal Background

In light of its international human rights obligations as detailed in the report, the UK has an obligation to ensure the progressive realisation of the right to adequate housing, even in times of economic crisis, which extends to guarantees of ‘security of tenure, affordability, accessibility, location and cultural adequacy’ and ‘should be ensured to all persons irrespective of income or access to economic resources.’

The current housing situation was described in crisis terms, broadly characterised by soaring house prices, dramatic increases in private sector rents, inadequate housing standards, insecurity of tenure, discrimination and poor management practices, a massive shortage of social housing, overcrowding and increasing homelessness.

UK Reforms and their Impact

The report charges the Government with effectively forcing people to choose between paying for food and heating or staying in their homes. The Bedroom Tax and the changes to the calculation of the maximum rates of Local Housing Allowance (paid to those in private rental accommodation) faced particular scrutiny. The implementation of the former was condemned for failing to account for the gap between supply and demand for smaller social housing, which prevents people from downsizing, even when they want to. Rolnik described families as having few choices, and the policy as having caused ‘tremendous despair.’ The accuracy of the projected financial benefits of the policy was also doubted.

The relationship between the housing crisis and deteriorating living conditions for those living in low-income households was observed. Evidence has suggested a link between housing policy and increased rent arrears, fuel poverty and food bank usage, homelessness and the use of B&Bs as emergency accommodation. The Special Rapporteur was particularly critical of the impact of the policies on disabled individuals and considers the Government’s response – an increase in funding for Discretionary Housing Payments – as inadequate to guard against the discriminatory impact of the policy on this vulnerable group.

Conclusions

The Special Rapporteur’s conclusions clearly indicate that progressive realisation of the right to adequate housing is under threat by the regressive, and likely discriminatory, austerity policies. Specific recommendations include significantly reassessing housing related austerity policies, the immediate suspension of the bedroom tax with a view to its removal, and broader recommendations in relation to land, planning and housing policy.

The Government’s immediate response, however, is less than satisfactory. The report has been dismissed as ‘partisan’ and unimaginatively labelled a ‘misleading Marxist diatribe.’ The tone of this dismissal echoes the response to the recent conclusions of the European Committee on Social Rights in relation to the impact of austerity policies on the UK’s obligation to maintain a system of social security under the European Social Charter. Against this background, the political will is clear. It is unlikely that this report will force a climb-down in the austerity politics that weigh heavily on the effective exercise of key social rights, particularly by vulnerable members of society. However, the report adds to the momentum building behind international criticism of austerity policies both in the UK and beyond.

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The Zulu Case: Threats to Squatters’ Rights in South Africa
By Andrew Wheelhouse | 4th July 2014

It is trite to say that land is a contentious issue in South Africa. The issue of land encompasses not only the legacy of the unjust expropriations and arbitrary evictions of the apartheid era, but also contemporary concerns as to when landowners, including state organs, are permitted to evict squatters.

Section 26(3) of the Constitution, given effect by The Prevention of Illegal Eviction from and Unlawful Occupation of Land Act (PIE), prohibits evictions without a court order. However, the balance struck between landowners and squatters is questionable. The spectre of orchestrated ‘land invasions’ is often invoked by those applying for eviction orders in court. Many argue that this marginalises the interests of squatters, who are usually desperately poor with nowhere else to go.

These concerns form the backdrop to the case of Jabulani Zulu and 389 Others v eThekwini Municipality and Others [2014] ZACC 17 in which the Constitutional Court of South Africa handed down judgment on 6 June.

The appellants are residents of Madlala Village, an informal settlement in Durban, which occupies land allocated by eThekwini Municipality to the construction of low-cost social housing. The KwaZulu-Natal High Court (Koen J) had granted an interim order authorising the Municipality and the South African Police Service to prevent persons from occupying or building on the land and permitting them to demolish any structures constructed after the granting of the order.

As the residents were not original parties, they brought an application for leave to intervene in the proceedings on the basis that the interim order authorised their eviction without compliance with PIE. The state parties argued that the order did not affect the appellants because it was aimed at prospectively preventing land invasions. Kruger J held that PIE was not applicable and dismissed the application.

The difficult issue was whether the Constitutional Court could tackle the constitutionality of Koen J’s order, given that the appeal concerned the narrow question of leave to intervene in proceedings before the High Court. All of the parties addressed this question at the hearing. In the event the majority thought not, with the Court producing three judgments and a confusing web of partial or full concurrences.

The Court unanimously held that Koen J’s order was an eviction order and that the Madlala Village residents should be granted leave to intervene. Zondo J, writing the main judgment, observed that the order was drafted sufficiently widely that it would include ‘continuing occupation that had commenced prior to the grant of the order.’ However, he concluded that the constitutionality of the interim order was not properly before the Court and so could not be ruled upon.

Another concern was that records before the court demonstrated that Koen J’s order had been used as an eviction order both before and after the hearing before the Constitutional Court, despite the state parties’ insistence that this was not the case. While
critical of this, the majority took the view that the rights of the appellants were safeguarded by an order of the High Court (per Jeffrey AJ) preventing further demolitions or evictions. It is telling that at that hearing the Municipality relied on Koen J’s order as authorising its actions.

Moseaneke ACJ considered that the protection offered by Jeffrey AJ’s order meant that there were no special considerations that justified dealing with the constitutionality of Koen J’s order.

In a powerful judgment, Van der Westhuizen J disagreed. He argued that to essentially remit the matter would render the High Court proceedings ‘an empty and futile formality’; the main judgment had found Koen J’s order to be an eviction order, which he held to be ‘inevitably unlawful’ as being issued in disregard of the provisions of PIE. It was necessary to establish legal certainty, as the matter before the Court ‘was not an isolated or unique incident,’ and indeed, other courts have issued similar orders. The lengthy consideration given to the question of constitutionality meant that ‘it has effectively become the subject of the appeal.’ However, only Froneman J joined him out of a bench of eleven.

Some will regard this case as a missed opportunity to rule conclusively on interim orders that appear to circumvent constitutional protections on the right to housing. Nevertheless, Van der Westhuizen J’s comments in particular may well persuade future parties to tackle the question of constitutionality head-on in order to establish a binding precedent that will help ensure the lower courts do not produce orders that may be open to abuse.

Andrew Wheelhouse was called to the Bar Of England & Wales at Middle Temple in 2013. Between January and July 2014 he served as a Foreign Law Clerk to Justices Skweyiya and Madianga at the Constitutional Court of South Africa. He writes here solely in a personal capacity.

Right to Housing Debate Stalled by Canadian Court
By Ravi Amarnath | 6th January 2015

By a 2-1 majority, a provincial appellate court has halted proceedings in Tanudjaja v Canada (Attorney-General) 2014 ONCA 852, which sought to recognise a constitutional obligation on provincial and federal governments to provide citizens with affordable and accessible levels of housing. Consequently, 10,000 pages of proposed evidence on this novel claim will remain idle pending appeal.

The original application was brought by four individuals and a public interest group (the ‘applicants’) in the Canadian province of Ontario. The applicants alleged that various decisions of the Ontario government and the federal government have resulted in homelessness and inadequate provision of housing.

Specifically, the applicants claimed that the actions of both governments violated their right under section 7 of the Canadian Charter of Rights and Freedoms (“Charter”) to ‘life, liberty and security of the person’ and their right under section 15 of the Charter to the ‘equal protection and equal benefit of the law without discrimination.’ They sought a number of remedies, including mandatory orders that strategies be developed in consultation with affected groups to provide adequate housing and that monitoring regimes be established.

Two aspects of the applicants’ claim made it unique in Canadian jurisprudence. First, the applicants did not challenge the constitutionality of a particular legislative program or scheme by either level of government; instead, the applicants made a more holistic claim that overall changes to legislative policies, programs and services have resulted in greater levels of homelessness and inadequate provision of housing.

Secondly, to date, the Supreme Court of Canada has interpreted section 7 of the Charter as ‘restricting the state’s ability to deprive people’ (Gosselin v. Québec (Attorney General) [2002] 4 SCR 429) of life, liberty and security of person, as opposed to imposing an obligation on the state to ensure these rights are fulfilled.

Prior to proceeding to trial, counsel for the Attorney General of Canada and the Attorney General of Ontario successfully had the applicants’ claim struck on the basis that it was ‘plain and obvious’ that their claim could not succeed.

Justice Lederer of the Ontario Superior Court of Justice stated: ‘The Application seeks the subsequent implementation of programs designed to ensure that housing which satisfies these requirements is made available, by Canada and Ontario, to the poor, disadvantaged and vulnerable members of our society. This is a desirable end. … The question is whether the court room is the proper place to resolve the issues involved. It is not; at least as it is being attempted on the Application.’

A majority of the Ontario Court of Appeal upheld the decision, preventing the case from being heard on its merits. Justice Pardu, for the majority, held that the applicants’ claim that section 7 of the Charter confers a free standing right to adequate housing is
doubtful in light of the fact that Court has previously declared the Charter does not confer a freestanding right to health care. For similar reasons, she concluded it was not necessary to decide whether homelessness can be viewed as a ground of discrimination under section 15 of the Charter.

In dissent, Justice Feldman noted that while the Charter does not provide any freestanding right to housing, Canada’s constitution, which includes the Charter, has always been interpreted as a ‘living tree,’ (Edwards v. A.G. of Canada [1930] A.C. 124) which is capable of growth and expansion.

Accordingly, she concluded the application ought to be heard on its merits, stating: ‘It has been brought by counsel on behalf of a large, marginalized, vulnerable and disadvantaged group who face profound barriers to access to justice … the [applicants] put together a significant record to support their application. That record should be put before the court.’

While Canada’s national statistics agency does not track homelessness on an annual basis, a recent report estimates that 235,000 Canadians, or just under seven percent of Canada’s population, experience some form of homelessness every year.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

HEALTHCARE

The European Social Charter in Austerity Europe: Damning Conclusions on the Right of Access to Healthcare in Spain
By Rachel Clement | 11th February 2014
Recent conclusions published by the European Committee on Social Rights (ECSR) present yet another damning indictment of the impact of austerity measures on human rights across Europe. In particular, the Committee’s condemnation of discriminatory healthcare policy in Spain points to the increased burden of austerity measures placed on vulnerable minorities.

The Contracting Parties in the Council of Europe submit annual reports to the ECSR, detailing the implementation of the rights contained in either the European Social Charter (ESC) or the Revised European Social Charter (rESC). In a recent post on this blog, Daniel Cashman has discussed the Committee’s finding that the UK was in violation of Article 12§1 ESC. However, the UK is not alone in failing to meet its Charter obligations. Almost every state was found to have breached at least one obligation under either Art. 12 ESC or Art. 12 ESC (both of which contain a right to social security expressed in almost identical terms), indicating pervasive inadequacies in levels of social security across Europe and signalling a widespread failure to implement austerity-based economic policies in a way which ensures compliance with the ESC.

The Council of Europe has already expressed concern over the impact of austerity measures. Only last December, the Council of Europe Commissioner for Human Rights published an issue paper, ‘Safeguarding human rights in times of economic crisis,’ in which human rights were described as providing ‘a universal normative framework and operational red lines within which governments’ economic and social policies must function’ and which included recommendations for bringing economic policy in line with human rights obligations.

However, the conclusions with respect to Spain’s implementation of the ESC detail a particularly egregious policy, which warrants further scrutiny. The recently enacted Royal Legislative Decree 16/2012 and Royal Decree 1192/2012 exclude foreign nationals, present in Spain unlawfully, from receiving access to healthcare, save in ‘special situations’ (i.e., emergent treatment needs, and care for pregnant women and minors). The ECSR’s reporting procedure is used to assess compliance within a specified reference period, and as the legislation was enacted after that period, a formal declaration of non-conformity was not possible. Nevertheless, the Committee expressed in strong terms the view that the legislation is contrary to Article 11 ESC and that the maintenance of the legislation would lead to a formal conclusion of non-conformity in the next reporting cycle addressing Art. 11.

The Committee stated that ‘the States Parties to the Charter... have guaranteed to foreigners not covered by the Charter rights identical to or inseparable’ from those contained within it, and that states have positive obligations to ensure access to healthcare for migrants ‘whatever their residence status.’ The Committee invoked Art. 12 of the ICESCR and General Comment No. 14 on the right to the highest attainable standard of health when stating that healthcare must be accessible universally, without any form of discrimination.

The measure was enacted in response to the economic crisis and the preamble of the Spanish legislation attempts to justify the policy as necessary against this background. The Committee took a dim view of this justification. It reiterated its existing position that ‘the economic crisis should not have as a consequence the reduction of the protection of the rights recognised by the Charter.’ The Committee also highlighted the importance of impact assessment and consultation, particularly with regard to the impact of austerity measures on the most vulnerable groups in society.

Though the strength of the enforcement mechanism provided by the reporting obligations is much maligned, the Spanish legislation has already attracted the concern of the United Nations Committee on Economic, Social and Cultural Rights, and the condemnation of the United Nations Special Rapporteur on Contemporary Forms of Racism, Racial Discrimination, Xenophobia and Related Intolerance, and it is likely that the international pressure will continue to build. In a broader context, this measure provides a shocking example of what the Council of Europe has already acknowledged, and what many activists, lawyers and individuals affected by austerity policies experience on the front lines: vulnerable minorities are bearing a disproportionate burden when it comes to the implementation of austerity measures across Europe.

Rachel Clement is a DPhil Candidate at the University of Oxford.

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Women's and Children's Health: Evidence of Impact of Human Rights
By Paul Hunt | 22nd February 2014

During 2011-13, I had the fortune to serve as a part-time Senior Human Rights Advisor to WHO Assistant Director-General Flavia Bustreo. The records show that the first Director-General of WHO – Brock Chisholm – recognised that WHO had a vital role to play in the promotion and protection of health-rights.

Regrettably, since Director-General Chisholm stepped down in 1953, WHO has struggled to establish an appropriate health-rights role consistent with its Constitution, which explicitly recognises the right to the highest attainable standard of health. However, Assistant Director-General Bustreo understands the complementarity between health and human rights, as demonstrated by her speeches and scholarship.
On beginning my secondment, I asked colleagues how I could most usefully help them advance the health-rights agenda both within WHO and beyond. The answer was clear: they recognised the legal and political reasons for adopting a human rights-based approach, but wanted to know what evidence there was that human rights contribute to health gains. In other words, they wanted to see evidence that human rights could help them reduce suffering and save lives.

Some warned against looking for evidence that human rights contribute to improvements in health. Their argument was that human rights have intrinsic value and must be respected whether or not there is evidence demonstrating that they contribute to health gains. I was relatively untroubled by this argument. Today’s greatest health-rights challenge is operationalisation: how to make human rights real in hospitals, clinics, and communities. Without health professionals, it will be impossible to operationalise health-rights, and so, if possible, it is vital to marshal arguments that health professionals find compelling. Crucially, it is not either-or: evidence of health gains can supplement normative and political arguments in favour of human rights and health.

Other, methodological, objections to the project were more challenging. What do you mean by ‘evidence’ and ‘health gains’? How do you show that human rights shaped a health intervention? How do you demonstrate that a human rights-shaped intervention contributed to health gains?

Dr. Bustreo asked me to lead an 18-month project on the evidence of impact of human rights on aspects of women’s and children’s health. A multi-disciplinary Steering Group was established, including Dr Francisco Songane, former Minister of Health (Mozambique), and Dr Sujatha Roa, former Secretary of Health and Family Welfare (India). Researchers were commissioned and some 30 authors contributed to the publication. The monograph – *Women’s and Children’s Health: Evidence of Impact of Human Rights* – was launched at an event co-organised by WHO and the German Government and co-hosted by the Norwegian Government.

It addresses the methodological challenges and examines the evidence of impact of a human rights-based approach on aspects of women’s and children’s health in four countries: Nepal, Brazil, Malawi and Italy. One chapter illustrates the impact of one principle of a human rights-based approach – participation – on women’s and children’s health. The publication concludes that applying human rights to women’s and children’s health policies, programmes and other interventions not only helps governments comply with their binding national and international obligations, but also contributes to improving the health of women and children.

One theme emerging from the research is that a human rights-based approach to health is supported by an enabling environment, with features such as high-level political leadership and advocacy for a human rights-based approach. Another theme is the striking scarcity of research on and evaluation of the impact of a human rights-based approach on women’s and children’s health and the vital importance of multidisciplinary and multi-method approaches to these issues.

The publication emphasises the need to establish a platform for policy-makers seeking to implement a human rights-based approach to women’s and children’s health, and the importance of establishing a multi-disciplinary network of policy-makers,
practitioners and scholars interested in research on and evaluation of the impact of a human rights-based approach on women’s and children’s health.

WHO has recently embarked on other human rights initiatives, in close collaboration with a range of partners. For example, it has recently published *Ensuring Human Rights in the Provision of Contraceptive Information and Services: Guidance and Recommendations*. Of course, the road ahead is littered with obstacles. But there are signs that senior management in WHO has re-discovered the vision that inspired its predecessors some 60 years ago.

*Professor Paul Hunt, Human Rights Centre, University of Essex.*

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**Aboriginal Right to Pursue Traditional Medicine Recognised by Canadian Judge**

*By Ravi Amarnath | 3rd December 2014*

A Canadian judge has ruled that a constitutional right exists for certain aboriginals in Canada to choose traditional medicines over physician-recommended procedures.

In August 2014, J.J. (whose identity cannot be released) was diagnosed with acute lymphoblastic leukemia (A.L.L.), a form of cancer in the bone marrow. J.J. is a member of The Six Nations of the Grand River (‘Six Nations’) in the Canadian province of Ontario.

Doctors at a local hospital believed J.J. had a 90-95% chance of recovery with chemotherapy. They deferred decisions regarding her course of treatment to her mother, as J.J. was deemed not to have the required capacity to consent. J.J.’s mother initially allowed the hospital to perform chemotherapy on J.J. but withdrew consent 12 days after treatment had begun. She informed doctors of the family’s plan to treat J.J. with traditional medicines and has since taken J.J. to Florida to pursue these treatments.

Hospital staff asked a local children’s aid society to intervene. After an investigation, the agency declined as it felt J.J.’s mother was devoted to J.J. and was doing what she felt was best for her daughter.

The hospital subsequently sought a court order against the children’s aid society requiring it to bring J.J. to a ‘place of safety.’ The hospital argued the decision of J.J.’s mother to discontinue chemotherapy for her daughter made J.J. a child ‘in need of protection’ under subsection 40(4)(a) of Ontario’s Child and Family Services Act.

Representatives of the Six Nations provided submissions in the case, arguing the family had a constitutionally protected right to provide their daughter with traditional medicines. Specifically, section 35(1) of the Constitution Act, 1982 (the ‘Constitution’) states: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby reorganized and affirmed.’

In order to qualify as a constitutionally protected aboriginal right, the Supreme Court of Canada has held that ‘an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.’ Furthermore, the activity must have existed prior to contact with European settlers and must not have been extinguished at the time Canada’s Constitution was entrenched in 1982.

From the evidence in J.J.’s case, the application judge determined that the Six Nations had a practice of using traditional medicines prior to European settlement and that this practice remains an integral part of its activities today. He therefore recognized an
aboriginal right under section 35(1) of the Constitution to pursue traditional medicine.

The judge concluded: ‘I cannot find that J.J. is a child in need of protection when her substitute decision-maker has chosen to exercise her constitutionally protected right to pursue their traditional medicine over [the hospital’s] stated course of treatment of chemotherapy.’

To date, the hospital has not decided whether to appeal. If the decision is not appealed, it will not bind courts in other Canadian provinces as the case was decided at a court of first instance.

_Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford._

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**When Policing Meets Health: International Experts call for Improved Alliance between Law Enforcement and Public Health**

By Janine Ewen | 10th November 2014

The 2nd International Law Enforcement and Public Health Conference, organised by the Centre of Law Enforcement and Public Health (CLEPH) and the Law Enforcement and HIV Network took place between the 5th and 8th of October at the Vrije Universiteit in Amsterdam.

The conference was greeted by public health practitioners, intelligence institutions, local police and non-governmental organisations, all uniting around a common theme: public health depends on the police and other arms of law enforcement to achieve our global health agenda, and the police need public health systems to deal with complex social issues.

Despite the intersection of these two sectors, there is a continued struggle to identify our global police in a health role. The police are seen to criminalise activities (e.g. drug use or sex work). It is also likely that many of us will have visual representations of the police locking up menaces in our communities.

Unfortunately, neither arrests nor criminalisation invoke an image of a body with a role to play in public health. Twenty-first century health challenges ask us to consider partnerships, expand our knowledge outside the medical field and encourage those at the frontline to consider their practices through the lens of prevention and harm reduction. Law enforcement officials are witnessing health and welfare cases, just as much as healthcare professionals. The key element that unites both disciplines in the middle is the most predominant function of all: to protect the public.

The Chief Constable of the Dutch Police Service, Pieter-Jaap Aalbersberg opened the gathering and asked participants to integrate, rather than go deeper for solutions, stating:

‘Major advancements in public health tell us that our health is not just about healthy bodies, but healthy lives. This requires more recognition, as well as adjustments to practice. Our Red Light District has existed since 1400. Our approach in Amsterdam is care and empowerment for sex workers, but human trafficking and healthcare combine to deal with victims trafficked against their will.’

