Table of Contents

Message from the OxHRH Director and OxHRH Blog Managing Editor 3

Meet the OxHRH Editorial Team 4

The OxHRH Blog at a Glance 7

Chapters:
1. Relationship Rights as Human Rights 8
2. Equality, Non-Discrimination and Human Rights 25
3. Access to Justice and Human Rights 43
4. Conflict, Security and Human Rights 55
5. Migration, Asylum, Trafficking and Human Rights 69
6. Constitutions, Institutions, Nation Building and Human Rights 82
7. Gender-Based Violence and Human Rights 97
9. Resources, the Environment and Human Rights 132
10. Media, Privacy, Communication and Human Rights 137
11. Criminal Justice and Human Rights 144
12. Religion and Human Rights 153

Photo Credits 160
Message from the OxHRH Director and OxHRH Blog Managing Editor

When we launched the Oxford Human Rights Hub Blog in June 2012, we had an instinct that there was an urgent need for a dynamic space where human rights researchers, practitioners and policymakers could share cutting edge analyses of developments in human rights law across the world. We could not have guessed how quickly and energetically the Blog would gather momentum and develop an organic life of its own. By December 2013 the OxHRH Blog had featured pieces written by more than 150 experts from 25 different countries, ranging from the UK, the US, Canada and Australia, to South Africa, India, Greece, Pakistan, Chile, Israel and many others. More than 50% of the Blog’s contributors over this period were based outside of the United Kingdom. The infographic on page 8 gives some idea of this impressive reach. And our readership has similarly blossomed: the OxHRH Blog currently attracts over 10,000 unique visitors each month – a figure that continues to grow. Our recent survey attracted a warm and encouraging response. We are indeed growing into a global community.

The OxHRH Blog has proved to be a very democratic space. Our contributors include senior counsel and judges, professors and senior policy makers and UN Special Rapporteurs. And we also provide a platform for people who are early in their careers, such as graduate students, pupil barristers and young lecturers.

But all our blogs are characterised by their consistently high quality. This is in no small measure due to our extremely skilful team of editors, who carefully select, review and edit each contribution to ensure the highest scholarly standards of analysis of human rights law. The strict word limit requires authors to engage in a high level of discipline to refine their arguments. It also makes the blogs accessible to its target audience. Our blogs are regularly used as a teaching and argumentative resource and the UK government has even cited an OxHRH Blog post in its Execution of Judgment Plan before the ECtHR in Vinter v UK (App No 66069/09).

Particularly pleasing has been the spontaneous way in which comparative perspectives on similar questions have emerged. Take LGBTQ rights. We have expert blogs on up to date developments on LGBTQ rights from the US, India, Israel, the UK, Cameroon, New Zealand, Australia, the European Convention on Human Rights and Chile. A similar pattern has emerged in relation to migration and asylum seeking; access to justice; gender based violence and many others. Our ability to provide rapid expert assessments on developments on the same issues in different jurisdictions provides a unique opportunity for researchers and students to detect trends, develop explanations for different approaches from historical, social, legal or political perspectives, and formulate models for future development.

It is for these reasons that we decided that our blogs should be more than ephemeral daily postings. We decided to collect the blogs thematically into an e-book, which could become a resource for researchers, practitioners or policy-makers who needed to see the holistic picture which emerges from the fragments. This is the first of what we hope to be an annual exercise.

Global Perspectives on Human Rights intends to showcase this rich and collaborative project. It is primarily an e-resource, allowing the ideas and thinking contained within to be freely accessible to the widest possible audience. We have sought to identify 12 themes that categorise the contributions that the OxHRH Blog has received in its first 18 months of operation. While categorisation of often overlapping and interlinking themes is an inherently fraught task, 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. We also hope that these chapters demonstrate the way in which similar themes at the heart of human rights law’s contemporary concerns – such as relationship rights, or gender-based violence, to name just two examples – are indeed, global concerns. And that through comparative dialogue and the sharing of experience from diverse contexts, we can all benefit in our learning on what the best way to approach these issues might be.