EUROPOL’S Director, Rob Wainwright, gave his perspective through a talk entitled ‘When “International” meets interdisciplinary: fighting crime and reducing harm at a European level.’ Wainwright repeated the stance on health’s relationship with crime prevention, recommending that the police should be engaging in discussions with health organisations. He noted an example:

‘We supported a research project on access to services for women who experience domestic violence. In Europe 42,000 women cannot reach out to health services because of intimidation and violence from male partners; a daily crime that requires actions from health and law enforcement.’

Wainwright also discussed the problems of policing that hinder a flourishing relationship between public health and the law:

‘The police nature and mind-set across Europe is conservative. This must change. For example officers are very reluctant to work with non-governmental organisations because of their lack of structure, but they often have the best relationships with people… Public health and policing have become inseparable now.’

NGOs in attendance included the Open Society Foundation (OSF), a world-leading organisation aiming to shape public policy, human rights, and economic, social and legal reform. Representing OSF’s International Harm Reduction programme, Sanjay Patil drew attention to the lack of funding directed towards health care:

‘Billions of dollars is spent on hardware upgrading for law enforcement, rather than building up improved systems for health and
Aldo Lale-Demoz, Deputy Executive Director of the UNODC, elaborated on a further component absent in policing and health: a human rights person-centred approach.

‘My colleague and Director of the UNODC, Yury Fedotov highlights continuously that many national drug control systems rely on sanctions and imprisonment, rather than evidence-based health care in full compliance with human rights standards.’

The gathering was a unique opportunity to put into perspective that having healthy lives depends on our perception that we are safe. The flow of high crime and rates of poor health cannot be resolved by ‘top-down’ jurisdiction, but it can improve when we recognise those who are involved in aspects of health and crime. Harm reduction is an evolved idea that has become attractive, practical and a commitment. Its values are based upon the person and ensuring that an environment with treatment and options can help to minimise risks.

Janine Ewen specialises in Public Health and Human Rights. Recently she presented her research paper on sex workers and the World Cup 2014: ‘We will use the Venom of a Snake for a Useful Antidote’ in Brazil at the International Mega Events and Cities conference.

SOCIAL SECURITY

Kong Yunming v The Director of Social Welfare: Constitutional Protection of Social Welfare Rights in Hong Kong
By Sebastian Ko | 4th February 2014

On 17 December 2013, the Court of Final Appeal of Hong Kong unanimously allowed the appeal of Madam Kong in Kong Yunming v The Director of Social Welfare (Kong) (17/12/2013, FACV2/2013). Kong, an applicant for Comprehensive Social Security Assistance (CSSA), was married to a Hong Kong permanent resident who died one day after she arrived in Hong Kong on a One-Way Permit (OWP) in 2005. She became homeless after her late husband’s public housing unit was repossessed. In 2006, the Director of Social Welfare (the Director) rejected her application for CSSA, as she did not meet the seven-year residence requirement (the Requirement). She sought judicial review on the basis that the Requirement contravened inter alia arts 25, 36 and 145 of the Basic Law.

The CSSA scheme was a means-tested social security scheme. The scheme originally had a one-year residence requirement, which remained until 2004 when the Requirement was introduced. This Requirement, however, did not apply to minors or where the Director’s discretion applied. The OWP scheme was devised to help reunite Mainland and Hong Kong family members, especially children of permanent residents. The Court declared the Requirement unconstitutional, restoring the former one-year requirement.

Right to social welfare

Ribeiro PJ examined the nature of the constitutional right to social welfare in Hong Kong. Art 36 provides that ‘Hong Kong residents shall have the right to social welfare in accordance with law,’ and protects the right to social welfare effected through administrative social security schemes. Art 145 requires the government to ‘formulate policies on the development and improvement’ of the social welfare system. Subject to constitutional review, the government could modify rights under art 36 by adopting policies developed in accordance with art 145, even if certain benefits were reduced or eliminated. The court would refrain from adjudicating the merits of socio-economic policies, unless the measure (i.e. the Requirement) was ‘manifestly without reasonable foundation’ (MWRF).

The Director claimed that the Requirement was imposed to: defend the financial sustainability of the system against the growth of welfare applicants generated by the OWP scheme and a rapidly ageing population; and to curb increasing expenditure on CSSA. However, the Director failed to establish a rational connection between the Requirement and the sustainability rationale.

The Director also argued that the Requirement promoted uniformity in qualifying periods for heavily state-subsidised benefits, and that benefits should be withheld until an applicant has contributed to the Hong Kong economy. It was held that these objectives were insubstantial in terms of societal interests, and besides, the Requirement was a disproportionate means to achieve them. The Requirement also unreasonably excluded indigent mothers, who were overwhelmingly represented amongst new arrival CSSA recipients, but who were insufficiently recognised for their contribution as caretakers of the children of permanent residents.

The Director sought to advance three proportionality arguments based on the following:

a) the Requirement was widely publicised on the Mainland to deter potential indigent new arrivals;
b) new arrivals, if denied CSSA, could rely on charities for help; and
c) the Director’s discretion would be exercised in exceptional cases.

Ribeiro PJ found that none of the arguments qualified as reasonable mitigation of the hardship caused by the Requirement. It was therefore MWRF, given its contradictory policy consequences and insignificant benefits and supporting government statistics.

**Equality analysis**

Bokhary NPJ held that the Requirement excluded non-permanent residents from the right to social welfare. Art 24 of the Basic Law guarantees equal constitutional protection for all residents, and art 36 applies to residents generally. The Requirement’s discrimination of different classes of residents was unjustifiable by ‘any standard of review.’ The Requirement was also illegitimate as it contravened arts 2 and 9 of the ICESCR, which the Basic Law aims to implement. The increased residence requirement was an unwarranted retrogression in addressing basic needs.

**Director of Social Welfare: Constitutional Protection of Social Welfare Rights in Hong Kong**

Kong attracted much public controversy in Hong Kong. Whilst some people saw the decision as judicial permission for new immigrants to exploit welfare resources, others viewed it as an affirmation of the rule of law. How the Hong Kong courts will address new immigrants’ rights to other aspects of social welfare (e.g. public housing) remains to be seen. Kong represents a watershed in Hong Kong’s jurisprudence on socio-economic rights.

Sebastian Ko completed the BCL at the University of Oxford, and is a practising lawyer in Hong Kong.

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**McDonald v UK: The ECTHR on Social Care Provision**

By Stephen Cragg QC | 4th June 2014

So did Ms McDonald OBE, former ballerina, win her case in the European Court of Human Rights (McDonald v UK [2014] ECHR 492 (20 May 2014)) or not? The Guardian on 20 May 2014 said: ‘European court awards payout to disabled woman over loss of night care.’ But the article then explained ‘ruling grants government wide discretion in balancing needs of vulnerable individuals with “economic wellbeing of the state.”’ The case clearly needs some explanation.

First, a short recap.
Ms McDonald is disabled and needs to visit the lavatory several times at night but needs assistance to get out of bed to do so. Her local authority assessed her as needing help to use the commode at night and provided a night-time carer.

However, in November 2008 the council decided that Ms McDonald only needed general assistance with toileting and stopped the night-time service. Her needs could be met if she wore incontinence pads at night, even though she is not incontinent. But the council failed to follow the statutory rules for re-assessing a person’s needs in making this decision.

Having lost a challenge in the High Court, she appealed to the Court of Appeal, by which time the council had carried out a proper assessment in November 2009. The Court found that the council had acted unlawfully in the year between the decision to remove services and the new assessment but that withdrawal of services after November 2009 was a legally defensible decision. In 2011 the Supreme Court agreed.

In Strasbourg there were a number of questions. First, did her situation come within the Article 8 right to respect for private life? Second, if she were within the scope of Article 8, then were those rights breached during the period between November 2008 and November 2009? Third, again if she were within the scope of Article 8, could the otherwise lawful decision-making process be justified, or was the attack on Ms McDonald’s rights and dignity simply too great to be justified?

Of most interest on the first point, the Court said the case involved providing a low level of care which ‘conflicted with her strongly held ideas of self and personal identity,’ and emphasised that ‘the very essence of the Convention was respect for human dignity and human freedom.’ These principles have been expressed in ‘right to die’ cases, but have not been expressed before in relation to social care provision. But the Court decided that ‘the contested measure reducing the level of her healthcare falls within the scope of Article 8.’

Having got over that hurdle, the period between November 2008 and November 2009 was easy for the Court to consider. Any breach of Article 8 must be ‘in accordance with the law.’ The Supreme Court had decided that statutory procedures had not been followed. Therefore, the November 2008 assessment was ‘not in accordance with the law’ and the breach of Article 8 could not be justified. Ms McDonald was awarded 1,000 Euros.

But after November 2009, the assessment resulting in service withdrawal was lawful. The Court had ‘regard to the wide margin of appreciation afforded to States in issues of … health-care policies’ and especially where ‘State resources’ were in issue. Set against this standard, there had been a proportionate consideration of the Article 8 breach, which was justifiable in the context of the wider need to make provision of services for others.

Therefore, local authorities are unlikely to be criticised for rights violations from devising policies to provide the most efficient way of sharing resources amongst care users, even if important services are withdrawn from some people, with the consequent adverse effect on their dignity and independence.

But the case represents a win for Ms McDonald in establishing that the withdrawal of care services could have such an effect on a person’s dignity and independence as to amount to a breach of rights. It also represents a win in establishing that if the proper assessment procedures are not carried out, then any breach of those human rights cannot be justified (and damages may be payable).

And, for the first time, the case puts the provision and withdrawal of social and health care services firmly on the human rights radar.

Stephen Cragg QC is a barrister at Doughty Street Chambers and was the lead counsel for Ms McDonald before the European Court of Human Rights.

Property Rights, Pension Claims, and the Problematic Features of the ECtHR’s Proportionality Review
By Ingrid Leijten | 7th August 2014

Although less mind-blowing than other recent Strasbourg judgments, the case of Stefanetti and Others v. Italy [2014] ECHR 394 is an interesting one, especially when viewed against the backdrop of the European Court of Human Rights’ (ECtHR) earlier pension rights rulings. Importantly, the judgment demonstrates the problematic features of this line of case law. For what determines when pension reductions, understood as interferences with property rights, are (dis)proportional?

In Stefanetti, the ECtHR had to review the fact that the applicants’ pensions had amounted to approximately a third of what they had expected. The reduction resulted from Law 296/2006, which established a method of calculating the pensions of Italians who
had been working in Switzerland, interfering with the interpretation given by the highest courts thus far. The Court had previously dealt with this issue in the 2005 case of Maggio and Others v. Italy [2014] ECHR 769]. In contrast with this earlier case, however, the Court has now concluded that there was a breach of the right to property in Stefanetti.

Unlike in Maggio, the applicants in Stefanetti received less than half of what they had expected from their pensions. This is reason enough to ‘reassess the matter and scrutinise the reduction more closely.’ Eventually, the Court relied upon information about minimum and average pensions in Italy. It then considered that seven out of the nine applicants received somewhat less than €1,000 a month, which is less than the average pension. Because Italy’s minimum pension of €461 can be regarded as inadequate, these sums ‘must be considered as providing only basic commodities.’ The reductions had therefore ‘undoubtedly affected the applicants’ way of life and hindered its enjoyment substantially.’

When exactly is a pension reduction ‘disproportional’? It is the Court’s task to provide individual rights protection and it hence seems unproblematic that it reaches different conclusions in two similar cases. Interestingly in this regard, however, is that the Court did not distinguish between the nine individuals whose applications were reviewed together in the Stefanetti case. But was the reduction as disproportional for one applicant – who still received €1,820 – as for another applicant – who only received €714? This question can be answered in the affirmative if the Court only looks at the percentage of the reduction as such, since it was the same for these two applicants. However, the Court also explicitly examined the effects thereof, considering what the applicants received in light of the minimum pension.

This, moreover, begs the question of whether the effects in Maggio were truly less severe. That the Court did not distinguish amongst the Stefanetti applicants can be justified by the fact that it eventually attached weight to the circumstances surrounding the pension reductions. Yet, as the circumstances in Maggio were comparable, this also fails to explain why in that case, no violation of property rights was found.

Framed as a human rights concern, property review must account for all relevant circumstances. When social benefits or pensions are considered to be ‘possessions,’ however, this triggers review of social circumstances and the appropriateness of welfare policies. The similarity of the facts in Maggio and Stefanetti make painfully clear that it is then difficult, if not impossible, to draw the line.

The dissenters in Stefanetti also questioned the Court’s capacities in this regard. They highlighted the ‘huge and unjustified disparity there would have been, to the advantage of the applicants, had the system not been amended’ as well as the wide margin of appreciation. Moreover, they observed that none of the applicants fell into the lowest pension bracket and that it cannot be said that ‘the old-age pensions actually received by the applicants … are at such a level as to deprive the applicants of the basic means of existence.’

This is an interesting point. Would its case law improve if the Court examined whether ‘core’ social security guarantees are interfered with, in the sense that basic means of subsistence are at stake? Only then, it can be argued, can the Court reach the solid conclusion that a legislative interference in the sensitive and politically-laden social security sphere is ‘disproportional’ in terms of its impact upon fundamental rights.

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Women’s Rights to Social Security and Social Protection
By Beth Goldblatt and Lucie Lamarche | 11th November 2014

There is a growing international focus on social protection in the developing world, while at the same time, countries in the developed world are cutting back on social security in pursuit of ‘austerity.’ The breaking down and building up of welfare systems in different parts of the world provide a fascinating context in which to examine the impacts of such programmes on women. Many of the austerity cuts have targeted single mothers and other poor women, adding to the burdens facing these vulnerable groups. At the same time, some of the social protection measures being introduced into developing countries are specifically directed at mothers who are seen as reliable vehicles for tackling child poverty. Such measures often place additional responsibilities on poor women. A human rights framework that is fully cognisant of women’s interests and entitlements is crucial in interrogating these developments and in helping to shape new responses that advance the rights of women.

We are pleased to introduce a new book on the right to social security examined from a women’s rights perspective that contributes to the articulation of such a framework (Beth Goldblatt and Lucie Lamarche (eds), Women’s Rights to Social Security and Social Protection, Oñati International Series in Law and Society, Hart, 2014). The collection emerges from an international initiative to focus on women in the interpretation and development of this central social and economic right. This initiative involved a webinar and workshop that encouraged human rights practitioners and scholars to deepen our understanding of the gender dimensions of social security and protection in the context of increasing poverty and inequality in the world.

The book contains chapters that explore conceptual questions on the relationship between the right to social security and rights to equality and participation for women. It also considers the meaning of the right to social security in an age where the language of ‘crisis’ and the focus on ‘human capital’ shape dominant discourse. There are chapters evaluating the place of women within international law, including within the International Labour Organisation’s Social Protection Floor Recommendation and the work of other UN bodies dealing with social security and protection. There are also a number of chapters on specific countries’ social security programmes, analysed from a women’s rights standpoint, including China, Canada, Australia, Bolivia, Ireland, Spain, Chile and the USA.

The book explores a range of ways of ‘engendering’ the right to social security. The first approach integrates the right to social security with the right to equality to ensure that social security is guaranteed equally for men and women. The second approach requires a systemic gender-based reformulation of the social security right by critiquing and reframing it in light of feminist theory. The third approach proposes a human rights approach to social protection that mainstremas gender and includes a set of guidelines that tests compliance of social protection programmes with human rights obligations informed by a gender perspective (this is the approach taken by Magdalena Sepúlveda Carmona, former Special Rapporteur on extreme poverty and human rights).

These approaches are closely interrelated and lead towards the same goal of a gendered social security right that is socially, economically and politically transformative. The right to social security is also closely related to many other rights such as rights to work, health and livelihood. The authors of the chapters in the collection are mindful of the many intersecting categories of disadvantage that shape women’s rights to social security including age, race, disability, migrant status and many others. The chapters note the need for the restructuring of labour markets and the reallocation of care responsibilities in society if women are to fully participate as equals in all societies. These issues are intimately linked to the rights to social security and protection and require both national and transnational responses.

The book brings together research and writing across the disciplines of social policy, human rights and feminist theory. While it engages with scholarly debates within these fields, it is also directed, in a practical way, at contributing to the development of the right to social security from a women’s rights perspective.

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Lucie Lamarche is a Professor in the Faculty of Political Science and Law at the University of Quebec in Montreal.

First Nations Child Welfare Funding Before National Tribunal
By Ravi Amarnath | 12th November 2014

The fate of thousands of First Nations children is in the hands of an administrative tribunal in a decision that could alter the course of child welfare funding in Canada.

Canada currently has two parallel systems in place to fund child welfare services, which aim to protect children from abuse and neglect. Ordinarily, individual Canadian provinces are responsible for funding child welfare services within their jurisdiction. However, Canada’s federal government is responsible for funding child welfare services for Canada’s indigenous population – notably its First Nations population – who live in allocated areas of land throughout the country, known as reserves.
Aboriginal Affairs and Northern Development Canada (‘AANDC’) is the Canadian agency responsible for overseeing the implementation of on-reserve child welfare services. One of AANDC’s objectives while funding child welfare programs is to ensure that services are provided ‘in a manner that is reasonably comparable to those available to other provincial residents in similar circumstances.’

In 2007, two organizations, First Nations Child and Family Society of Canada, and the Assembly of First Nations (the ‘complainants’) filed a complaint to the Canadian Human Rights Commission (‘CHRC’) in which they asserted that AANDC underfunds child welfare services for on-reserve First Nations children.

The complainants’ alleged that this underfunding, as of 2007, resulted in 27,000 First Nations children, or one out of ten children, being placed in care as opposed to one out of 200 non-First Nations children – a figure that AANDC disputes.

Based on these figures, the complainants asserted that AANDC’s underfunding of welfare services was a form of adverse differential treatment, a prohibited ground of discrimination under subsection 5(b) of the Canadian Human Rights Act (‘CHRA’).

The CHRA was enacted in 1977 with the purpose of protecting individuals from discrimination when employed by, or receiving services from, the federal government, a First Nations government or private companies regulated by the federal government. Complaints are originally investigated by the CHRC, and subsequently adjudicated upon by the Canadian Human Rights Tribunal (‘CHRT’) if they are deemed to have merit.

While the complainants’ claim was initiated over seven years ago and has had a protracted legal history, the majority of proceedings have centred on whether the CHRT should adjudicate the matter on its merits.

In 2011, the former CHRT Chairperson determined that the CHRT could not hear the merits of the case. She stated that the complainants were required, but had failed, to identify a valid ‘comparator’ group to the federal government to establish their claim in discrimination. The decision drew rebuke, as the Supreme Court of Canada had stated days earlier, in the context of equality rights under the Canadian Charter of Rights and Freedoms, that it is ‘not necessary to pinpoint a mirror comparator group.’

On subsequent reviews – both at the Federal Court and Federal Court of Appeal – the Chairperson’s decision was found to be unreasonable and the decision was sent back to the CHRT to be heard on its merits by a newly comprised tribunal.

The substantive hearing on the merits of the case began last year and concluded this past October. The complainants are seeking a number of remedies in the case, including a declaration by the CHRT that AANDC funding is discriminatory and the formation of a national advisory committee to develop a new funding formula and oversee this new program.

If the tribunal rules in the complainants’ favour, the decision could have widespread ramifications for AANDC, which provides funding for a number of services for First Nations, and other indigenous peoples, in Canada.
Two outside interest groups, the Chiefs of Ontario and Amnesty International, provided submissions in the case.

Ravi Amarnath was born and raised in Fort Saskatchewan, Alberta (Canada). He is a graduate student in law at the University of Oxford.

OTHER TOPICS IN SOCIO-ECONOMIC RIGHTS

Not Reaping the Benefits: the United Kingdom’s Continuing Violation of Article 12§1 of the European Social Charter
By Daniel Cashman | 6th February 2014

On 29 January 2014, the European Committee of Social Rights found, yet again, that the United Kingdom is in violation of Article 12§1 of the European Social Charter (‘the Charter’). This finding sets off alarm bells regarding the legality of the Coalition Government’s ‘welfare reforms’ implemented by the Welfare Reform Act 2012.

The UK’s compliance with the Charter is assessed by reference to periodic reports submitted by the Government, which are considered by the European Committee of Social Rights (‘the Committee’) in accordance with Article 24 of the Charter. The most recent report to have been considered by the Committee concerned provisions relating to ‘health, social security and social protection.’ The Committee concluded that the UK was primarily in conformity with the relevant provisions (although it requires further information regarding Article 13§4); however, with regard to Article 12§1, it found that the United Kingdom was in breach of its undertaking ‘to establish or maintain a system of social security.’

The jurisprudence of the Committee with regard to Article 12§1 was set out in Report XVIII-2. The Committee requires social security benefits to be ‘effective.’ For income-replacement benefits, this means that their level should never fall below ‘the poverty threshold defined as 50% of median equivalised income and as calculated on the basis of the Eurostat at-risk-of-poverty threshold value.’ In its most recent report, the Committee noted that the poverty threshold in 2011 stood at €714 per month.

The relevant level of benefits provided by the UK were:

- Short-term incapacity benefit: €85 per week;
- Long-term incapacity benefit: €112 per week;
- Employment and Support Allowance and Jobseekers’ Allowance: €321 per month;
- State pension: €490 per month;
- As these amounts do not even reach 40% of the Eurostat median equivalised income, the Committee concluded that they were ‘manifestly inadequate.’

This conclusion should not have been a surprise for the Government. The Committee found the UK to be in breach of Article 12§1 of the Charter in its reports for both the period 2001-2004 and 2005-2007. However, in its previous two findings, the Committee found fewer breaches; it concluded that (only) the levels of Statutory Sick Pay, short-term incapacity benefit and contributory jobseekers’ allowance for single persons were manifestly inadequate.

So, having found that the UK has been in breach of Article 12§1 of the Charter for (at least) the period from the beginning of 2001 until the end of 2011, what does the future hold for the UK’s compliance with the Charter? Unfortunately, the picture is bleak. The Committee’s most recent report only considered the situation up to the end of 2011. This means that the Coalition Government’s sweeping welfare reforms in the Welfare Reform Act 2012, mostly brought into effect from April 2013, are not included. Rather than seeking to raise benefits to the poverty threshold, the Government has introduced stringent reforms and caps. For example, by virtue of an overall benefit cap, 40,000 households are expected to lose an average of £93 per week; and, as a result of benefits only being up-rated by 1%, rather than in accordance with CPI inflation, 9.6 million people are expected to see an average weekly loss of £3.

The repeated findings of the UK’s violation of Art 12§1 might raise questions about whether the reporting procedure really has sufficient teeth in enforcing the Charter, especially in the light of a near-certain finding of a continued violation in the Committee’s next report on the UK’s social security provision. However, one would hope that the Government would sit up and take notice of the Committee’s persistent analysis. Unfortunately, members of the Coalition Government have reportedly responded to the Committee’s findings as ‘lunacy’ and ‘meddling.’ In so doing, the Government is dismissing the Committee’s concern for the most vulnerable in society.

Daniel Cashman is a barrister, who completed the BA and BCL at the University of Oxford. He was a founding co-chair of Oxford Legal Assistance and currently sits on the Executive Committee of Oxford Pro Bono Publico.
Is There a Hierarchy of Human Rights and Human Rights Reporting?
By Katharine Quarmby | 24th March 2014

I believe that just as there is a hierarchy of rights, as discussed by human rights scholars, there is also a hierarchy of human rights reporting.

War reporting and the human rights violations that occur in conflict zones are seen as ‘classic’ human rights journalism. It’s dangerous work. Last year, the International Federation of Journalists estimated that over 100 journalists and media workers were directly killed because of their work. Around half were engaged in human rights reporting.

I was one of the many journalists who travelled to Rwanda after the genocide that killed at least 800,000 Tutsis and moderate Hutus in 1994. I was there in 1997 to record the aftermath with BBC Panorama, and the film we made, Valentina’s Story, produced by Mike Robinson and reported by Fergal Keane, is a classic piece of human rights reporting. In 1999, as a BBC Newsnight producer, I went back with Fergal, to make two more classic human rights films, gathering evidence on rights violations during the genocide that could be used by the Arusha War Crimes Tribunal. Reporting on violations is crucial stuff and continues today, all over the world.

I have moved on to smaller scale human rights journalism that I also consider important, but which is less well-funded and more controversial. This is because the very rights of those under fire are seen as inconvenient, not mainstream or unpopular.

Disability, for instance, are seen as segregated from other rights, and are not central to the work of most human rights groups. Similarly, during the Leveson Inquiry, despite a campaign by disabled people and their organisations, none were called to give oral evidence on how they were treated in the media. Leveson took oral evidence from women’s rights organizations, transgender organizations and refugee organisations. This was disappointing, when the stereotyping of disabled people by certain sections of the media, especially around benefit cuts, is evidenced to have caused a worsening of public attitudes towards them.

The failure to understand the discrimination faced by disabled people meant that it took many years to get the pressing issue of disability hate crime recognized. The key intervention of Lord Ken Macdonald, then the Director of Public Prosecutions, who called disability hate crime a ‘scar on the conscience’ of the criminal justice system, was one of the reasons why that change happened. But there is still a long way to go, as disability rights are often seen as inconvenient to the general public, and this is mirrored in journalism itself.

Lastly, we come to unpopular human rights journalism – and this is where I would place the rights of Britain’s nomads, which come
into conflict with another set of rights – those relating to property. The rights of Britain’s nomads to family life, to education, to a decent standard of housing, and to enjoy a life free from discrimination often come into conflict with British planning law.

This played out in Court 76 of the High Court on October 12, 2011, as I reported for the Economist, when the Dale Farm Irish Traveller residents lost a crucial legal battle against their eviction. I wrote: ‘Dale Farm has become a symbol of an increasingly bitter dispute about the rights of Gypsies and Travellers, around a fifth of whom have nowhere legal to live. Basildon council argues that it is simply enforcing planning law...This was echoed by Mr Justice Ouseley. He said that there must be “public respect for and confidence in” planning law, and that although Basildon council had not identified alternative pitches where the travellers could live, those deemed homeless had been offered “bricks and mortar” accommodation. The decision by Dale Farm residents to decline such housing, due to their “cultural aversion” to it, he said, was their own responsibility.’

Basildon was right in legal terms, but who won, when those evicted have ended up homeless and in poor health? There has to be a better way of honouring property rights than by ignoring human rights concerns. Reporting on such travails is unpopular human rights journalism – but important, all the same.

Katharine Quarmby is an award-winning non-fiction writer and journalist.

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**Going Hungry? The Human Right to Food in the UK**

*By Jonathan Butterworth | 6th May 2014*

The Government is legally required under the International Covenant on Economic, Social and Cultural Rights (Article 11) to secure the human right to adequate food for everyone in the UK. But in recent years we have seen large increases in the levels of malnutrition, hunger and food bank usage, all of which are indicative of the UK being in breach of its international legal obligations in respect of the right to food.

In the 2014 Just Fair Consortium monitoring report ‘Going Hungry? The Human Right to Food in the UK,’ we learn how and why this is so.

**How do we know there is a problem?**

The numbers of people given three days’ emergency food by Trussell Trust food banks has risen exponentially from 26,000 in 2008-09 to 913,138 in 2013-14, as growing numbers of people can’t afford to provide the basics for their families and are forced to choose between heating, eating or paying for housing costs.

The effects of this state of food insecurity are widespread and dramatic. Public health experts have warned that the rise of malnutrition in the UK ‘has all the signs of a public health emergency,’ with a 74 per cent increase in the number of malnutrition-related hospital admissions since 2008-09.
Women, children and people with disabilities have been particularly adversely affected. Single mothers report having missed meals so that their children can eat. At times, they cannot even ensure their children are adequately fed. And this is whilst experts warn that child poverty is expected to increase in the near future.

What are the causes of the problem?

In the Just Fair Consortium monitoring report, ‘Going Hungry? The Human Right to Food in the UK,’ we have learnt that nutritious food is becoming too expensive for many people on low wages or benefits. The fall in the real value of wages has meant that the number of working poor who are hungry or unable to afford nutritious food has increased.

Evidence also shows that hunger has been fuelled by the inadequacy of social security provision and the processes by which it is delivered. People already on low incomes have been made even poorer by the under-occupancy penalty, the abolition of crisis loans and community care grants and the decision to cap increases in benefits to one per cent rather than indexing them to inflation. The squeeze on social security has been compounded by payment delays and sanctions, which leave some people with no income at all – 31 per cent of those visiting Trussell Trust food banks do so because their benefits have been delayed, and 17 per cent do so because of changes to benefits.

Even though they are spending more, people have been forced to cut the amount they eat and eat more poor quality, unhealthy food. From 2007 to 2012, expenditure on food rose by 20 per cent, but the actual volume of food consumed declined by seven per cent, as household incomes for poorer families have been put under greater stress whilst prices have increased.

What is required to address the problem?

We cannot allow the gap between wages, benefits and food costs to continue to grow. We cannot permit food banks to become a substitute for a comprehensive social security system. We cannot allow malnutrition rates to continue to rise. Securing the human right to food must become a national priority.

We call on the Government to draw up a national right to food strategy and action plan, including an assessment of the state of enjoyment of this right. Any further deterioration in income levels, which undermine people’s ability to access food, shelter and basic services, must be avoided. We urge the Government to close the gap between income and food costs.

The Government must take urgent action to reduce benefit delays, review how benefit sanctions and welfare reforms are being implemented and reduce unnecessary hardship, hunger and distress. We call on the Government to mobilise all available resources and make full use of its tax and spending powers to deal with the national food emergency.

Jonathan Butterworth is co-founder and Director of Just Fair. He previously acted as an ESCR consultant for Democratic Audit, an adviser to the British Institute of Human Rights, and was a teaching fellow at UCL.

Finance and Human Rights: Developments in Brazil and Peru
By Caio Borges | 20th January 2015

In December 2014, governments, businesses and civil society gathered at the Palais des Nations, the UN’s headquarters in Geneva, for the Third Annual Forum on Business and Human Rights. The event was organised by the UN Human Rights Council to serve as a prominent global venue to discuss the trends and challenges in the implementation of the UN Guiding Principles on Business and Human Rights (the GPs). The GPs can be understood as a ‘heterodox’ normative construction that puts together pre-existing hard law – binding obligations upon States to protect human rights – with ‘soft law’ – non-binding practical guidelines for companies on how to incorporate human rights standards into their day-to-day operations.

One session of the Forum discussed recent trends in the regulation of the financial sector in Latin America. The presentations by the Brazilian Central Bank (BCB) and the Peruvian Financial Authority made it clear that the two countries are following different paths towards the improvement of the respect of human rights by the financial sector, with the initiatives of Peru being strikingly more sophisticated than that of its giant neighbour.

In April 2014, the Brazilian authority adopted a regulation requiring every financial institution operating in the country to establish a social and environmental policy or, if such a policy was already in place, to review it in accordance to the provisions of the new rule. It commands that institutions should establish internal procedures, controls, systems and governance structures to ensure compliance with their policies. It also requires financial institutions to present an action plan describing how they intend to make it operational.
Socio-Economic
Chapter 12

Despite being lauded by the financial market and the regulator itself as a landmark rule, the resolution is void of substantive criteria to allow external stakeholders, and even the BCB, to assess the robustness of the policies, especially their adherence to universal human rights standards, such as the GPs.

Unlike the Peruvian rule (not available to the public at the time of writing), the Brazilian norm ignores the remedial aspect of the ‘corporate responsibility to respect,’ one of the pillars of the GPs, and requires neither the financial institutions nor the borrowers to establish a grievance mechanism to solve human rights-related conflicts.

Regarding the engagement of stakeholders by financial institutions in the process of building or reviewing the policies, the wording of the norm is weak. According to the rule, financial institutions should only ‘stimulate’ the participation of interested parties in the process. It says nothing about the importance of banks requiring their corporate clients to demonstrate that they have meaningfully consulted affected communities throughout the life of the project cycle.

These loopholes in the Brazilian regulation mark a contrast with the Peruvian initiative, which has incorporated the core elements of the GPs and therefore, once enacted, will set a benchmark in the region, perhaps in the world.

The justification of the BCB is that the rule is aimed at ‘levelling the playing field,’ given that many financial institutions in the country, especially regional development banks, still lack an internal framework on social and environmental responsibility.

However, the light-touch regulation by the BCB is already showing its deleterious effects. In November 2014, the Brazilian Development Bank (BNDES) issued its new Social and Environmental Policy. Regrettably, the updated policy barely changed the wording of the old one. This is a problem because the BNDES, a bank that now lends two to three times more than well-known international financial institutions, such as the World Bank and the Inter-American Development Bank, has fragile social and environmental standards.

According to a study by Conectas Human Rights, in the past ten years the BNDES has grown in size and importance, but this has been accompanied by an increase in the number of denouncements that the Bank is providing financial support to companies allegedly involved in human rights abuses, such as the use of slave-like labor and displacement of communities without proper compensation, depriving them of their right to water, food, land and other basic rights.

The hope is that the BCB be more ambitious in its next steps. To ensure that the policies are not just words of good intention, the authority should conduct a thorough analysis of the first wave of policies, which are due to February this year, and exercise rigorous oversight over their execution. If best practices are needed, one is right next door.

Caio Borges is an attorney in the Business and Human Rights project at Conectas Human Rights, an international not-for-profit, non-governmental organization based in São Paulo, Brazil. Mr. Borges holds a Master degree in law and development from the Getulio Vargas Foundation Law School in São Paulo and is a researcher in the same institution.

The Benefits of Using Equality and Non-Discrimination Strategies in Litigating Economic and Social Rights – New Guide Published
By Joanna Whiteman | 14th January 2015

Socio-economic inequality is the biggest human rights and development challenge today. At the Equal Rights Trust we believe that using the rights to equality and non-discrimination in cases relating to the social and economic rights of the vulnerable is one, until now under-explored, way to address the challenge. On 10 December 2014, we published a Guide (with accompanying Online Case Compendium), which both makes our case and illustrates how such litigation may be brought.

Economic and social rights are clearly enshrined in international human rights law. The International Covenant on Economic, Social and Cultural Rights of 1966 sets out critical rights, such as those to education, an adequate standard of living, health and social security, and it requires that states guarantee that these rights will be exercised without discrimination (Article 2(2)). And yet there remains a serious problem of their realisation. What is this problem? Why does socio-economic inequality persist and indeed grow?

From a legal perspective, for a start, in contrast to the rights contained within the sister Covenant, the International Covenant on Civil and Political Rights 1966, the rights were imbued with weaker effect with states only required to ensure the rights’ ‘progressive realisation.’ Further, economic and social rights are not justiciable in many jurisdictions. Even where they are, courts remain reticent to interfere in what they still consider to be a matter with huge resource implications, which remains to be determined by legislatures.

The reticence to treat socio-economic rights on an equal footing with civil and political rights is misplaced. As Octavio Ferraz has
rightly pointed out, the issue is not that there aren’t the resources to secure everyone’s social and economic rights but rather that the resources are unequally distributed. Oxfam’s now well-cited finding that the 85 richest individuals in the world have, collectively, the same wealth as the poorest 3.5 billion demonstrates the inequality in stark terms. Inequality and discrimination, not limited resources, are at the heart of the problem of non-realisation of social and economic rights. Advancing equality and non-discrimination is key to solving the problem.

Unlike economic and social rights, the rights to equality and particularly to non-discrimination have received more traction both in terms of adoption as justiciable rights and in terms of being upheld in progressive judgments by courts. The Equal Rights Trust has long believed that these rights can provide an important basis upon which the socio-economic rights of the most disadvantaged can be realised.

In 2011, we commenced research into the extent to which courts at the international, regional and national levels (in selected jurisdictions) have made findings of discrimination or inequality in relation to socio-economic rights realisation. We found that there while there is some useful jurisprudence, it remains too limited and there is a need for equality and non-discrimination strategies to be employed more often and more effectively before courts.

The outcome of our research was ‘Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights,’ which was published on 10 December. The Guide, taken together with its accompanying Online Case Compendium:

- Elucidates the conceptual links between equality and non-discrimination on the one hand and economic and social rights on the other and explains why the former could be used to advance the latter;
- Brings together for easy reference almost 100 cases from the key international and regional courts and treaty bodies and courts in nine national jurisdictions, which may provide useful precedents for lawyers;
- Provides practical guidance to litigators on assembling a case strategy which makes the most of the equality and non-discrimination framework to advance socio-economic rights.

It is our hope that greater involvement of equality and non-discrimination strategies in cases relating to socio-economic rights, will result in greater realisation of the rights. And we hope that our Guide will provide a useful resource for litigators in working towards this goal.

Joanna Whiteman is Head of Litigation at the Equal Rights Trust and drafted the Trust’s ‘Economic and Social Rights in the Courtroom: A Litigator’s Guide to Using Equality and Non-Discrimination Strategies to Advance Economic and Social Rights.’
Chapter 13
Labour
Introduction
By Dr Barbara Havelková

Labour law today is facing some difficult questions: How to achieve social inclusion in an age of austerity? How to combine the rights of workers with the aim of competitiveness in a globalized world? Several of the blog contributions forming this chapter addressed these questions head on, in others, the issues lurk in the background.

It is also important to note the overlap between the human rights issues raised in these labour rights contributions and elsewhere in this anthology. Many themes cut across several chapters, for example, equality rights, freedom of assembly and expression, socio-economic rights, migration and criminal justice. Indeed, many of the posts included in other sections of this anthology could have equally found a home in this chapter – such as contributions on the increase in employment tribunal fees, highlighted in Chapter 1 on ‘Access to Justice’ or recent judicial pronouncements protecting the right to strike as a form of freedom of association, contained in Chapter 7.

This introduction takes a thematic approach to the contributions in this chapter, divided under three headings: The Expansion and Contraction of Labour Law Protection; Uniform or Varied Protection?; and Transnational Regulation and Convergence?

The Expansion and Contraction of Labour Law Protection

In several jurisdictions we have seen development whereby marginalized groups, previously uncovered by the protection of labour rights or human rights, have now been brought into the fold. Max Harris’ post ‘The Regulation of Casual Work and the Problematical Idea of the ‘Zero Hours Contract’ (p 336) looked at the extension of sexual harassment protection to sex-workers in New Zealand. This was accompanied by Meghan Campbell’s review of the landmark Canadian decision of Bedford [2013] 3 SCR 1101 (‘Safety of Sex-Workers Again at the Centre in Canada (Attorney General) v Bedford’ p 338). In this case the Supreme Court struck down several criminal law provisions which compromised the safety of sex workers thus violating the rights to life, liberty and security of the person, guaranteed by Section 7 of the Canadian Charter of Rights.

The interference with the livelihood of the particularly marginalized has also been addressed in South Africa and Pakistan. The South African Constitutional Court recently issued an ‘interim injunction’ to protect street traders from the Johannesburg’s controversial ‘Operation Clean Sweep’, as Brian Ray reported (‘South African Informal Traders Forum and Others v The City of Johannesburg and Others: A Promising Start by the South African Constitutional Court’ p 341). Ravi Nitesh in ‘The Plight of Indo-Pak Fishermen and the Need to Appreciate Economic Rights’ (p 342) highlighted how Pakistan has recently released boats of fishermen arrested for fishing on the wrong side of the Indo-Pakistani border. He urges in his post for the Indian government to respect the fishermen’s right to earn a living and do the same as Pakistan.

Alongside these positive extensions of labour and human rights to workers previously uncovered, including the self-employed, opposite trends exist as well. Closer to home, Mark Freedland criticises ‘Zero Hour Contracts’ as a highly precarious form of employment with dubious coverage by employment rights. (‘The Regulation of Casual Work and the Problematical Idea of the ‘Zero Hours Contract’ p 336) He notes that ‘depending on the precise nature of the arrangement … access even to such fundamental rights… as freedom of association may be in doubt.’ The rise of ‘Zero Hour Contracts’ can be also seen as an example of the difference in the level of protection afforded to different groups of workers.

Uniform or Varied Protection?

Bob Hepple’s post (‘Women at work – positive obligations for positive results’ p 332) looks at the position of women. He argues that continuing gender gaps have their roots in ‘socio-cultural traditions, structures of employment and in the way we measure economic value’. These structural obstacles to equality can only be overcome by ‘positive action’. According to Hepple, a ‘positive duty’ to advance equality of opportunity, which has been imposed on public authorities by the Equality Act 2010, should be extended to employers. Sheila Wild (‘The UK’s Widening Gender Pay Gap – What Must Be Done’ p 333) notes that the gender pay gap has not merely been persistent, but is sadly growing in the UK. Similar to Hepple, she observes that the causes of this are structural, and need to be tackled as such. Positive action to encourage diversity is also suggested for another characteristic specifically protected by equality and antidiscrimination legislation worldwide: ethnicity. The authors of a blog submitted on behalf of the Centre on Dynamics of Ethnicity (‘When does being better qualified provide you with fewer opportunities?’ p 334) observe that despite high educational achievements, members of ethnic minorities in the UK are more likely than whites to be unemployed, less likely to attain higher ranks of management and when employed, are likely to be paid less. The authors argue that a proactive approach to counteract the ‘subtle hostility or open racism’ in the labour market is needed.

While these contributions are concerned with improving the position of discriminated groups, the question must also be asked whether new disadvantaged groups are not currently being created by the legislation itself. The answer by Mark Freedland would be yes, as far as ‘Zero Hour Contracts’ are concerned. Sophie Beesley (‘What will the Flexible Working Regulations 2014 mean for employers and employees?’ p 335), reflecting on the amendments to the Flexible Working Regulations 2014, is more sympathetic to the ‘flexibilization’ of the labour market. She does, however, point out that the main benefits will be reaped by the employers.
Phillip D Grant Jr and Matthew Tyler ask whether particular privileges enjoyed by certain groups of employees should legitimately be maintained (‘Vergara Ruling Poses Problems for Separation of Powers and Academic Freedom’ p 343). They discuss the recent decision of the California Supreme Court in Vergara striking down the provision of tenure and extra job security for teachers. The right to education of students, more specifically to good quality public education, was seen as prevailing over the special employment rights of teachers in this case.