We would like to thank the efforts of our entire editorial team. Since inception, we have had 20 people from 11 different countries work on the production of the OxHRH Blog. It is their hard work, creativity and enthusiasm, and that of our 150-plus contributors, that makes the OxHRH Blog the success that it has become. Particular thanks go to those who have worked as staff editors for the OxHRH Blog, namely Chris McConnachie (2012-13), Dhvani Mehta (2012-13), Miles Jackson (2012-13), Greer Feik (2013) Celeste Robinson (2013), Angelica DeGaetano (2013), Claire Overman (2013-14), Chintan Chandrachud (2013-14) and Rachel Wechsler (2013-14).

The OxHRH editorial team also includes the extremely valuable contribution of our volunteer Regional Correspondents. They help us to reach out to jurisdictions whose experiences of human rights law may be lesser known to those which are habitually looked to by predominately English-speaking human rights law comparativists. For example, we have, since the inception of the Blog, had the valuable contributions of Regional Correspondents from the Commonwealth Caribbean (Se-shauna Wheatle) and Southern Africa (Shanelle van der Berg and Tabeth Masengu). Earlier this year we welcomed two new Regional Correspondents from Latin America (C. Ignacio de Casas and Thiago Amparo) and one from East Asia (Sebastian Ko).

They are helping to expand the reach of the OxHRH, both in terms of readership and contributor base, into new frontiers. Along with our Regional Correspondent for Western Europe (Adélaïde Remiche), and our Consulting Editor (Angelica Gaetano) this team has helped us to transcend linguistic boundaries that often hinder comparative dialogue. They have greatly assisted us in bringing to an English speaking audience human rights developments from non-English speaking countries, as well as helping us grow in our capacity to offer multi-lingual publication of several of our posts.

We would particularly like to thank Claire Overman for her great work in managing the production of this publication and to Max Harris, for assisting Claire in undertaking the daunting task of editing this entire volume. We would also like to thank Gullan & Gullan for their pro bono work designing this anthology and to our Associate Directors Nazila Ghanea, Cathryn Costello and Liora Lazaras; our Events Manager and Administrator Meghan Campbell, and our Administrator Zoe Davis-Heaney for their big hearts which have given us such a beautiful looking publication. We would also like to thank Hart Publishing for supporting the hard-copy printing of this anthology. Thank you to the Dean of the Oxford Faculty of Law Timothy Endicott – our first ever OxHRH blogger! – and the Oxford Faculty of Law, for its ongoing support of the Oxford Human Rights Hub. Finally, thank you to the entire OxHRH team. Particularly our Associate Directors Nazila Ghanea, Cathryn Costello and Liora Lazaras; our Events Manager and Administrator Meghan Campbell, and our Administrator Zoe Davis-Heaney.

We hope that you enjoy reading Global Perspectives on Human Rights.

Sandra Fredman
Rhodes Professor of Law, Oxford University
Director of the Oxford Human Rights Hub

Laura Hilly
DPhil Candidate, Oxford University
Managing Editor of the Oxford Human Rights Hub Blog
Meet the OxHRH Editorial Team

Sandra Fredman
Director

Sandra Fredman FBA QC (hon) is the Rhodes Professor of Law at the University of Oxford and a Fellow of Pembroke College Oxford, a member of Old Square Chambers in London and the Director of the Oxford Human Rights Hub. She founded the Oxford Human Rights Hub in 2012 and is responsible for the original design, inception and subsequent development of the OxHRH Blog. She is always on the lookout for new ideas and contributors, and works closely with the editorial team in order to ensure that the highest level of academic rigour is reflected in the OxHRH Blog’s posts.

Sandra says: “To witness the blossoming of the OxHRH Blog from a small seed of an idea to such a vibrant space in less than two years has been an enormous source of pleasure and fulfillment for me. I have been particularly fortunate to have such a dynamic and energetic team of editors led so well by Laura Hilly. I had always hoped that the blog would be a communally owned space, which would bubble with many different ideas and contributions, and this is what it has turned out to be. All of this without ever sacrificing the highest level of academic rigour.”

Thiago Amparo
Regional Correspondent

Thiago joined the team as a Regional Correspondent for Brazil of the OxHRH Blog in March 2014. He is currently a PhD candidate on comparative constitutional law at the Central European University in Budapest. Thiago has background in international human rights law, having worked at the Brazilian NGO sector for around 6 years. New to the position of regional correspondent, Thiago is indeed excited about collaborating with academics and activists from Brazil in order to provide the blog with up-to-date and critical analyses of current human rights topics in the country – and there is a lot to be covered! When he is not reading about discrimination law for his PhD or searching for new posts on Brazil for the Blog, Thiago enjoys studying foreign policy and human rights, NGO funding and UN-related topics, drinking Brazilian coffee.