Transnational Regulation and Convergence?

Finally, two contributors focus on whether transnational systems can support labour rights at home. In the context of the EU as well as under the European Convention on Human Rights (ECHR), the presence of a consensus among the member states is important for the question of whether rights will be protected and what their content will be. Two recent cases suggest that the diversity of national protection in Europe means that the required threshold for consensus is not reached with regard to labour rights.

Menelaos Markakis analyses of the AMS Case C 176/12 case concerning the appointment of trade union representatives in undertakings (‘The CJEU’s Ruling in AMS and the Horizontal Effect of the Charter’ p 340). He notes that there is good news, in that the ECJ confirmed horizontal application of fundamental rights in situations within the scope of EU law. The disappointing news for labour rights, however, is that the guarantee contained in Article 27 was insufficiently specific to be fully effective without EU or national legislation identifying its content. John Hendy’s and Michael Ford’s analyse the RMT v United Kingdom [2014] ECHR 366 case which saw a challenge to the ban on sympathy strikes in the UK (‘RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights’ p 337). They note that although secondary action was seen as falling under the protection of Art. 11 ECHR, the European Court of Human Rights applied a wide margin of appreciation to the UK and therefore the interference with the right was seen as justified.

The contributions in this chapter highlight two things: First, the importance of human rights for workers, even if their claim does not succeed (as in AMS), or the right is found to exist but the limitation is seen as justified (as in RMT). Second, the importance of the guarantee of these rights to those who are not in traditional employment relationships, but work under a range of different contracts or are self-employed.

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The most significant change in recent decades influencing the position of women at work is the transformation of state-managed capitalism into a globally marketised, privatised and deregulated system. This is accompanied by an ideological change from the post-War spirit of social solidarity into a belief in individual choice, personal autonomy and meritocracy. Women are told that they will succeed through individual advancement and by being more career-oriented.

This change has resulted in a new gender gap. The gap in numbers between economically active men and women has been slowly decreasing. But the gap based on inequity in the quality of employment has grown. Women who enter the labour market are now generally highly educated but still have a difficult time finding work. When they do, they are generally segregated in poorly-paid, insecure, home-based or informal work. There remain, in many countries, legal restrictions on working in certain jobs, often based on religious or patriarchal assumptions. There are persistent social and cultural pressures on women to combine family responsibilities with paid employment or to remain at home as carers. Unpaid work is not valorised. The employment opportunities and earning potential of women continues to be well below that of men.

The roots of gender inequality lie in the socio-cultural traditions of countries, the structures of employment and the way we measure economic value. What is needed is radical transformation that empowers women to the same degree as men and that restores a spirit of social solidarity. An increasing number of countries have adopted anti-discrimination legislation and policies; the Equal Rights Trust has been working in over 30 countries to promote and advise on such measures. However, giving legal rights to women to make individual complaints against discrimination is not enough, even when the law goes beyond outlawing direct discrimination to include indirect discrimination.

It has long been recognised that ‘positive action’ can bring about significant changes, including the eradication of practices that disadvantage women like word-of-mouth recruiting, introducing policies that seek to increase the proportion of women by making the criteria for recruitment and promotion more objective and job-related, and allowing for preferential treatment of women where they are under-represented. The ILO Convention on Discrimination (Employment and Occupation) makes it clear that ‘special measures’ -- ‘designed to meet the particular requirements of persons who for reasons such as sex, age, disablement, family or social responsibilities or social or cultural status…shall not be deemed to be discrimination’ (Art. 5). This is an exception to the general negative principle of non-discrimination.

What is missing is a positive duty on employers to advance equality of opportunity. In some countries (e.g. Britain) legal duties have been imposed on public authorities to implement gender mainstreaming. As the European Commission said in 2008, this ‘means mobilising all general policies and measures specifically for achieving equality by actively and openly taking into account at the planning stage their effects on women and men and by assuming that a transformation of institutions and/or organisations may be necessary.’

The economic crisis has made it extremely difficult to implement such policies. In Britain where, since 2006, there has been a general duty on public authorities to advance equality of opportunity, the duty is interpreted as mainly procedural – to have ‘due regard’ to the need to advance equal opportunities. Provided the authority follows the correct procedure, cuts in public expenditure, which will have an adverse impact on women, can still be implemented.

The ILO should examine how the equality conventions can better support transformative equality. The younger generation cannot afford to be – or do not wish to be -- herded into traditional full-time permanent employment based on the model of a male breadwinner and unpaid dependent partner. ‘Familial economic units’ (with either shared or single-parenting) need to be provided with policy options that enable them to maximise their utility (for example, properly paid parental leave and the valorisation of unpaid labour). However, we are woefully short of data about the situation inside organisations: who works for what wage or salary.

This plea for an approach of transformative equality links with the question of the role of workers’ and employers’ representatives. Obviously supporting workers’ representatives by law or otherwise is important. The growing feminisation of trade unions also heralds a shift in direction. But trade unions and other workers’ representatives cannot do much if the channels open to them are being squeezed by government measures. For example, in Britain, prohibitive fees have been introduced for taking complaints of discrimination to employment tribunals. The Equality and Human Rights Commission, which is supposed to help victims of discrimination, has had its power curtailed and budget cut by 70% from £70 million in 2010 to just over £18 million in 2014. The promise of greater gender equality through the actions of individuals is illusory.

The key to greater gender equality is through democratic participation in affirmative action schemes: to ensure a ‘fit’ or ‘proportionality’ between the aims of the scheme and the means used to achieve them and to recognise that restorative justice is a process in which conflicting interests have to be reconciled. There must be dialogue and participation of those whose interests are affected in the process of change, and there should be mechanisms to ensure the accountability of those who represent these interests.
The UK’s Widening Gender Pay Gap – What Must be Done
By Sheila Wild | 6th November 2014

The Geneva-based World Economic Forum’s Global Gender Equality Index 2014 has ranked the United Kingdom 26th out of 142 countries. Last year, the WEF ranked the UK 18th, and with Nordic Countries showing what can be achieved, and Iceland topping the rankings for the sixth consecutive year, questions are being asked about the UK’s relatively poor performance. Attention has focused particularly on the UK’s widening gender pay gap.

The Global Gender Gap Report 2014 benchmarks national gender gaps of 142 countries on economic, political, education- and health-based criteria. One-hundred and five countries have made progress overall, and only six – including the UK – have regressed relative to their starting point nine years ago, when the Index was first introduced. The report notes that no country has achieved gender equality. The highest ranking countries – Iceland, Finland, Norway, Sweden and Denmark – have closed 80 percent of their gaps, while the lowest ranked – Yemen – has closed a little over half of its gap. The Index is intended to create greater awareness among a global audience of the challenges posed by gender gaps and the opportunities created by reducing them.

The Index’s methodology is unique in that it focuses on measuring gaps rather than levels, thus making the Index independent of levels of development and enabling comparisons between an advanced country, like the UK, and a less developed one, such as Mozambique, which is ranked immediately below the UK at 27th. The preamble of the report sets out the way the Index is constructed and is recommended reading. Here we need only note that how the UK calculates the gender pay gap differs from that in the Index. (For a brief explanation of what the UK does, you can go to www.equalpayportal.co.uk.)

The UK ranks 46th on the WEF’s Economic Participation Indicator; 32nd on Educational Attainment; 94th on Health and Survival; and 33rd on Political Empowerment. Comparable rankings for Iceland are: 1st, 7th, 128th and 1st. And for Mozambique: 19th, 129th, 104th and 19th. Little attention has been paid to the UK’s low ranking on women’s political empowerment (it really does matter that there are so few women in Parliament!), but commentators are right to focus on women’s place in the economy; whereas on the non-economic indicators the UK has dropped only one or two places, on the Economic Participation Indicator, it has dropped from 35th to 46th. The gender pay gap is pertinent as a measure of labour market inequality. If the gender pay gap is widening, then women’s economic opportunities are shrinking.

It isn’t enough to open up educational opportunities to women and exhort them to move into male-dominated occupations; it isn’t enough to outlaw discrimination at work and to provide a legal entitlement to equal pay. We also need to ensure that economic policies do not put women at a disadvantage, and to do that, we need to understand how women fit into the economy. It is well-
known that a large percentage of women work part-time, but women also make up the majority of low paid workers, and they dominate the public sector; women make up the majority of employees in central and local government and in the National Health Service.

Women’s dominance in the public sector means that efforts to redress economic recession by introducing freezes on public sector pay and below-inflation pay awards for public sector workers will have a disproportionately negative impact on women. And as most of the new jobs being created are in the private sector, and as most are low-paid, women are unlikely to be able to move out of the public sector into a better-paid job in the private sector. Things could get worse. Since the WEF gathered its data, the UK’s own Social Mobility Commission has reported that 5 million Britons, 61 percent of them women, are stuck in low paid jobs [Social Mobility Commission, 2014].

The UK economy is gendered, and the labour market is unequal. The ways in which pay is structured are unequal. Downward pressures on pay affect women more than they do men. If we want to close the gender gap, these structural inequalities must be tackled. If we want to climb up the WEF rankings, we must stop weighting the scales against women.

Sheila Wild was formerly Director of Employment Policy at the Equal Opportunities Commission and is the founder of EqualPayPortal, the independent website aimed at equipping people to understand and deal with equal pay issues.

When Does Being Better Qualified Provide you with Fewer Opportunities?
By Centre on Dynamics of Ethnicity | 13th July 2014

The answer: when you’re a member of one of the UK’s many ethnic minorities.

Figures from the University of Manchester’s Centre on Dynamics of Ethnicity indicate that Britain’s job market is becoming less equal, despite the rising level of educational attainment among non-white people. So what’s going on?

It’s no secret that Britain is becoming less white. The most recent census showed that the white ethnic group accounted for 86.0% of the usual resident population in 2011, which was a decrease from 91.3% in 2001 and 94.1% in 1991. Indeed, a study from the University of Leeds predicts that ethnic minorities will make up a fifth of the UK population in less than 40 years’ time. While it should follow that there are corresponding increases in employment among ethnic minorities, this doesn’t appear to be the case.

According to research from the Cabinet Office, black and Asian ethnic minority workers are more likely to be unemployed than their white peers and are less likely to be found in the higher ranks of management. Those who are employed are more likely to be paid less. Overall, figures from the Centre on Dynamics of Ethnicity show that white ethnic groups are in a more advantaged position in the labour market compared with other ethnic groups, apart from Irish travellers and Gypsies.

These trends are all the more alarming because ethnic minorities are typically better educated than white Britons. Figures show that, between 1991 and 2011, ethnic minority groups experienced greater overall educational improvements than the white group.
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At comprehensive school level, Indian, Irish, Chinese, Bangladeshi and black African students did better than white Britons in obtaining five or more GCSEs at grade A* to C. At university level, more than 40% of the UK’s Indian, Chinese and Black African groups had degree-level qualifications. This compares to just 26% of white people in the period between 2010 and 2011.

Of course, it used to be that ethnic minorities were educationally disadvantaged. The rapid changes over the past 20 years have been a result of better access to learning opportunities – both in the UK and overseas. Some of these well-educated ethnic minorities have experienced growth in finding professional, clerical and managerial employment. However, they are still facing what University of Manchester researchers say are ‘significant barriers to enjoying the levels of social mobility of their white British peers.’

Institutional racism is often to blame. A government-funded study carried out by Business in the Community reported that ‘too many’ ethnic minorities felt that prestigious jobs – such as those in banking, media, politics and the law – were closed to them. Of the 1,500 people surveyed for the study, more than a quarter ruled out joining the top professions. The report’s authors concluded that ‘some of the best-paid professions in the UK are still seen as subtly hostile or openly racist towards ethnic minorities.’

Although it’s been over a quarter of a century since the introduction of the Race Relations Act, the problems still remain. Government initiatives intended to address inequalities – such as Ethnic Minority Outreach, Specialist Employment Advisers and Partners Outreach for Ethnic Minorities, and the Ethnic Minority Employment Stakeholder – have largely been ineffective. In response, some labour unions have called for the private sector to be forcibly driven into taking positive action to encourage ethnic diversity. The TUC, in particular, wants companies to carry out compulsory ethnic monitoring.

In the meantime, ethnic minorities must continue to rely on sheer determination to find work. Encouragingly, motivation is still high among the UK’s minority groups. The Business in the Community study found that ethnic minorities have higher aspirations to succeed than their white counterparts.

The Centre on Dynamics of Ethnicity (CoDE) is a four-year interdisciplinary programme of research concerned with understanding changing ethnic inequalities and identities.

What will the Flexible Working Regulations 2014 Mean for Employers and Employees?
By Sophie Beesley | 29th June 2014

‘That which yields is not always weak’ (Jacqueline Carey, Kushiel’s Dart).

From 30 June 2014, changes to the Flexible Working Regulations mean that any employee meeting the minimum service eligibility criteria can request flexible working arrangements. The challenge for employers will be to implement a fair system that allows them to create opportunities for employees and themselves.

Previously, the right to request flexible working was only available to employees with children under 17 (18 for a disabled child) or carers. Requests broadly cover changing working hours, times or location. If agreed, the changes became permanent amendments to the employee’s contract. The procedure for deciding requests was set out prescriptively in a mandatory statutory procedure, much criticised, particularly for its complexity and strict timescales.

To help employees improve their work-life balance, following the Children and Families Act 2014, the Flexible Working Regulations 2014 mean that, from 30 June 2014, there will be no requirement to be a parent or carer. Instead, all employees with at least 26 weeks’ service (and not having made a request in the previous 12 months) can request flexible working. Note, however, that the Regulations do not give employees the right to work flexibly, only the right to ask for it.

The prescriptive procedural requirements have also been replaced by a more flexible system, which requires only that employers must consider requests in a reasonable manner. However, with flexibility comes uncertainty – what is a reasonable manner? Helpfully ACAS has published a Code of Practice and additional guidance to help employers to get it right.

In the short term at least, if numbers of requests increase dramatically, employers may be safer sticking to their current structured procedures to ensure requests are treated fairly. And when requests are agreed, it may well be wise to do so on a trial basis to ensure they can be amended if necessary.

A rush of requests may not be the only challenge employers will face. For example, many requests may be very similar, such as not to work Mondays and/or Fridays or to work at home, potentially causing operational and employee relations issues. Requests may also extend and complicate employers’ responsibilities. For example, an employee asking to work through their lunch breaks could breach H&S regulations, and someone working at home will require a remote workplace assessment.
It is not yet clear how employers will be expected to manage competing requests. The Code of Practice suggests first-come-
first-served: having approved the first request, the business context changes and the employer should take this into account
when considering the second request, and so on. In practice, however, and against a backdrop of potential sex and disability
discrimination claims, value judgements may be made, despite the Government's intention not to create tiers of rights of this kind.

Employers will still be restricted to the same eight business reasons for rejecting requests that applied previously: additional cost,
impact on quality and/or performance, an inability to meet customer demand or to reorganise work or recruit, insufficient work when
the employee wants to work and planned structural changes.

Despite these challenges, looked at in the round, employers should welcome the changes. Research published by the CBI in
July 2013 found organisations could save up to 13% of workforce costs through more sophisticated, less rigid working practices. Accommodating requests can also boost loyalty and productivity.

Flexibility is also critical for the future. Research conducted by the Equality and Human Rights Commission (EHRC) calls for a
rethink of the traditional ‘sole breadwinner men, with stay-at-home wives’ way work is generally organised in the UK. Its view is that
flexibility is needed to accommodate the needs of a modern workforce. For example, after having children, growing numbers of
women need/want to continue working in roles that recognise their experience and abilities. People may also want to work reduced
hours when approaching retirement, and growing numbers of young people need to balance work and study. There are also the
challenges of caring for an ageing population. The Working Parents & Carers Survey (2011) showed that 20% of men requested
flexible working to care for children, compared to 40% wanting to care for a dependent parent or partner. For all these reasons,
flexible working may give employers the key to recruiting and keeping the best people.

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The Regulation of Casual Work and the Problematical Idea of the ‘Zero Hours Contract’
By Mark Freedland | 25th March 2014

There has, of late, been considerable public concern in the UK about the use of a kind of employment arrangement known as the
‘zero hours contract.’ The essence of employment arrangements of this kind is that the worker is offered work as and when the
employer or work-user wishes, without the guarantee to the worker of a minimum number of hours of remunerated work in any
given period of time. The public concern is that the use of this kind of work arrangement is apparently becoming more and more
extensive so that a large proportion of workers find themselves in situations of highly precarious employment.

Moreover, many experts in labour law have a further concern that it is often unclear what employment rights the workers in those
situations possess. Depending upon the precise nature of the arrangement in each case, the worker’s legal path of access, even to
such fundamental human rights at work as that of freedom of association, may be in doubt.

The Government purported to respond to this concern in December 2013 by launching a Consultation, which closed in mid-March
2014, but which will presumably give rise to public and Parliamentary debate when its results have been published. However, the
framing of the Consultation Document and the terms in which it was introduced by the Business Secretary Vince Cable suggest that
the Government takes the view that the ‘zero hours contract’ is an established and fully legitimate form of work arrangement,
offering valuable flexibility to employers and workers alike, and conferring, generally speaking, adequate employment rights upon
workers. It seems to be regarded as sufficient to elicit and address possible issues about the ‘exclusivity’ of some of those contracts
and the ‘transparency’ of the communication of their terms to the workers involved.

I argue that this approach to ‘the zero hours contract’ is misconceived and inappropriate in a number of different ways. It
understates the problems associated with the rapid growth of the ultra-casual employment arrangements, which are known as
zero hours contracts. In particular, it commits a particular error in its legal analysis. The point here is that if, as the Consultation
document does, we define a ‘zero hours contract’ quite simply as ‘an employment contract in which the employer does not
guarantee the individual any work, and the individual is not obliged to accept any work offered,’ we are, in fact, conjuring up an
oxymoron. It is a contradiction in terms, a non-existent beast, because we have it on the highest judicial authority that such an
arrangement, by definition lacking in mutuality of obligation, certainly cannot constitute a continuing contract of employment (see
Carmichael v National Power plc [1999] UKHL 47), and it probably cannot constitute a ‘worker’s contract,’ nor indeed any kind of
continuing contract at all. In the particular sense in which the Consultation Document uses the terminology, we might say that, just as
there is no such thing as a free lunch, there is no such thing as a zero hours contract.

However, putting irony aside, we should be very worried about this way of understanding the factual and legal nature of ‘zero hours
contracts.’ That is because, on that definition of the ‘zero hours contract,’ a worker working under such an arrangement would
typically lack the employment rights of ‘employees’ and probably also those of ‘workers.’ I contend that, if we are to accept the
notion of ‘zero hours contracts’ as even a partly legitimate institution, it should be on the footing that such arrangements both attract
and deserve the character of employment contracts or workers’ contracts to which the rights of employees or at least the rights of workers attach. This involves recognising workers’ claims to a degree of stability and reciprocity in their work arrangements, which even those engaged in casual work relations ought still to possess.

The achievement of that recognition would involve a full engagement with a whole host of legal and regulatory problems and issues of empirical or statistical assessment of the nature and extent of ‘zero hours’ employment and casual work more generally; the purpose of this Note is to draw attention to the urgent need for that engagement and to the dangers of being diverted from that engagement by the bland and misleading reassurances offered by Dr Cable’s Consultation.

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**RMT v United Kingdom: Sympathy Strikes and the European Court of Human Rights**

*By John Hendy QC and Michael Ford QC | 10th April 2014*

In RMT v United Kingdom [2014] ECHR 366, the European Court of Human Rights held that the ban on secondary action in the United Kingdom was a justified interference with the right to freedom of association in Article 11 of the ECHR. The RMT contended that its members employed by Hydrex were unable to take effective strike action to maintain their terms of employment, owing to the prohibition on secondary action now found in s.224 of TULRCA 1992.

The Court, first, rejected the argument of the government that Article 11 did not apply at all to secondary action, referring to ILO Convention No.87, Article 6 of the European Social Charter and its earlier decision in Demir Application no. 34503/97. Taking secondary action, the Court held, was part of trade union activity covered by Article 11. After deciding, second, that the ban pursued the legitimate aim of seeking to protect the rights and freedoms of others not involved in the dispute, the Court turned to consider the critical issue of whether the ban was justified because it was necessary in a democratic society.

The Court emphasised that the margin of appreciation was wide in the context of industrial and economic policies of the state. However, it noted factors counting in favour of the RMT. One was the practice across European States at the far end of the spectrum, illustrating that the UK was one of a small group of European countries that adopted an outright ban on secondary strikes. Another was the repeated criticisms of the UK’s prohibition of sympathy action by the ILO Committee of Experts and by the decisions of the European Committee on Social Rights on the Social Charter. The Court also referred to how a ban on secondary action could in some contexts, such as an out-sourced workforce, severely hamper trade unions’ efforts to protect their members.
But having decided that the interference with freedom of association in Hydrex was not especially far-reaching, and in light of the breadth of the margin of appreciation in this area, the Court decided that the cogent arguments adduced by the RMT on trade union solidarity and efficacy were not sufficient to persuade it that the ban was disproportionate.

The case is important for its clear recognition that restrictions on industrial action, including sympathy strikes, are protected by Article 11. It leaves open the possibility that, in other circumstances, restrictions (including the ban on secondary action) will not be justifiable under Article 11(2). But it also reflects a trend in recent judgments of the Court, exemplified by, for example, the judgment of the Grand Chamber in Sindicatul Pastorul cel Bun v Romania Application no. 2330/09, of affording States a wide margin of appreciation in relation to what the Court views as sensitive matters of social policy.

It is likely that some commentators will conclude that the judgment represents nothing short of an appeasement by the ECtHR of the UK government’s threats to withdraw from European Convention and its repeated attacks on the ECtHR, so evident in the UK stance at the 2013 Committee of Ministers’ meeting in Brighton, which lead to the Brighton Declaration and the subsequent inclusion of the references to ‘margin of appreciation’ and ‘subsidiarity’ in the Preamble to the Convention. Certainly, parts of the judgment could be seen in that way, and there is no doubt that the judges of the ECtHR have been eager to reassure the UK government, British judges and elements of the English media that little or no threat is posed to the autonomy of the British legal system by the ECtHR or the Convention. The official visit by the President and Vice-Presidents of the ECtHR to the British judges last month (with the President giving a lecture at UCL on ‘Wither the Margin of Appreciation?’) and the recent article by the former President (N Bratza, ‘Living Instrument or Dead Letter – the Future of the European Convention on Human rights,’ (2014) EHRLR 116) might be thought to be illustrative of their concern to reassure. The cynical commentator might say that the judgment is a demonstration of that reassurance. Whether the trade union movement in the UK or in Europe will view the Court’s treatment of the right to strike as reassuring is doubtful.

John Hendy QC and Michael Ford QC are barristers at Old Square Chambers in London. They acted for the RMT in this case, instructed by Richard Arthur and Neil Todd of Thompsons.

Safety of Sex-Workers Again at the Centre in Canada (Attorney General) v Bedford
By Meghan Campbell | 17th January 2014

Earlier this year, I argued that the Ontario Court of Appeal (ONCA) gave a comprehensive and nuanced assessment of Canada’s criminal provisions on prostitution. The Supreme Court of Canada in a unanimous decision upheld the ONCA’s ruling and struck down these provisions as unconstitutional because they materially increase risk of harm for those who work in the sex trade.

Prostitution is legal in Canada but prior to Bedford much of its associated activity was criminalised. The applicants in this case argued that the prohibition against running a brothel, living off the avails of prostitution and communication in public for the
purposes of prostitution violated their constitutional rights to security of the person (sections 210, 212(1)(j) and 213(1)(c) Criminal Code. The Supreme Court agreed with the applicants, as the law prevented prostitutes from implementing safety measures, such as hiring bodyguards, working indoors or properly screening potential clients. This decision is one step further than the ONCA, as the Supreme Court ruled the prohibition on communication was unconstitutional.

Similarly to the ONCA, the Supreme Court relied on the trial judge’s evaluation of the factual and social science evidence. The prohibition against brothels meant that sex-workers were forced outdoors and could not use receptionists, perform health checks or have safe-houses. Criminalising living off the avails of prostitution did not allow sex-workers to hire drivers or bodyguards. Prohibiting public communication limits face-to-face screening time and forces sex-workers into back alleys. All these prohibitions were held to materially increase the risk of harm to sex workers.

Under section 7, it is not sufficient that the security interest be engaged, a court must also consider whether the provisions are consistent with the principles of fundamental justice: proportionality and breadth. The Court explains that the law will be unconstitutional if it is grossly disproportionate. Under the equality provisions of the constitution there is no requirement to demonstrate that a certain number of people experience the grossly disproportionate effects; if one person is disproportionately affected, this suffices. Therefore, the applicants do not have to spend time and resources showing that a disproportionate number of sex-workers are negatively affected by the law. Rather, they need only present evidence of their own experience.

The purpose of the prohibition against brothels was to prevent neighbourhood disruption. While the law achieves this aim, it is grossly disproportionate, as it significantly increases the risk of serious harm to sex workers. Similarly, the communication prohibition is meant to prevent the nuisance of street prostitution and remove it from public view. This is also grossly disproportionate, as it removes an essential tool for safety. While the prohibition of living off the avails of prostitution is meant to ensure sex-workers are not exploited, the law is overbroad, as it captures relationships that could increase safety.

The Attorney-General of Canada tried to argue that the laws were only unconstitutional if there was direct causation between the criminal provisions and the harm. However, the Supreme Court only required a sufficient causal connection: a reasonable inference between the evidence and the prejudice. The applicants did not need to definitively prove these measures would increase their safety; it was sufficient that there was the possibility that they could.

The Attorney General also argued that because sex workers had freely chosen an inherently risky profession, they have to live with these risks. The Court rejects this argument. First, Chief Justice McLachlin questions whether sex-workers are ‘people who can be said to be truly “choosing” a risky line of business’ (Para. 86). Second, the exchange of sex for money is legal, so the key question is whether the law makes this lawful activity more dangerous. Violence from clients ‘does not diminish the role of the state in making a prostitute more vulnerable to that violence’ (Para. 89).

In light of the reasoning in this judgment, it is surprising that the Court suspended the declaration of invalidity. This means that the Canadian government has one year to introduce new legislation regulating prostitution before the current provisions will be null and void. The Court does not offer any specific guidance on future regulation. However, its repeated emphasis on the safety of sex-workers will hopefully be at the centre as policy-makers discuss the next steps.

Dr Meghan Campbell the Western Junior Research Fellow at New College, Oxford and a Deputy Director of the Oxford Human Rights Hub.

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**Sex Workers Equally Protected from Sexual Harassment as Other Workers – Says New Zealand Case**

**By Max Harris | 5th April 2014**

In 2003, New Zealand decriminalised sex work and established a system of safeguards for those engaged in such work through the Prostitution Reform Act. Just over a decade later, the first major case has been heard, highlighting some of the benefits of this regime.

The case is called DML v Montgomery and M & T Enterprises Ltd [2014] NZHRRRT 6. It involved a plaintiff, DML (whose name was suppressed), who alleged that the owner of a brothel at which she worked had sexually harassed her, causing humiliation, loss of dignity and injury to her feelings. The New Zealand Human Rights Review Tribunal (a body that deals mainly with discrimination, harassment and privacy matters) ultimately found in favour of the plaintiff. The Tribunal awarded the plaintiff NZD $25,000; issued a declaration and a restraining order (to prevent a continuing breach); and ordered that the brothel’s management staff undergo training to understand why sexual harassment is unacceptable.

Under s 62 of the New Zealand’s Human Rights Act 1993, four elements need to be satisfied for sexual harassment to be proven. There must be: (i) language or visual material or physical behaviour of a sexual nature; (ii) that is unwelcome or offensive to a
person; (iii) that is repeated or of a significant nature; and (iv) that has a detrimental effect.

The defendant claimed that given the brothel context, language that he used – including intrusive questions about the plaintiff’s sexual activity, information about his own sexual practices with other sex workers and comments made to the plaintiff about her physical appearance – was not inappropriate. The Tribunal rejected this, saying that ‘[e]ven in a brothel language with a sexual dimension can be used inappropriately in suggestive, oppressive, or abusive circumstances’ (at [106]). It found that language of a sexual nature had been used (and that the plaintiff’s evidence was to be preferred to the defendant’s).

The second element was subjective and was clearly met in this case. The plaintiff was made to feel uncomfortable, did not want to have the conversations with the defendant that they had and was upset and distressed.

Fourth, there was manifest detriment caused. The plaintiff had to work in a demeaning and hostile work environment, felt scared and degraded, stopped working at the brothel and was already dealing with stress of giving evidence in a trial as a result of childhood sexual abuse when the comments were made. Accordingly, sexual harassment was established. The employer was also found to be vicariously liable for this sexual harassment.

In the course of determining the appropriate remedies in this case (a declaration and restraining order, training order and damages), the Tribunal made important comments about sex work and sexual harassment. ‘Sex workers are as much entitled to protection from sexual harassment as those working in other occupations,’ the Tribunal said at [146]. It added: ‘Sex workers have the same human rights as other workers.’

A debate continues about the merits of decriminalisation of sex work. But this case highlights the concrete protections that the law can provide – when sex work law is reformed – to those in the sex work industry.

Max Harris is an Examination Fellow at All Souls’ College, Oxford and an Associate-Director of the Oxford Human Rights Hub.

The CJEU’s Ruling in AMS and the Horizontal Effect of the Charter
By Menelaos Markakis | 20th January 2014

In its judgment in AMS Case C 176/12 (15 January 2014), the Grand Chamber of the Court of Justice of the European Union ruled on whether the Charter of Fundamental Rights of the European Union can apply in a dispute between private parties, holding that the Charter is applicable ‘in all situations governed by European Union law.’

AMS is an association governed by private law. It brought a challenge before the French courts concerning the appointment of a trade union representative. French labour law requires a workplace to have at least 50 employees before a union representative can be appointed. AMS argued that this threshold had not been met. The trade union argued that French labour law, which provided for the exclusion of certain categories of employees from the calculation of staff numbers in an undertaking, was in breach of EU law, and hence the number of AMS employees was well above the threshold.

The impugned French legislation had been adopted in the implementation of the European Parliament and of the Council establishing a general framework for informing and consulting employees. The Directive precludes a national provision that excludes a specific category of employees from the calculation of the staff numbers of an undertaking (see the Confédération générale du travail and Others Case C-385/05 judgment). However, according to settled case law, the provision of a directive seeking to confer rights or impose obligations on individuals cannot of itself apply in proceedings exclusively between private parties, even if the Member State concerned has failed to implement the directive correctly.

It is for this reason that the trade union sought to rely on Article 27 of the Charter of Fundamental Rights of the European Union, according to which ‘[w]orkers or their representatives must, at the appropriate levels, be guaranteed information and consultation in good time in the cases and under the conditions provided for by Union law and national laws and practices.’ Citing Åkerberg Fransson Case C-617/10, the Court held that ‘the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by European Union law’ (Para. 42). Since the impugned French legislation was adopted to implement Directive 2002/14, Article 27 of the Charter was held to be ‘applicable’ to this case (Para. 43), notwithstanding the fact that this was a dispute between private parties.

However, the Court ruled that ‘for this article to be fully effective, it must be given more specific expression in European Union or national law’ (Para. 45). ‘It is not possible to infer from the wording of Article 27 of the Charter or from the explanatory notes to that article that Article 3(1) of Directive 2002/14, as a directly applicable rule of law, lays down and addresses to the Member States a
Consequently, Article 27 of the Charter cannot be invoked in a dispute between individuals in order to disapply the impugned national provision (Para. 51). The Court went on to distinguish AMS from Küçükdeveci Case C-555/07, ruling that “the principle of non-discrimination on grounds of age at issue in that case, laid down in Article 21(1) of the Charter, is sufficient in itself to confer on individuals an individual right which they may invoke as such” (Para. 47).

The importance of this Grand Chamber ruling far surpasses the circumstances of this particular case. The Charter was held to be applicable “in all situations governed by European Union law,” and this might lead to it being applied in a dispute between private parties. The ultimate outcome of each case will surely depend on the content of the EU fundamental right invoked by the parties and on the impugned national legislation in the main proceedings. The ink is barely dry on the judgment, but it seems to me that Professor Peers has rightly argued that “the old argument that the Charter can never apply to private parties at all … has surely been rejected by the Court here.”

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**South African Informal Traders Forum and Others v The City of Johannesburg and Others: A Promising Start by the South African Constitutional Court**

By Brian Ray | 19th February 2014

Departing sharply from its normal procedures, the South African Constitutional Court recently issued what we in the States would call an ‘interim injunction’ in a case pending before the South Gauteng High Court, called South African Informal Traders Forum and Others v The City of Johannesburg and Others (“SAITF”) [2014] ZACC 8. The order prohibits municipal authorities in Johannesburg from ‘interfering’ with the activities of multiple street traders in the city center who are lawfully licensed to trade by the City.

The case involves the City of Johannesburg’s ‘Operation Clean Sweep’ program, a controversial new policy that was instituted in October 2013, under which the police cleared all informal trading operations from large areas of the inner city without distinguishing between licensed and unlicensed traders. The City’s actions were plainly illegal and violated not only the trader’s constitutional rights, but also the City’s own trading by-laws. Even more troubling, the Clean Sweep policy reflects a pattern of blatant disregard for the City’s constitutional and statutory obligations to its poorest residents, which are traceable back to at least the unconstitutional mass eviction policy that poor residents successfully challenged in Occupiers of 51 Olivia Road, Berea Township and 197 Main Street Johannesburg v City of Johannesburg and Others [2008] ZACC 1.

In City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd and Another [2011] ZACC 33, the
Constitutional Court chastised the City for repeatedly failing to recognize its constitutional and statutory obligations in the housing context and ordered the City to revise its planning and budgeting processes to remedy those defects. As a relatively recent High Court decision enforcing Blue Moonlight illustrates, the City has continued to drag its heels with respect to complying with that order. Blue Moonlight and several other, more recent, eviction-related cases suggest that the Court is willing to take an active role in enforcing social rights under the right circumstances and that it is beginning to recognize the need to address the underlying patterns of bureaucratic and administrative intransigence, like those in the SAITF case. This is a somewhat surprising development, considering the deeply deferential and largely secondary enforcement approach the Court articulated in Mazibuko and Others v City of Johannesburg and Others [2009] ZACC 28, where it reversed two lower court judgments that found the City’s pre-paid water policy unconstitutional.

Upon closer inspection, however, there are clear continuities between Mazibuko and Blue Moonlight. For good reason, reaction to Mazibuko has focused on the Court’s retreat from any significant interpretive role and insistence that social rights are principally the province of politics. But this emphasis on the disappointing substantive limits the Court described obscures the relatively strong authority the judgment establishes for courts to scrutinize the adequacy of the process the government uses in adopting a policy or reaching a decision. These more recent cases show that, when operating in a role that it can safely characterize as procedural—especially when faced with a policy that either completely ignores or actively infringes upon social rights—the Court has been much more willing to exercise its authority to at least temporarily stop implementation of a challenged policy and, sometimes, even to change it.

The temporary injunction in the SAITF case is another example of this stronger procedural role. It is too soon to tell whether the Court will take a similarly active role in the SAITF case, much less whether it will draw any connection to Blue Moonlight and attempt to remedy the underlying issues that connect the two cases.

Nonetheless, it’s certainly a promising start.

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The Plight of Indo-Pak Fishermen and the Need to Appreciate Economic Rights
By Ravi Nitesh | 5th September 2014

The recent decision of the Pakistan Government to release 57 boats of arrested Indian fishermen is a welcome move. India should replicate the same. However, hundreds of boats are still lying unused in Pakistan, and the process of confiscating arrested fishermen’s boats is still continued on both sides. The real and most effective solution would be to adopt a confidence-building approach, based on respect for the fishermen’s right to earn a living. There is a need to work towards ending such confiscation of boats and to start the release of fishermen through sea routes only.
India and Pakistan both border the Arabian Sea; fishermen live along the coast of India and Pakistan and are involved in fishing as their profession. However, there is no clear demarcation in these waters to make a ‘visible’ border between countries. Even the States of India and Pakistan have not agreed upon, nor signed any final agreement to decide, their water boundary. Due largely to the absence of any such demarcation, fishermen of both nationalities end up crossing their own coordinates and enter the other country’s ‘administrative’ zone. They then get arrested, along with their boats, for this ‘offence.’ Sir Creek is one of these disputed points and a hotspot for the arrest of fishermen. Such arrested fishermen now number the hundreds on both sides of border, and the length of their imprisonment varies from months to years. Recently exchanged lists in July 2014 (as per consular agreement) between the Governments of India and Pakistan state that 237 Indian fishermen are currently in Pakistani jails, and 116 Pakistani fishermen are in Indian jails.

Despite being arrested at sea, these fishermen, if released, are released through land routes at Wagah Border. This is significant, as although they are arrested in their boats, these boats are divested upon their release. It must be understood that boats are the fishermen’s livelihood. Further, due to their high cost and the fishermen’s limited means, most are not owned; the fishermen have boats on a rental basis, a partnership basis or on loan with high interest. Having their boats removed upon release therefore causes even more severe financial repercussions for them.

Article 73 of the UN Convention on the Law of the Sea clearly states that, though arrest can be made (clause 1), arrested vessels and their crews shall be promptly released upon the posting of reasonable bond or other security (clause 2). In addition, it holds in clause 3 that coastal state penalties for violation of fisheries laws and regulations in the exclusive economic zone may not include imprisonment in the absence of agreements to the contrary by the States concerned or any other form of corporal punishment.

Authorities in both countries must bear this provision in mind and must understand the plight of these fishermen. If these boats can be handed back to their fishermen upon release, and if this release can be done through the sea route itself, it will be a great step towards appreciating the economic reality of the situation for these fishermen. The recent decision of the Government of Pakistan, in which it agreed to hand back 57 boats belonging to Indian fishermen who were released in May, gives some hope that the rights of these detainees will henceforth be borne in mind. The same should be reflected by India as well. Such goodwill gestures by these governments will certainly help to improve Indo-Pak relations more generally. However, independently of this longer-term advantage, respecting the economic rights of these fishermen will help to improve the lives of those in greatest need.

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Vergara Ruling Poses Problems for Separation of Powers and Academic Freedom
By Phillip D Grant Jr and Matthew Tyler | 11th July 2014

On June 10th, handing down judgment in Vergara v. California Case No. BC484642 the California Supreme Court struck down three statutes providing tenure for primary and secondary teachers and extra job security for more experienced teachers.

The suit was filed on behalf of nine public school students by a non-profit organization, Students Matter, which primarily advocates for increasing the amount of private intervention in American public school systems. The plaintiffs believed that California’s tenure laws had adversely affected their access to quality public education.

Citing Serrano v. Priest 5 Cal.3d 584, Butt v. State of California 4 Cal.4th 668 and Brown v. Board of Education 347 U.S. 483 (1954), the court held that California’s laws led to more under-qualified teachers in classrooms serving poor and minority students and hindered ‘meaningful, basically equal educational opportunity’ guaranteed by the state’s constitution. This, the court held, was the direct result of statutes granting tenure to teachers after two years of employment – which ensures that a teacher cannot be fired without due process – as well as the state’s ‘first in last out’ policy – which requires newly tenured teachers to be fired before older teachers in the event of budget shortages.

In its decision, the Court acknowledges a constitutionally mandated separation of powers, noting that ‘[i]t is...not this Court’s function to consider the wisdom of the Challenged Statutes’ and that ‘it is not the function of this Court to dictate or even to advise the legislature as to how to replace the Challenged Statutes.’ The judges’ intervention in ensuring equality of education, however, may be seen as interference in a matter best left to the legislature. While the challenged statutes may, in fact, lead to less equal public education, how best to remedy this is typically left to elected representatives; in other words, it is suspect whether or not teacher tenure is a justiciable matter pertinent to the Court.

What is perhaps most disconcerting about the ruling, however, is its lack of deference toward academic freedom, an equally important right for students and faculty. Since its inception in the 1800s, the public provision of education in the U.S. has often
been justified by its importance in shaping an informed citizenry necessary for checking the power of government. In Sweezy v. New Hampshire 354 U.S. 234 (1957), the U.S. Supreme Court, ruling on whether or not a professor could be fired based on the content of his lectures, stated that '[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.' Untenured teachers – who can simply be fired at the end of an academic year by not having their contracts renewed – face more pressure to appease administrators and parents by altering their curricula or teaching styles.

While we may be past the era of McCarthyism that targeted ‘subversive’ educators at all levels, pervasive pressure from politicians and administrators over school prayer, sexuality, evolution and standardized test-based ‘accountability,’ among other things, necessitates the continuation of academic freedom at all levels in order to insulate quality education from political tides. As the U.S. Supreme Court ruled in Tinker v. Des Moines 393 U.S. 503, ‘It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’ A classroom in which students and teachers are both de jure and de facto allowed to discuss a range of academically appropriate topics creates a ‘marketplace of ideas’ necessary to a liberal democracy.

Even though this law may not affect the jurisprudence of other jurisdictions outside of California, it epitomizes a shift in public attitudes toward academic freedom. Moreover, given the influence of ‘Race to the Top’ in nationalizing certain aspects of education policy – and even rewarding states for reforming their tenure laws – it is possible that the preferences expressed in the Vergara ruling could have future influence on public policy, if not jurisprudence.

It is a worthwhile goal to provide equal educational opportunities to children, despite ethnic and socioeconomic background. But these goals must also be weighed against the imperative of academic freedom and a separation of powers.

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Matthew Tyler is a master’s student in social studies education at Teachers College, Columbia University in New York and a 2014 James Madison Fellow.
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Introduction
By Kate Mitchell

Human rights law has traditionally understood the primary actors to be States and individuals. In this dynamic, human rights law provides a means through which vulnerable individuals are protected from abuse by the more powerful machinery of the State. The rise of multinational corporations has changed this dynamic. On the one hand, corporations have the capacity to promote the social and economic wellbeing of individuals, bringing a form of economic stability into countries that the political machinery of the State had been unable or unwilling to secure. On the other hand, the relationship between the governed, those who govern and the corporations promising benefits to both is not without tension or controversy, and concerns are often raised by lawyers and civil society about the potential for corporations to abuse their powerful position. The contributions to the Oxford Human Rights Hub Blog in 2014-2015 concerning Business, Finance and Human Rights highlight some of the complexities in this new area of human rights law.

There is a preliminary question about whether developments in business, finance and human rights can be regarded as contributions towards human rights law at all, at least in the area of international human rights law. As international law currently stands, and as the UN Framework and Guiding Principles on Business and Human Rights correctly observes, States are the primary duty-bearers under international law. For corporations, the language that is used is that of corporate social responsibility, rather than corporate duties or obligations. This language filters down to the regional level of the European Union, as explored in Gosia Pearson’s contribution ‘The Emergence of Business and Human Rights in the EU’s External Relations’ (p 349). Although, as Pearson explains, the division of competencies within the EU is such that the implementation of the UN Guiding Principles at a regional level raises many complexities, and at the end of the day, the legal regulation of corporations (as opposed to corporate social responsibility initiatives), and accountability mechanisms for corporations whose behaviour may fall short of human rights standards, fails to be regulated at the domestic level. There is increasing movement in this area, as Pearson highlights, with several Member States of the EU (including the UK in its adoption of its action plan on business and human rights entitled ‘Good Business: Implementing the UN Guiding Principles on Business and Human Rights’ in 2013) taking initiatives and introducing legislation that clarifies the expectations of companies in protecting human rights in a business environment.

While corporations are not, generally speaking, duty-bearers under international law, it is unquestionable that corporations are rights holders. This can raise tensions between the human rights obligations that States may owe to individuals and the contractual obligations States may owe to corporations. Maria Laura Farfan and Tomas Rubio explore this complex issue in their contribution on ‘Vulture Funds: the Real Dimension of the Controversy from a Human Rights Perspective’ (p 350). As Farfan and Rubio identify, when States are in the midst of economic and financial crisis, the risk of default of sovereign debt can raise several, often conflicting, challenges for States. Defaulting on sovereign debt can lead to costly and lengthy litigation with bondholders, as the litigation between NML Capital and the Argentine Republic explored in Farfan and Rubio’s piece illustrates. Likewise, as Farfan and Rubio also identify, defaulting on debt can have catastrophic human rights consequences including increases in unemployment, poverty, and damage to fundamental social services. The economic impact of sovereign debt default on corporations is frequently litigated, in domestic litigation like that mentioned by Farfan and Rubio, but also before international arbitration panels convened under bilateral investment treaties. For human rights lawyers, the concern is that the simultaneous human rights impact of sovereign debt default will be underappreciated and undervalued.

Hector Jose Miguens raises similar concerns to Farfan and Rubio in his contribution ‘Vulture Funds and Bankruptcy Law Processes for States in Economic Crisis’ (p 351). Mindful of the challenges that economic crises present both to human rights and to business, Miguens explores various efforts that have been made to adopt legal frameworks for sovereign debt restructuring processes. As Miguens identifies, efficient, stable and predictable legal regimes create favourable environments for human rights and business. The initiatives within the United Nations noted by Miguens that provide assistance and guidance to developing countries in this area should therefore be welcomed.

While numerous complexities remain, the contributions to the Oxford Human Rights Hub in 2014-2015 highlight that the relationship between business and human rights is increasingly receiving the attention within human rights discourse that it deserves.

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Globalization has provided numerous opportunities for enterprises to contribute to the respect of human rights. At the same time, it also increases the risks of business involvement in human rights violations. The European Union sought to address these challenges in its internal policies and in relations with third countries and organisations.

The European Union (EU) played a key role in the development of the UN Framework and Guiding Principles on business and human rights. There were several factors that influenced the EU’s active involvement in this process, including a growing pressure from the European Parliament and civil society, an opportunity to promote its own standards on Corporate Social Responsibility (CSR) developed in 2006, and a need to fulfil its traditional role in shaping the human rights agenda at the UN. At the same time, the UN Framework and Guiding Principles increased the prominence of business and human rights as part of a wider EU CSR agenda, as reflected in “A renewed EU strategy 2011-14 for Corporate Social Responsibility” and concrete actions that followed to implement it.

Business and human rights also emerged as a topic of the EU’s external policy on human rights. It became part of the EU Strategic Framework on Human Rights and Democracy. The Action Plan, annexed to the document, foresaw three actions for completion by the end of 2014, namely: 1) to ensure implementation to the Commission Communication on CSR, in particular by developing and disseminating human rights guidance for three business sectors and for small and medium-sized enterprises; 2) to publish a report on EU priorities for the implementation of the UN Guiding Principles; and 3) to develop national plans for EU Member States on implementation of the UN Guiding Principles. These commitments have been only partially implemented.

The guidance for three sectors (information and communication technologies, oil and gas, as well as employment and recruitment agencies) and for medium and small enterprises were published in 2013 and 2012, respectively. While the two sets of guides are important developments as they offer vital support to enterprises, there was no specific dissemination campaign among companies either within the EU or in relations with third countries. Instead they were promoted at events, such as the Business and Human Rights Forum, or in human rights dialogues with third countries. It is difficult to measure the concrete impact of the guides due to lack of information on whether companies use them in formulating their own CSR policies and operations. However, an assessment is possible based on a survey carried out with 200 randomly selected large companies, among which just five referred to the UN Guiding Principles. Size and country of origin of companies were the most important contributing factors in this respect.

The report on the EU priorities for the implementation of the UN Guiding Principles has been delayed several times and has not
yet been published. It will not establish EU priorities but will instead present the state of play of the implementation of the UN Guiding Principles, and what should be done next. Due to the division of competences within the EU, the report will only cover EU institutions, omitting an assessment of Member States’ efforts.

Only four Member States finalized their national plans on business and human rights: UK, Netherlands, Italy and Denmark. Spain and Finland prepared drafts. Belgium, France, Germany, Portugal and Sweden signalled they would develop such plans, and the Czech Republic and Malta plan to include business and human rights in their national plans on CSR. According to a recently published European Commission compendium on Member States' CSR policies, different inter-related factors determined development of national action plans, such as: the structure and level of development of national economies, the involvement of stakeholders in policy design, and division of labour among ministries on CSR.

The EU’s external policy on business and human rights is still emerging. If there is a second Action Plan on Human Rights and Democracy, the activities in this field should be more concrete and forward looking. While ensuring coherence among EU internal and external policies is important and should be maintained, the European External Action Service could become more proactive in stepping up the international dimension of internal policies, for example, through more systematic inclusion of human rights dialogue and the funding of projects.

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Vulture Funds: the Real Dimension of the Controversy from a Human Rights Perspective
Maria Laura Farfan and Tomas Rubio | 1st September 2014

While a lot of perspectives (economic, political, legal and even diplomatic) have been brought to the table regarding the possible effects of New York Judge Thomas Griesa’s verdict in the litigation between NML Capital, LTD (Plaintiff) and the Argentine Republic (Defendant), there has been no voice for a human rights perspective.

After the Republic of Argentina defaulted on its external debt in 2001, 92.4% of the bondholders agreed to negotiate with Argentina a reduction in its amount. NML Capital, Ltd. (NML) – one of Argentina’s bondholders – did not agree to restructure the debt and brought a suit in the United States courts to collect what it was owed. NML prevailed in 11 debt-collection actions brought against Argentina in the Southern District of New York.

Human rights issues creep into this debate: because of a US court decision, Argentina is facing a delicate economic and financial situation (including the risk of a new default), with the consequent human rights violations that it may entail. Figures don’t lie: the default that Argentina faced in 2001 led to an abrupt growth in unemployment levels, a drastic rise in poverty, and serious damage to education and health systems, among other effects. In fact dozens of human rights organizations from all over the world signed a joint statement warning against this kind of problematic judicial intervention.
Obviously this is a result that neither Argentineans, nor the rest of the world, wants to see. For the relevance of the case extends beyond the situation in Argentina. It sets a judicial precedent with effects for countries around the world since creditors will no longer have an incentive to accept any debt restructuring in the future. If there is a court decision that establishes the principle that bondholders should receive the whole amount, developing countries, which lack the means to pay large debts in one go, will be severely affected. This could establish a dangerous international jurisprudence, whereby the validity of fundamental human rights is put into question.

Does this mean that international obligations assumed by States should be ignored? Of course not: States’ debts and obligations must be honored. However, one important point emerges from this case: rules of the international financial systems require a deep social sensitivity, in addition to economic and legal knowledge, in order to solve complex problems. The current international paradigm must be reconsidered. The international community has to decide if, as appears to be the consequence of Griesa’s ruling, creditors will be allowed to put themselves above the most essential needs of individuals, or whether vulnerable countries are to have the possibility of a reasonable negotiation, which could produce favorable solutions for both. Whatever the answer may be, it has to be in consonance with human rights law, which the international community has a duty to promote and guarantee.

Acting otherwise could mean a regrettable backlash and would certainly fail to fulfill numerous international human rights agreements (which are of course as binding as economic commitments). Those duties are established in the Charter of the United Nations when it lays down International Economic and Social Co-operation principles (Chapter IX); the American Convention on Human Rights, which states the requirement of international co-operation to allow the progressive development of economic, social and cultural rights (Chapter III); the International Covenant on Economic, Social and Cultural Rights (e.g. Article 2, paragraph 1); and generally, the Millennium Development Goals, which must be pursued. In addition, any State and international organization also must have in mind the Guiding Principles on foreign debt and human rights endorsed by the United Nations Human Rights Council in 2012, where the importance of human rights in the context of this kind of controversy has been established.

Here is where the issue appears most pressing. This decision must be analyzed not only in terms of the economic damage it may cause. It is much more important to note the detriment that will be caused to the most vulnerable people, those susceptible to the greatest effects of a crisis. They are the real victims of the current system and its loopholes.

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The ‘Vulture Funds’ Issue and the Bankruptcy Law Process for States in Economic Crisis

Hector Jose Miguens | 3rd February 2015

A recent book edited by Juan Pablo Bohoslavsky and Jernej Letnar Čemič Making Sovereign Financing and Human Rights Work (Hart, 2014) notes that poor public resource management, the global financial crisis curbing fundamental fiscal space, millions thrown into poverty, and authoritarian regimes running successful criminal campaigns with the help of financial institutions are all phenomena that raise questions around finance, economic issues and human rights. They argue that there is urgent need for more systematic, robust legal and economic thinking about sovereign finance and human rights.

UN General Resolution 68/304 emphasized the importance of a timely, effective, and durable solution to the debt problems of developing countries to promote their inclusive economic growth and development. It also advocated the intensification of efforts to prevent debt crises, by enhancing international financial mechanisms for crisis prevention and resolution in cooperation with the private sector. Finally, it decided to adopt a multilateral legal framework for sovereign debt restructuring processes, with a view to increasing the efficiency, stability and predictability of the international financial system.

As Juan Pablo Bohoslavsky noted, there are a number of ways to meet this aim, many of which are complementary: national legislation, collective action clauses, facility programs in multilateral institutions and soft law principles can play, to some extent, a role. In addition to economic and political efforts, other legal solutions may be appropriate, such as drafting bills for collective procedures for States.

Filling the legal void at the global level through an international regulatory framework resulting from an equal, participatory and transparent process would be a legitimate and complementary approach to national legislation or contractual efforts. As suggested by the UN General Assembly Resolution on external debt sustainability and development adopted on 20 December 2013 (68/202), national efforts to promote more responsible lending and borrowing should be complemented by global strategies and policies.

There is a need to reinforce coherence and coordination in order to avoid the duplication of efforts in the financing of development processes. Private creditors of sovereign debt are increasingly numerous, anonymous, and difficult to coordinate, and there are
a variety of debt instruments and a wide range of jurisdictions in which debt is issued, which complicates the restructuring of
sovereign debt. Moreover, the international financial system does not have a sound legal framework for the orderly restructuring of
sovereign debt, which further increases the cost of non-compliance.

Therefore, implementing a collective procedure to restructure sovereign debts and adopting a codification of international law are
necessary in order to fulfill the purposes and principles of the Charter of the United Nations and to give greater importance to its
role in the relations among States regarding the human rights in the economic and social field.

Chapter Eleven of the United States Bankruptcy Code provides a useful example of insolvency legislation that could be
implemented. As suggested some years ago in different international documents and forums –notably this report by Anne Krueger–
both creditors and the debtor are in need of practical institutions of bankruptcy proceedings applicable to States and foreign
creditors.

This is true, especially pertaining to the following legal matters: out-of-court proceedings, an international bankruptcy jurisdiction,
the automatic stay, the first day orders, a sort of “bankruptcy estate”, property of the “bankruptcy estate”, creditors' claims against
the “bankruptcy estate”, discovery, regulated insolvency professionals (such as creditors' and equity committees, mediators,
examiners, trustees, etc.), a system of debtor-in-possession financing, the selling of certain assets, voidable preferences, fraudulent
conveyances, shielding debtor assets, injunctions, equitable subordination of certain creditors, priorities, economic reorganization
plan of the debtor, negotiation of the plan, plan process, fiduciary duties of government officials, post-petition debt securities, and,
finally, discharge and payments to creditors before and after de confirmation of the plan.

Apart from the comparative Bankruptcy Codes available it could be prudent to follow the regime of the Legislative Guide on
Insolvency Law of the United Nations Commission on International Trade Law, adopted in 2004, also by analogy and, when
suitable, the UNCITRAL Practice Guide on Cross-Border Insolvency Cooperation (2009).

Any sort of bankruptcy regime for indebted States would be useful to protect human rights, especially the social and economic
rights of those in the State. The lack of a collective procedure causes chaos in the relationship between the creditors and the State
debtor – and delays in the negotiation of a solution of the crisis with the creditors, as well as lengthy procedural struggles among
the parties in different jurisdictions – all of which impact negatively in the human rights of the population in that country, and the
capacity of that State in providing for them.

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Chapter 15

Transitional Justice
Introduction – Heather McRobie
Accountability for Human Rights Violations During Dictatorship in Uruguay
Colombian Victims: Changing the Rules of the Game
50 Years Later, Still in Search of Truth: Challenges Facing Truth Commissions in Brazil
Mind the Values Gap: Do We Really Believe in the Constitution?
Will Tunisia’s Truth and Dignity Commission Heal the Wounds of the Authoritarian Past?
Introduction
By Heather McRobie

Scholar Ruti Teitel has defined ‘transitional justice’ as the conception of justice associated with periods of political change. This encompasses both formal justice mechanisms such as prosecutions of those who have committed crimes under the previous authoritarian regime, and informal mechanisms intended to bring societal-level justice, such as truth-telling and truth and reconciliation processes. The articles collected here reflect the way in which transitional justice as a practice and as an academic lens is itself transitioning – or developing – in tandem with new global realities. The tumultuous changes ignited by the Arab revolutions of 2011 have created both new spaces and new challenges for transitional justice, while other regions and contexts continue to grapple with the dual task of processing their authoritarian past and establishing the foundations of rule of law and democracy.

Many of the concepts and frameworks of transitional justice – particularly the right to truth, in response to forced disappearances – emerged out of Latin America’s painful transitions from authoritarianism in the 1970s and 1980s. This is reflected in the pieces in this chapter, which provides a snapshot of the range of transitional justice processes, and the different paths South American countries have taken to come to terms with their past. Lucia Berro (‘Accountability for Human Rights Violations During Dictatorship in Uruguay’ p 357) addresses the manner in which the legacy of authoritarianism continues to manifest at a societal level, and the open letter written by academics to Uruguayan presidential candidates, calling upon them to prioritise accountability for past crimes. Contemporary attempts to ‘breaking the circle of impunity’, as Berro puts it, is also a theme that threads through recent developments in Colombia. Andrei Gómez-Suárez (‘Colombian Victims: Changing the Rules of the Game’ p 357) highlights the dynamics between the three ‘groups’ of transitional justice processes – perpetrators, victims and bystanders, and how the politicised discourse of victimhood threatened to stagnate the peace process and transition from authoritarianism.

A key concept of transitional justice emerging from the Latin American experience of post-authoritarian transitions was the ‘right to truth’, to heal the societal damage caused by states who ‘disappeared’ their enemies and opponents. As Renan Honorius Quinalha outlines (‘50 Years Later, Still in Search of Truth: Challenges Facing Truth Commissions in Brazil’ p 359) through the case of Brazil’s Truth Commissions, this un-stitching of the silence of the victims of dictatorships is a process that requires wholesale restructuring of state institutions. That statements made at Brazil’s National Truth Commission can still cause societal shock-waves fifty years after the military coup points to the unhealed wounds that politicised memorialisation processes and incomplete or ineffective transitional justice processes can leave festering.

While the core ideas of ‘transitional justice’ emerged from the ‘first wave’ of transitional justice experiences in South America in the 1970s and 1980s, South Africa’s post-apartheid transition was also a paradigm-forming experience for both the theory and practice of transitional justice. Alongside the paradigm of the ‘truth and reconciliation commission’, which has since been used as a template in numerous transitional justice and post-authoritarian processes, the South African experience of transition was bound up with the constitution drafting process, and the need for a constitution that articulated a new, inclusive and healing vision of South Africa. Kayum Ahmed (‘Mind the values gap: do we really believe in the Constitution?’ p 360) takes the pride South Africans feel at their constitution, often lauded for its progressive values, as a starting point of an exploration of the “values gap” between the vision articulated by the constitution and societal views on issues of LGBT rights and reproductive rights. Ahmed’s analysis chimes with the research of recent transitional justice scholars on the difficulties of ‘embedding’ post-authoritarian constitutions in the new (transitional) cultural context.

The revolutions of the Arab world in 2011 inherited the legacies of transitional justice, in theory and in practice, yet the countries that overthrew dictators during the 2011 Arab uprisings have struggled to carve out the space between various polarising forces, to begin to process their past. The liminal period of post-revolution has been punctuated by political violence even in the country with the most ‘straightforward’ transition, Tunisia. As I describe in my article (‘Will Tunisia’s Truth and Dignity Commission Heal the Wounds of the Authoritarian Past?’ p 361), Tunisia was best placed amongst the revolutions in the region to find a point of sufficient stability to begin to process its painful past.

As a more recent transitional justice process, it was also able to draw upon earlier ‘generations’ of transitional justice experiences – the concept of the South American-originated ‘right to truth’ echoes through to Tunisia’s Truth and Dignity Commission, while the South African experience of a ‘transitional justice constitution’ was self-consciously referenced in Tunisia’s post-2011 constitution-drafting process. However, unreliable support from the government, as well as schisms within the body tasked with delivering the Truth and Dignity Commission mean that Tunisia is still just beginning its transition to democracy and rule of law.

While the function of formal and informal transitional justice mechanisms alike may be to process the path, it is always with one eye on the future – to lay more firm foundations for a state or society to begin to flourish, unencumbered by the brutalities of its past. While all the cases discussed in this chapter provide snapshots of countries still in the process of ‘transition’ – or of healing from their past – they also provide examples for how societies continue to find dynamic and innovative ways to process their collective traumas and past experiences in order to begin again.
Accountability for Human Rights Violations During Dictatorship in Uruguay
By Lucia Berro | 27th November 2014

This Sunday, November 30th, 2014, Uruguayans will choose their next president, and the country will celebrate 30 years of democratic elections after over a decade of civil-military dictatorship.

The country has come a long way since the reinstatement of democracy and has been praised for its progressive achievements in human rights issues, taking the lead on making legal same-sex marriage, guaranteeing women’s right to safe and legal abortion and legalizing and regulating the production, sale, and consumption of marijuana. However, the legacy of the dictatorship remains an ‘unfinished business’ for Uruguayan society and the country has faced strong criticisms for its inertia in addressing the systematic human rights violations that occurred between June 1973 and February 1985, which included the systematic use of torture, political imprisonment and forced disappearance.

Pablo de Greiff—the United Nations Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of non-recurrence—said: ‘A chapter of Uruguay’s recent past is yet to be resolved adequately. In order to move forward and continue on the path of development, the country needs to realize the rights to truth, justice, reparation and guarantees of non-repetition.’

Due to the lack of discussion and attention to the topic accountability for past crimes in the presidential campaign, sixty academics around the world, led by Francesca Lessa, signed an open letter addressing the presidential candidates.

The letter requests the next president to tackle as urgent the following three priorities:

1. Remove all obstacles that impede the reporting of human rights violations and the advancement of judicial proceedings in courts without unjustified and undue delays;

2. Establish a formal mechanism to investigate all crimes of the dictatorship – from enforced disappearances and torture, including domestic violence and rape against women and children and sexual crimes, and summary executions, violations of labour rights and freedom of expression, as well as economic-crimes – thus targeting a broad universe of victims;

3. Continue to progress with the design and implementation of public policies for comprehensive reparation for victims, encompassing symbolic and material reparations aimed at all the different categories of victims. Reparation comprises also the right to truth, as the Inter-American Commission on Human Rights said, which includes not only the direct victims and their families but the whole society that possesses ‘the inalienable right to know the truth about what has occurred … in order to avoid a repetition of similar events in the future.’

No matter who is elected this Sunday, the next government has a unique opportunity to finally break the circle of impunity and lay ‘a solid foundation for a just and equitable society that will allow new generations to address the challenges of the future.’

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Colombian Victims: Changing the Rules of the Game
By Andrei Gómez-Suárez | 24th November 2014

Important developments have taken place in the Colombian peace process since August 2014. For example, the establishment of the Historic Commission of the Conflict and its Victims and the Subcommission to discuss Disarmament, Demobilization and Reintegration, made up of members of the security forces and FARC. However, the direct participation of victims in the negotiations deserves special attention because it has contributed to building legitimacy for the Santos-FARC peace talks amongst skeptical sectors of society.

In June 2014, right in the middle of the presidential race, the negotiation teams decided to create a new mechanism for the participation of civil society in the peace talks. Before beginning to discuss the fifth point of the agenda on victims’ rights, it was decided that five delegations of twelve victims each would travel to give their testimonies to the negotiation teams in Havana. The United Nations, the National University of Colombia and the Church were asked to select the victims and to organise the logistics for their direct participation.
The first delegation of victims showed a sense of working as a collective, which seemed to be fading away with subsequent groups. Although each delegation is made of a broad spectrum of victims, they don’t claim to represent all the victims of the Colombian armed conflict. On the contrary, by recognising the diversity of spirals of victimisation and the different impacts of the conflict, the delegations of victims have helped to make visible the human face of the Colombian tragedy to Colombians and to the world, as well as making clear the challenges to the protection of their rights in a post-conflict scenario.

However, the recognition of a diverse universe of victims has been hijacked by politicians opposing the peace process. This has unleashed a perverse and dangerous process of identity politics, which stigmatises sectors of Colombian society and fractures the country’s already weakened social fabric. If unattended, the hyperreal dichotomy between FARC and state victims, which is beginning to gain strength, could become the seed of a new spiral of violence. In transitional contexts, identity politics are often socially constructed to justify the continuation of violence in order to protect an ahistorical and fantastic identity.

Now that the fourth delegation of victims has returned to Havana, the challenge for the remaining delegations will be to avoid falling pray of party politics and contribute to the reconciliation of Colombian society by overcoming the division and mistrust that has impeded the consolidation of a movement for peace in Colombia. The challenge faced by the victims is great; the challenge for Colombian society is even more serious.

Death threats against victims after returning from Havana demonstrate that there is a need for social movements, individuals and organisations to stand by the victims. Their presence in the rounds of negotiation has been a victory for civil society, which has seen itself represented in Havana for the first time with these delegations, going a long way toward tackling the perception that the negotiations lacked an important democratic component. The support of civil society for the victims is crucial to ensure that this small victory is not used by spoilers to reignite a dirty war against those supporting the peace process.

Instead of compartmentalising victims, security officers and policy makers into different conferences and spaces, Colombians need more events that bring them together to talk about the transversal issues that perpetuate political violence. There are some examples worth noting. In terms of public institutions, the National Centre for Historical Memory brought victims, security officers, practitioners and students, among others, to commemorate Memory Week and participate in the Archives for Peace International Seminar in October, to discuss the idea of a Memory Museum in Colombia. International organisations are also playing their part. The Organisation of Iberoamerican States has convened three international conferences to talk about transitional justice and the idea of a culture of peace. These two-day workshop-conferences convene a series of roundtable discussions in which students, victims, security officers, and policy makers sit down to offer their views on truth, justice, reparations and guarantees of non-repetition.

However, the most important development is the International Victims Forum, which took place in September in twenty cities around the world. The Forum aims to bring together different sectors of victims, from all sides of the conflict, just as the delegations to Havana seek to encompass the multiplicity and heterogeneity of suffering. The key proposals made by the Forum are centred on the importance of creating the institutional framework, which can effectively guarantee the fulfilment of the rights of Colombian victims who live outside the country. In the fourth delegation, just returned from Havana, one participant was Juan Carlos Villamizar, the first victim to go to the negotiating table from his exile in Spain – a historic development in terms of the recognition of the six
The presence of victims in Havana highlights the flexibility of the negotiation parties to respond to the demands of Colombian society without compromising the strategic objective of ending the armed conflict by reaching a comprehensive agreement on four points: rural development, political participation, illicit drugs and victims’ rights. The direct participation of Colombian civil society is a ground-breaking exercise in the global paradigm of conflict resolution. However, for it to succeed, it takes more than the commitment of the negotiation teams; the whole of Colombian society must overcome the fragmentation that has brought more than fifty years of war.

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50 Years Later, Still in Search of Truth: Challenges Facing Truth Commissions in Brazil
By Renan Honorius Quinalha | 7th April 2014

On the eve of the 50th anniversary of the military coup, which initiated the latest and the longest Brazilian dictatorship (1964-1985), the statements of the retired Army Colonel, Paulo Malhães, at a public hearing of the National Truth Commission (the ‘CNV’) held on March 25th, shocked the Brazilian public.

‘I killed as many people as was necessary,’ he said. During the dictatorship, broad tactics of repression and violence were used to persecute political dissidents. According to the numbers known today, it is estimated that around 500 were killed or missing, more than 70,000 were imprisoned for politically-motivated reasons (and often subjected to systematic torture), thousands were exiled and a number of others lost their political rights.

Since the democratic transition, the relatives of the missing and former victims of the dictatorship have demanded truth and justice with respect to the state violence committed in the recent past. However, only since a few years ago have these claims garnered more attention in the Brazilian political agenda. As far as reparatory policies are concerned, it is worth noting that Law 9140, passed in 1995, recognized the official responsibility of the Brazilian state in cases of dead and missing people. In 2002, through an executive provisional order (later turned into Law 10,559 in 2003), the Amnesty Commission was established, with the objective of providing financial and symbolic reparations to those who were the victimized during the dictatorship.

More recently, however, a key milestone was reached with the adoption of Law 12,528 in 2011. This law created the CNV, with a mandate to examine and clarify the serious human rights violations in Brazil that occurred in the period between 1946 and 1988, focusing on the military dictatorship. The CNV is a state body without judicial powers, but it is vested with the authority to investigate ‘serious human rights violations,’ according to Law 12,528. In order to promote the right to truth, some of the powers granted to the CNV include the authority to summon public officials to testify, to request documents, and, importantly, to name perpetrators.

In the aftermath of the CNV’s establishment, a series of other institutions at both state and local levels started to participate in the transitional process, including state and municipal truth commissions, NGOs, unions, universities, and so on. There have been numerous public hearings throughout the country. For example, the Truth Commission of the State of São Paulo held more than 120 public hearings, which were open to the general public and broadcasted live, with the broad participation of victims and relatives. A large amount of information was systematized through these official channels, opened by the Brazilian state for the very first time in Brazil’s history.

Yet, almost two years since the CNV’s work started, it still faces major obstacles in its fact-finding tasks as well as in its relationship with the armed forces. Many files are now available for consultation, some even in digital format. However, there must be full and complete access to existing military archives, which have not yet been analyzed, to ensure the success of all of the Truth Commissions in Brazil during their remaining time. Second, the armed forces are not yet fully under civilian control. The armed forces must break their silence and apologize to the nation for the violations committed by some of their members, as evidenced by the recent testimony of Paulo Malhães before the CNV. In order to break the lack of institutional support for the Truth Commissions, political branches, particularly the presidency, must fully exercise democratic control over the armed forces and other social groups that were influential during the dictatorship. Only in this way can there be restoration of truth and respect for human rights.

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Mind the values gap: do we really believe in the Constitution?
By Kayum Ahmed | 14th July 2014

South Africans often proudly proclaim that our Constitution is one of the most progressive in the world. Yet if you ask most South Africans how they really feel about gay rights and abortion, their answers, more often than not, contradict the values enshrined in the Constitution.

Understanding this ‘values gap’ between our personal values on the one hand and constitutional values on the other is important because it provides us with insights into the nature of South African society.

So who are we? A recent Foundation for Human Rights (FHR) study suggests that 63% of us are opposed to same sex relationships, and 73% of our population believe that a woman cannot refuse sex with her husband if he demands it. By the way, that last statistic includes women respondents to the survey. Given the gap between our personal values and the values enshrined in the constitution, the question we are confronted with is how do we bridge this values gap? The response one often receives is: education. More specifically, human rights education. The logic is that if we teach people about the rights in the Constitution, they are more likely to understand and accept these rights. Unfortunately, this is not quite the case.

As part of my studies on human rights education, I tested this hypothesis by conducting a survey of students currently participating in a South African masters degree programme in one of the most prestigious international human rights law programmes in the country. All of the students enrolled in the masters programme participated in the anonymous survey, which compared their personal values to the constitutional values. On the question of whether gay people should have the right to marry, 56% agreed that same-sex couples should have this right, and 22% strongly disagreed. About 42% of the class supported a woman’s right to choose an abortion, while 50% of students were opposed to abortion.

We assume that most, if not all, students studying human rights law would fully support human rights principles, and therefore would be supportive of the values enshrined in the Constitution. However, only 62% agreed or strongly agreed with the following statement: ‘my personal values are the same as the values in the Bill of Rights.’ Twenty-five percent of students disagreed or strongly disagreed with this statement. Some of these masters students are likely to go on to teach other students. Many of them may go on to become judges and policy makers, given their level of expertise and education. What do you think will happen when those masters students become policy makers, and those policy makers are confronted with questions pertaining to gender equality and same sex rights?
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When comparing the results of my survey to the FHR survey, it is evident that the values gap exhibited by the masters students is far smaller than the gap between the personal and constitutional values of most South Africans. This means that human rights education does appear to have a positive impact on bridging the values gap, but its effect is not quite as compelling as proponents of human rights education have led us to believe.

People with low levels of education are often targeted through human rights education programmes. This is important, but I would argue that it is insufficient. The evidence shows that the values gap amongst those of us who have acquired masters degrees and have been appointed as decision makers – judges, teachers, policy specialists and political office bearers – remains significant.

It seems counter-intuitive to want to develop human rights education strategies focused on the highly educated in our society. However, given the role played by the educated elite in decision-making, it is imperative that we start bridging the values gap by acknowledging that it is not only the poor who need to be ‘workshopped.’ The personal beliefs and values of the privileged and powerful need some shaking up too.

But as you know, we educated types do not like being questioned. We know what’s best for you. Well at least 62% of us do.

Kayum Ahmed is the Chief Executive of the South African Human Rights Commission. Kayum holds five degrees and recently started his third Masters degree (MSt) in international human rights law at Oxford.

Will Tunisia’s Truth and Dignity Commission Heal the Wounds of the Authoritarian Past?
By Heather McRobie | 20th February 2015

Tunisia’s Truth and Dignity Commission sets a precedent in transitional justice initiatives amongst countries that experienced the Arab uprisings four years ago and has been greeted with optimism by victims of the Ben Ali regime. But unreliable support from the government and internal divisions within the Commission pose threats to its ability to fully deliver justice for historical human rights abuses.

In 2011, Tunisia’s Jasmine Revolution inspired popular uprisings across the Middle East and North Africa. Four years later, Tunisia is again setting a precedent in the region – its Truth and Dignity Commission, which began work in December 2014, will be the first attempt at a ‘truth and reconciliation’-style process in a country that overthrew a dictatorial regime in 2011.

Many herald the establishment of the Truth and Dignity Commission as another sign that Tunisia is the Arab Spring’s ‘success story.’ As Syria continues to be engulfed by war, Libya disintegrates with two governments, each claiming legitimacy, and Egypt slides back to authoritarianism under Sisi, Tunisia appears the country of the 2011 revolutions that is best placed to begin to address its authoritarian past.

The Truth and Dignity Commission was established in the 2014 constitution and 2014 Transitional Justice Law. The Commission has a broad remit to address ‘political, social and economic crimes’ committed between 1956 and 2013. Its work will encompass both ‘informal’ transitional justice processes like ‘truth-telling’ and recognition of victims of human rights violations, which seek to bring about societal-level reconciliation, and more ‘formal’ aspects such as reparations, which will be paid from the Commission’s Victims Fund.

The Commission has been welcomed by victim’s rights groups and anti-torture groups, which particularly throughout the Ben Ali period, sought accountability for human rights abuses committed by the state and campaigned for rule of law and transparency. The Commission claims that its offices currently receive, on average, five people a day seeking justice for human rights abuses committed by the state.

The inclusion of the word ‘Dignity’ in the transitional justice body is significant, a self-conscious reference to the demand of the Tunisian Revolution for ‘employment, freedom, and national dignity.’ As such, the Commission positions itself as an inheritor and defender of the values of the revolution, notably a rejection of the authoritarianism and corruption of the Ben Ali era. However, human rights organisations have expressed concern that current high-level politicians, particularly President Essebi, who was elected in late 2014, previously held high-ranking governmental positions under Bourguiba and Ben Ali. And as such, they will be disinclined to support the spirit of the transitional justice initiative.

While the constitution protects the existence of the Truth and Dignity Commission, the government has ultimate control over its budget, a fact that has already begun to constrain the work of the Commission. If the current and/or future Tunisian government is not fully supportive of the Commission’s work, this could pose problems particularly for its planned work that deals with reparations.

Moreover, in a report released in January 2015 entitled ‘Tunisia: Four Years On, Injustice Prevails,’ Human Rights Watch noted that...
transitional justice processes and the attempt to establish transparency and rule of law were still far from complete, and efforts to ‘ensure accountability for unlawful killings committed during the 2011 uprising were blighted by legal and investigative problems and failed to deliver justice for the victims.’

In addition to the external obstacle of the government’s wavering support for the Commission, the body has also been marred by internal divisions, as members of the Commission come from across the political landscape, from left-leaning feminists to those who identify with Islamist ideologies.

Lastly, the Commission faces the challenge of living up to the pressure placed on it by the region, as the first commission of its kind since the revolution, to provide a ‘template’ for post-2011 transitional justice in the wake of authoritarianism. The Truth and Dignity Commission thus faces a difficult task – but hopefully not an insurmountable one.

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Development & MDGs Post 2015
Chapter 16

Introduction
By Dr Jaakko Kuosmanen

The world leaders are renewing their commitment to global development in September 2015. The expiring Millennium Development Goals (MDGs), which were adopted in 2000, will be replaced from the beginning of 2016 with a new set of Sustainable Development Goals. The posts in this chapter primarily focus on the United Nations processes aiming to establish the new goals.

In the first post (‘The Sustainable Development Goals: a new vision of development?’ p 367) Tessa Khan considers the differences between the MDG process and the Post-2015 process, and highlights the political disagreements on development issues between different countries. In her second post (‘Charting the Future of Development: A Tale of Two Agendas’ p 368), she considers two parallel international processes – the Post-2015 discussions and the new agenda on global trade, which includes negotiations on various trade agreements (TPPA, TTIP, and TISA). Khan emphasises the potential role both processes have in the realisation of human rights. She juxtaposes the two processes, and notes that while the Post-2015 Development process has been participatory and internationally endorsed, the new global trade agenda is secretive, driven by corporate interests, and backed by powerful and oppressive enforcement mechanism.

The participatory process aiming to integrate the voices of civil society in the new development goals has been impressive in many ways. In my post (‘Civil Society Wants its Voice Heard in Post-2015’ p 369) I give a briefing on a civil society gathering that took place at the UN in New York in September 2014. Thousands of civil society representatives gave a detailed response to the Open Working Group ‘Zero Draft’ on Sustainable Development Goals, and reaffirmed their commitment to be watchdogs in the process. As the Post-2015 process was shifting from open consultations towards intergovernmental negotiations, civil society representatives showed a united front and reminded governments that the voices of those who have participated in the various consultations around the world should not be lost at the final stages of the process to realpolitik.

Janine Ewen’s post (‘An Unsecured Commitment: Security and Justice in the Post-2015 Development Agenda’ p 370) focuses on security and justice in the Post-2015 Development Agenda. Intentional homicidal violence and armed conflicts constitute a major challenge for human well-being globally. Ewen highlights the importance of integrating the demands of security and justice in the final Sustainable Development Goals, and emphasises the fundamentally important nature of these demands: our ability to go about our daily lives depends on our safety.

Another crucial issue in the process has been the development of indicators for measuring progress on development targets. In her post (‘Against Happiness: Why ‘Happiness’ is not a Good Measure of Progress’ p 371), Professor Frances Stewart criticises the use of Gross National Income as a problematic indicator of progress, and evaluates the strengths and weaknesses of the more nuanced Human Development Index. Her broader claim is that there are serious problems in using ‘happiness’ as measure of progress. One important issue is that happiness of those alive today may be achieved at the cost of future generations. In addition, an approach focusing on happiness fails to adequately acknowledge the problem of adaptive preferences.

Ken Gee-Kin’s post (‘Chinese Environmental Protection Law – The Illusion of Enhanced Human Rights Safeguards’ (p372) focuses on environmental protection in China. More specifically, Gee-Kin discusses the amended Environmental Protection Law adopted by the Chinese Government. He argues that there are important obstacles for the enforcement of the law, including those arising from the lack of funding, resources, and motivations. He also highlights institutional deficiencies that hinder the law from moving from rhetoric to practice. In the final post in this chapter ‘Should There Be A Human Rights Approach for Environmental Protection?’ (p x), Avani Bansal discusses a human rights approach to environmental protection. She contends that human rights law and environmental law should continue to develop as two independent but closely linked fields. Bansal concludes by emphasising the importance of not understanding environmental concerns and developmental concerns to be something in conflict, but rather as concerns that need to be integrated in order to achieve the goal of sustainable development.

As all of the blog posts highlight, development is a complex issue. However, it is also a fundamentally important issue. The process of setting the new global development goals is one unlike any we have seen before. Much has been learned during the past 15 years since the MDGs were first set. The process has been much more inclusive. There is now also a much greater understanding of the interlocking nature of the various development challenges the world is facing, and this has been recognised better in the new Sustainable Development Goal setting process. However, we are far from a point where there is any room for complacency. The new goals, even if improved from the MDGs, only mark the beginning. As we have witnessed with the MDGs, it is easy to make promises; it is much harder to make them reality.

Dr Jaakko Kuosmanen is a Postdoctoral Research Fellow and Programme Coordinator of the Oxford Martin School Programme on Human Rights for Future Generations.
The Sustainable Development Goals: A New Vision of Development?
By Tessa Khan | 27th July 2014

On 19 July 2014, after eighteen months of fraught negotiation, a UN Open Working Group of seventy governments adopted a proposal for seventeen goals to ensure a sustainable future – economically, socially, and environmentally.

The proposed goals, known as the Sustainable Development Goals (SDGs), will be a key component of negotiations starting in September in the UN General Assembly on the post-2015 international development agenda. The impetus for this whole process is the pending expiration of the Millennium Development Goals (MDGs) which have embodied an international commitment to aspirations like eradicating poverty, universal primary education, and gender equality.

Rather than just consider the content of the newly-adopted SDGs, this post addresses an important, albeit uncomfortable, antecedent question: does the post-2015 development agenda really matter? The agenda’s predecessor, the MDGs, has been widely criticised for being substantively a failure of ambition, and politically a framework with little normative weight. The former is apparent in the binary, compartmentalised nature of the goals, as well as their failure to address structural impediments to development. The MDGs were also conceived at a time when the impacts of climate change and the financial crisis were yet to expose some of the deepest flaws in the dominant model of development. The limited normative influence of the MDGs is partly a product of the process by which they were devised: they were essentially plucked from the UN Millennium Declaration by UN staff without any preceding intergovernmental negotiation or debate.

The post-2015 development agenda has distinguished itself procedurally from the MDGs in two important respects. First, formal negotiations will begin in September 2014; a full year before the summit at which the agenda is due to be adopted. Second, the Open Working Group process has generally allowed ample space for open discussion of priorities for development, including with participation of civil society (although not all ancillary processes have been so transparent).

Whether this means that the final outcome will be any more effective than the MDGs is, however, uncertain. While governments have had no choice but to discuss the international structures and dynamics undermining equitable and environmentally sustainable development, negotiation of the SDGs has exposed a clear and deep division between the demands of the ‘G77 plus China’ bloc (comprising 134 countries) and those of developed countries (namely the US, EU, Australia, and Canada). The policies on which disagreement seems most intractable are those that are at the root of inequities in wealth, resources, and opportunities between and within countries: international trade, finance, and taxation architecture; patterns of production and consumption; responsibility for climate change; and responsibility for financing development.

The G77 plus China have, for example, consistently and stridently demanded expeditious and ambitious reforms of the IMF and World Bank; stronger regulation of the international financial sector; a strengthened global partnership for development with public international finance at its core; a development-oriented trading system; and sovereign debt sustainability. Much of this has been unequivocally resisted by the US, EU, and their allies, the result of which is the ineffectual language on these issues in the adopted text. The text has other weaknesses that reflect the lack of consensus between the global North and South: for example, the language of human rights is conspicuously muted in the proposed goals (although universal access to goods and services like...
health coverage and water are included). Even so, the scope of the SDGs is much more comprehensive than the MDGs, with goals on wealth inequality, decent work, peaceful and inclusive societies, and sustainable ecosystems. Means of implementation have also been included under each goal, recognising the need to create an enabling environment for development rather than simply focus on static targets.

A full appraisal of the proposed SDGs, however, needs to situate the goals within the crowded diplomatic space in which they were negotiated. The SDGs are only one of a number of outcomes that will inform the General Assembly’s discussion of the post-2015 agenda, including reports from specialised intergovernmental committees on topics such as technology facilitation and development financing, and outcomes of other relevant negotiations, like the UN climate dialogue. Far from signalling a final outcome for the process of negotiating the post-2015 development agenda, the proposed SDGs are just the beginning.

Tessa Khan coordinates the international advocacy program of the Asia Pacific Forum on Women, Law and Development. She is based in Chiang Mai, Thailand.

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**Charting the Future of Development: A Tale of Two Agendas**
**By Tessa Khan | 2nd August 2014**

For its sheer scale, poverty is the greatest systemic human rights violation of our time. Roughly 1.2 billion people live on less than $1.25 a day, the internationally accepted (though absurdly low) threshold defining extreme poverty. Double that number lives on less than $2.50 a day, an amount with which they are expected to secure sufficient food, housing, healthcare, and education.

The imperative to address this deplorable situation and to reduce poverty and promote economic development is powerful and urgent. It has recently triggered two international processes that are unfolding in parallel. The first concerns the UN post-2015 international development agenda; the second, a new agenda for global trade. Each has the potential to significantly influence progress towards equitable development and the fulfilment of human rights.

At the UN, governments are debating the goals of an international development agenda to be adopted in 2015. A key premise of the negotiations is that the current level and distribution of poverty is neither inevitable nor merely a matter of poor national planning. Rather, it is the product of an asymmetrical international political and economic order that has historically contributed to the depletion of developing countries’ resources and diminished their policy space to make development and human rights-oriented fiscal decisions. Creating an effective enabling environment for development is therefore a core priority of the largest bloc of developing countries (the G77 plus China), whose demands include expeditious and ambitious reforms of the international trade and finance architecture, and international financing that respects the need for domestic policy space.

Negotiation of the post-2015 development agenda has commanded the attention of media, human rights advocates, and thousands of civil society organisations. The process has generally been transparent and open to the participation of civil society.

In stark contrast, the second global process is not only closed to civil society, but also most of our elected representatives. That process is the negotiation of the Trans-Pacific Partnership Agreement (TPPA), the Transatlantic Trade and Investment Partnership (TTIP) and the Trade in Services Agreement (TISA). Together they cover most of the world’s trade – the TPPA covers one-third of global trade, the TTIP covers all EU-US trade, and the TISA encompasses two-thirds of global trade in services – and represent an
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alarming new paradigm for multilateral trade and investment agreements.

The degree of secrecy surrounding these agreements is extraordinary. The texts are not publicly accessible (although hundreds of corporate lobbyists have acted as advisers) and even after the agreements are finalised, they will remain classified for at least four years, defeating any semblance of public accountability. Leaked drafts indicate that the basic intent of the agreements is to create an environment that is favourable to foreign investment by severely constraining governments’ regulatory powers, with only a small share of the text dedicated to traditional trade issues. Crippling the ability of governments to regulate to protect the environment, public health, and to ensure fair provision of other essential services jeopardises key human rights safeguards and the capacity to ensure that development is socially and environmentally sustainable. All three agreements also seek to significantly liberalise financial sector regulation to allow unhindered movement of foreign capital, undermining post-GFC attempts to regulate financial speculation and maintain balances between local and foreign capital.

More concerning still is that the TPPA and TTIP (and potentially TISA) rely on investor-state dispute settlement (ISDS) as an enforcement mechanism. Aside from grave concerns regarding the impartiality and transparency of ISDS, under the current TPPA and TTIP drafts companies can sue governments for ‘indirect expropriation,’ which has been used by companies to claim losses because of government policies made in the public interest. ISDS awards in favour of transnational corporations have also been astronomical (for example, Occidental Petroleum successfully sued Ecuador for $USD1.77 billion).

The contrast between the processes to develop the post-2015 development agenda and a new trade agenda, both of which will impact the finances and policy-making autonomy of governments, could not be more dramatic. One is participatory, internationally endorsed, but with weak accountability. The other is secretive, driven by corporate interests, and backed by a powerful and oppressive enforcement mechanism. The first is rightly under public scrutiny. The second deserves equal, if not greater, vigilance.

Tessa Khan coordinates the international advocacy program of the Asia Pacific Forum on Women, Law and Development. She is based in Chiang Mai, Thailand.

Civil Society Wants its Voice Heard in Post-2015 Development  
By Jaakko Kuosmanen | 8th September 2014

In the last week of August 2014 the UN headquarters in New York was effectively taken over by civil society. Over 4000 participants from non-governmental organisations around the world gathered for a three-day conference aiming to ensure that all voices are heard in the Post-2015 development process.

The conference participants laid out a critical view of the Millennium Development Goals, and approached Post-2015 Development-related issues from various perspectives. A central underlying aim of the conference was the drafting of a Declaration that ‘defines an ambitious, inspiring, and concrete action agenda’ for the intergovernmental political negotiations beginning in September.

The Declaration was successfully drafted through a consultation process during the three days – not least due to hard work of the drafting committee that was composed of over twenty civil society representatives. The Declaration highlights that civil society organisations’ ‘vision for the post-2015 Development Agenda is that of an equitable, inclusive, and sustainable world where every person is safe, resilient, lives well, and enjoys their human rights, and where political and economic systems deliver well-being for all people within the limits of our planet’s resources’.

The Declaration also included a detailed statement on how each of the 17 Goals identified in the Open Working Group ‘Zero Draft’ document should be revised and developed in the final stages of the Post-2015 Development process.

One of the main questions looming large at the conference was the ability of civil society organisations to have an impact on the goals that – in all likelihood – will be adopted in September 2015.

The Declaration adopted in the conference will now be passed on to the member states engaging in political negotiations as well as to the UN Secretary-General. Yet, there is no certainty what – if any – impact these actions will have in the final decision-making process.

During the last year of the process there is an important shift from development discussions to international political negotiations. As generally is the case in international relations, also in the upcoming Post-2015 negotiations there is a strong presumption that national interests will have a key influence in the final goals.

So why talk about development and adopt a Declaration when you have no right to vote and influence the final stages of the process? At the conference the spirit of civil society appeared strong in the face of political realism. This is centrally because there was a sense of recognition that the only way to influence international development is not by sitting at international decision-making
With the Declaration civil society organisations sent a reminder to governments around the world. While the Declaration stated that civil society organisations are ‘committed to working hand in hand with governments in this universal quest for a life of dignity for all within planetary boundaries’, they are also committed to holding governments accountable. They also declared: ‘We are here... and here to stay’.

Dr Jaakko Kuosmanen is a Postdoctoral Research Fellow and Programme Coordinator of the Oxford Martin School Programme on Human Rights for Future Generations.

An Unsecured Commitment: Security and Justice in the Post-2015 Development Agenda
By Janine Ewen | 27th January 2015

Insecurity and injustice are a daily reality for large numbers of people around the world. Although gathering data on areas torn by public fear, human tragedy and below average living conditions can be challenging, we know from previous years that at least half a million people have been killed yearly as result of intentional homicidal violence (UNODC, 2011). Armed conflict has produced an average of 50,000 deaths annually, with 200,000 persons dying as a result of non-violent causes from the effect of living in a war zone (The Geneva Declaration, 2008).

A mixture of experiencing direct physical violence (e.g. sexual assault; harassment; fatal injury from weapons) and living in terror (organised crime, corruption) has led to the establishment of targets and indicators for improved security and justice by the United Nations Office of Drugs and Crime (UNODC), with consultation from the United Nations Development Programme (UNDP). The paper, ‘Accounting for Security and Justice in the Post-2015 Development Agenda’ draws on recommendations generated during a two day gathering of technical experts in the fields of rule of law, security and justice organised by UNODC in Vienna back in 2013.

Section 1.1. outlined targets in the agenda ‘Accounting for Security and Justice in the Post-2015 Development Agenda’
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against Happiness: Why ‘Happiness’ is not a Good Measure of Progress
By Frances stewart | 17th March 2014

‘Happiness is the meaning and the purpose of life, the whole aim and end of human existence.’ (Aristotle).

Gross national income (GNI) per head is generally accepted as the dominant indicator of country progress. Yet, it is a poor indicator. It does not account for externalities, income distribution or the many aspects of human well-being which are not measured by income – such as health, education, personal safety, social relations, work conditions, spirituality, and so on. Incomes are a means rather than an end. Dissatisfaction with GNI per capita as a measure of country progress has led to the development of a number of alternative indicators. One well-known example is Morris Morris’ suggestion, in the 1970s, of PQLI (Physical Quality of Life Index), a composite indicator including a measure of infant mortality, life expectancy and education. Yet, in the context of the debt crisis of the 1980s, this proposal never took off, and indeed growth of GNP per capita appeared more attractive as an indicator at a time of declining incomes.

The UNDP’s Human Development Index (HDI), consisting of a composite of life expectancy, a measure of education and modified incomes per head, gained more traction. Yet, it too has been subject to many criticisms, including that it does not account for the distribution of resources, it is not a good guide to many aspects of human development, it does not sufficiently differentiate progress among developed countries, and it does not account for environmental change. Moreover, all of these indicators are ‘objective’ – i.e. they consist of external measures of people’s conditions. A recent, powerful criticism of them all – and in particular of GNP per capita – is that progress should be assessed according to people’s perceptions of their own condition. In short, we should measure people’s own assessment of their lives, or their perceived ‘happiness.’

But there are serious problems with measures of happiness as the exclusive measure of progress. Apart from huge measurement problems, especially across countries due to cultural specificities, people adapt to their conditions, so that subjective assessments of well-being may rank high despite appalling health, bad housing, poor nutrition, and so on. Moreover, like the other indicators mentioned, it neglects agency. Human rights may be sacrificed so long as the happiness indicator looks good. Current levels of

- Prevent and eliminate all forms of violence against women and girls.
- Reduce bribery and corruption and ensure officials can be held accountable.
- Reduce and prevent violent deaths per 100’000 and eliminate all forms of violence against children.
- Enhance the capacity, professionalism, accountability, security, police and justice institutions.
- Ensure justice institutions are accessible, independent, well-resourced and respect due-process rights.
- Stem the stressors that lead to violence and conflict, including those related to organized crime.
- Reduce illicit flows and tax evasion and increase stolen asset recovery.

The stance is that they all should be included in the future Sustainable Development Goals (SDGs); however this is by no means a secured commitment. The SDG’s will build upon the Millennium Development Goals, eight international development goals that were established from the Millennium Summit of the United Nations in 2000, following the adoption of the United Nations Millennium Declaration. Shaping our future by investing resources on: maternal health; education; gender equality and environmental sustainability, categorised as individual targets, but grouped together as a means to an end on poverty and equality, leads to the question on how can any of these goals really succeed long term stability and survival without justice or security? The answer is obvious; they cannot.

Professor Clifford Shearing, a world leading academic and former Director of the Centre of Criminology at the University of Cape Town, has given a simple and clear message throughout his academic work on the theoretical understandings of security governance; all multi elements that form our social life, depends on our safety, or this will naturally disturb our daily living. We must feel safe, secured through a lasting presence of accountable security.

The principle of justice, from upholding fairness and equal treatment, serves our judgement on what is deemed to be right or appropriate behaviour, together with societal wrong doings. Without this basis, we will fail to not only recognise, but provoke a response to the standards of good, which may be considered bad, or the bad that is considered as the good. Justice also acts as a means for protection, strongly linking to security.

Although an undeniable need as a future priority, the suspected challenges arising from government resistance, significant disagreement and calculation challenges could prevent support and initiation of a security and justice post-2015 development framework. International experts believe an element of convincing is an immediate necessity to accompany the current conversation and running countdown.

Janine Ewen is a researcher on Policing and Public Health.

Against Happiness: Why ‘Happiness’ is not a Good Measure of Progress
By Frances Stewart | 17th March 2014
happiness may be achieved at the cost of future generations whose happiness, by definition, cannot be assessed. Intergenerational problems have come to the forefront as a result of present environmental threats, and it is critical that we adopt measures of progress which take this into account. There is also an ‘adding up’ problem: measures of happiness invariably consist of individuals’ rankings of their situation, and therefore cannot be added up in the way income can. This makes it impossible to generate a legitimate societal measure, yet this is precisely what the happiness gurus do.

Human progress includes many non-commensurate dimensions. While composite indicators are attractive as a way of summarising a great deal of information, they are invariably misleading, because they involve a particular weighting system across dimensions and people. This is true of the happiness indicators as much as of the income ones, and indeed of other composite indicators, such as the HDI. Assessing a multi-dimensional phenomenon requires information and evaluation on the important different dimensions. My perspective on this is that country progress should be evaluated on the basis of a range of indicators including the main human rights and their sustainability as well as indicators of agency. A ‘happiness’ measure may also be relevant to ensuring that progress in promoting human rights is not achieved at the cost of making people unhappy – but any measure of happiness or unhappiness should be one indicator among many, not the exclusive measure of progress. While internationally agreed-upon human rights would seem to provide an acceptable basis for choice of dimensions for global comparisons across countries, it would be preferable for dimensions at the country or community level to be selected by participatory processes, and equally, a weighting system developed in a participatory way, if aggregation is desired.

This proposal, curiously enough, is in the spirit of what Bhutan does in its famous National Happiness Index, where the subjective indicator forms just one of nine total indicators that contribute to the aggregate indicator.

Dr. Frances Stewart is an Emeritus Professor of Development Economics at Oxford University and the Editor of Oxford Development Studies.

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**Chinese Environmental Protection Law – The Illusion of Enhanced Human Rights Safeguards**

*By Ken Gee-Kin Ip | 30th June 2014*

In April 2014, the Chinese legislature amended significantly the Environmental Protection Law adopted in 1989. This post seeks to predict the amendment’s implications for Chinese citizens’ substantive and procedural environmental rights.

Substantive environmental rights refer to economic and social rights to which individuals are entitled, prescribing the level below which environmental standards must not fall. Procedural environmental rights denote civil and political rights such as information rights, access to justice and remedies.

The first goal of the amendment is to consolidate existing environmental regimes. The revised law (1) reinforces the Environmental Impact Assessment (EIA) Law (articles 19, 44, 56, 61 & 63), (2) standardizes (a) the total emission control quota system for key pollutants (article 44), (b) the pollutant discharge permit system (article 45) and (c) the risk and emergency control system (article 47).

However, only a tiny portion of all construction projects are subject to the obligation to prepare EIA reports, leaving the rest without any professional or scientific assessment. There is little supervision for compliance after approval of these projects. Also, the Local People’s Governments (LPGs) may encourage cursory EIA evaluation for investments conducive to local GDP targets although the relevant standards have not been met.

The second objective of the revised law is to strengthen environmental governance. The revised law requires public authorities to: (1) solicit opinions from experts and relevant stakeholders (article 14), (2) set up (a) environmental quality monitoring stations, (b) information sharing systems (article 17), (c) an inter-jurisdictional joint coordination mechanism (article 20), (3) eliminate pollution-intensive techniques (article 46). Enhanced enforcement measures include imposing daily fines (article 59), the power to seal up and detain facilities (article 25) and administrative detention (article 63).

Nevertheless, some local Environmental Protection Bureaus (EPBs) which are responsible for enforcement may suffer from lack of funding, resources and motivations. Despite the rigorous enforcement measures, business operators in some localities may still find it more cost-effective to break the law than to comply with it. More importantly, there is no distinct right to a healthy environment which would allow a victim to seek judicial redress when the pollution level has increased because a particular project exceeds the permissible standard. The victim must wait until significant injury manifests itself and then prove the violation of other indirect rights pursuant to China’s civil law, property law and tort law.

The third theme of the revised law is to facilitate public participation in environmental decision-making. The revised law provides for: (1) the role of the news media in supervising violations (article 9), (2) citizens’ right to: (a) obtain environmental information...
Should There Be a Human Rights approach for Environmental Protection?
By Avani Bansal | 22nd January 2014

Is climate change just an environmental issue or also a human rights issue? Do we need a new international environmental treaty to address the rights of people displaced from their homes? When the rights of indigenous people are in question, is it a human rights issue or an environmental issue or both? Such issues require us to consider the interaction between environmental laws and human rights law.

There are three commonly discussed approaches to examining the interaction between environment protection and human rights. This piece investigates these three approaches to examine if the human rights law regime should subsume the environmental law regime, if the latter should subsume the former or if both the legal regimes should exist separately, with mutual interaction.

First, human rights laws, institutions and processes can be invoked for asserting a right to clean environment. This usually leads to

(Article 53), (b) obtain pollutant-discharging information (article 55), (c) lodge confidential complaints (article 57), (3) the obligation to disclose (a) accident assessment results (article 47), (b) national environmental quality, (c) key pollutant monitoring data (d) administrative actions taken (article 54), and above all, (4) public participation in the EIA process (article 56).

While the revised law enhances the adequacy and accuracy of construction project information available to the public, it does not make those rights enforceable by an independent tribunal. As a corollary, there is no check over the legality of agency behavior and affected citizens are left without any redress. Moreover, only a fraction of projects are subject to the compulsory public participation requirement. The project proponents and EIA institutions’ great discretion over the public consultation process may sometimes result in a biased reflection.

The fourth aspect of the revised law is to stipulate the right of access to justice by registered environmental NGOs which have specialized in relevant public interest activities for five years (article 58).

The restrictive regulations concerning social organizations’ registration promote the monopoly of government-sponsored environmental NGOs. Specifically, the high thresholds relating to human and capital resources as well as an approved body willing to supervise its operation threaten the survival of most environmental NGOs which are not established, funded or staffed by the government. Also, the registration of more than one social organization with a similar function within a region is disallowed. The standing requirement virtually bars members of the public and civic environmental NGOs from seeking judicial review.

The foregoing institutional deficiencies hinder the revised law from advancing from legal rhetoric to a milestone in vindicating citizens’ substantive and procedural environmental rights.

Ken Ip completed his LLB (Hons) at the City University of Hong Kong and BCL at the University of Oxford.
adopter a rights-based approach for environmental protection with an emphasis on the right to clean environment, as in a series of judgments given by the Supreme Court of India under Article 21 of the Indian Constitution (which guarantees protection of life and personal liberty). For instance, in T. Damodhar Rao v. Municipal Corporation of Hyderabad AIR 1987 AP 171, the High Court held that ‘slow poisoning…caused by environmental pollution and spoilage should also be treated as amounting to violation of Article 21. This approach was also followed in subsequent cases such as Kinkri Devi v. Himachal Pradesh AIR 1988 HP 4.

A second approach would be to leverage environmental laws, concepts, institutions and processes for better protection of human rights which could not be attained in the absence of a clean and healthy environment. In other words, tort and statutory regulations which make reference to ‘environment protection’ could be used to assert protection of human rights. For instance, in the Bhopal Gas Tragedy case, criminal charges were brought for an industrial disaster that had huge environmental ramifications and left around 25,000 people dead and more than 120,000 people affected.

The final approach could be to interfuse environmental law and human rights. The movement towards “sustainable development,” which considers the needs of present and future generations, seems to be heading in that direction.

I argue that human rights law and environmental law should continue to develop as two independent but closely linked fields whilst ‘borrowing’ apposite concepts. For instance, in countries where a separate right to environment is not formulated in clear terms, the existing human rights provisions regarding right to life and human dignity can be invoked, on the basis that the right to decent life cannot be protected in the absence of its concomitant right to clean environment.

However, a human rights-based approach can lead to an anthropocentric approach to environment protection. Subsuming environmental law into human rights makes the environment only a function of human needs and rights rather than as an issue that deserves protection in and of itself.

The separate existence of environmental and human rights organisations within a multilevel governance structure therefore has its advantages. These institutions can join forces for specific overlapping objectives. For instance, the coming together of OHCHR and UNEP for a joint report on human rights and environmental protection is laudable and it helps both institutions to identify the common ground that they can cover together, strengthening each advocacy platform.

Taking a human rights approach to environmental protection is advantageous in that it reinforces the concept of mutual goals and the serious ramifications each may have on the other. Framing the relationship in terms of an irreconcilable tension between developmental prerogatives and environmental prerogatives stalls progress for environment protection both at international level (by pitching developed countries versus the developing countries in international environmental negotiations), and at national level (by making environment protection subservient to developmental priorities).

It is therefore imperative that developmental concerns and environmental concerns are not seen as conflicting, but that all actors realise the need to integrate them in order to make sustainable development a reality. We need to give more flesh to the concept by having more explicit legal provisions, institutions and practice which refer to it directly and in a binding manner, as this can help us in achieving sustainable development in all its dimensions.

Avani Bansal did the BCL and an MPhil in Law (International Environmental Law) at the University of Oxford and is currently setting up her legal practice in India.
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