Editor’s Pick:
Thiago’s favourite post so far has been Karl Laird’s post: “What’s love got to do with it? - Framing the Same-Sex Marriage Debate” (page 13). “Laird’s post questioning the role of love in the same-sex marriage debate is both provocative and eye-opening.”

Chintan Chandrachud
Editor

Chintan has been an Editor of the OxHRH Blog since November 2013. He is pursuing a PhD in Law at the University of Cambridge on the Judge Evan Lewis-Thomas Scholarship. His research focuses on judicial review under the Indian Constitution and the UK Human Rights Act. He plans to join the Bar in India after completing the PhD. He enjoys working with the Blog as it enables him to stay in touch with human rights developments from across the world.

Editor’s Pick:
Chintan’s favourite post so far has been Ayesha Malik’s piece entitled ‘Malaysia’s Dangerous Path Towards “Allah”’ (page 162). “This post is not only well written and excellently argued, but considers matters concerning the politicisation of Islam that are probably more relevant than ever before.”

C. Ignacio de Casas
Regional Correspondent

Ignacio was appointed Regional Correspondent for Latin America of the OxHRH Blog in February 2014. He is a lawyer specializing in international human rights litigation. He frequently handles cases involving the Inter-American and United Nations systems of human rights protection. Ignacio is counsel at Southern Lights Group, and the Vice President of Centro Latinoamericano de Derechos Humanos (Latin American Centre on Human Rights).

Ignacio is very excited about starting the MSt programme on International Human Rights at Oxford next September. (But his dearest dream would be to earn a ‘Blue’ with the Oxford Rugby Football Club).

Editor’s Pick:
Ignacio’s favourite post so far has been Olivier De Schutter’s post: “Fight Hunger and Discrimination by Empowering Women” (page 123). He says “In the first place it is great to have a post by a UN Special Rapporteur, in this case, on the right to Food. The main topic is well reasoned and has examples from around the world, that come from the author’s own experience of his work done through his mandate. So, at the same time the post is another way of airing the work of the UN Special procedures.”
Meet the OxHRH Editorial Team

Angelica DeGaetano
Editor, now Consulting Editor
Angelica has been an Editor of the OxHRH Blog since April 2013 and a Consulting Editor since January 2014. She is currently studying for an MPhil in Latin American Studies. She has a background in human rights legal issues and hopes to continue in the field in the future working on projects with an emphasis on Latin America.

For the OxHRH Blog has been interesting for Angelica to expand her knowledge on the current legal issues beyond her regional focus as well as to have the opportunity to work with the contributors who are academic experts and practitioners in the field.

Editor’s Pick:
Angelica’s favourite post so far has been: “Denied Education is Denied Survival: The Case of The Nasa People” by Ethel Castellanos-Morales and Camilo Castillo-Sánchez (page 144). “This post covers many important issues facing indigenous in Latin America. The case of the Nasa people in Colombia is used in this post to highlight the issues of education, infrastructure, traditional culture, and other human rights as provided by the constitution.”

Max Harris
Special Projects Editor
Max has written for the Human Rights Hub since late 2012, and joined the Editorial Team in March 2014 to help with the production of this publication. He is studying for a Master of Public Policy at the Blavatnik School of Government in Oxford, having completed the BCL (with Distinction) in 2013. He hopes to work in the future in some field that uses law to advance the cause of human rights, and to secure concrete gains for individuals and groups in the broader community.

Max enjoys being involved with work on the Human Rights Hub blog - a meeting and spending time with interesting people, and learning more about human rights issues around the world.

Editor’s Pick:
Max’s favourite blog post so far was the series published by Dawinder Sidhu on the inside of Guantanamo Bay (page 66). “The blogs provided a very powerful insight into a place that is mentioned a lot, but that we still don’t know much about. The blogs made the place real, and reminded us of the urgent need to work towards closing down Guantanamo Bay.”

Greer Feick
Editor
Greer was an Editor of the OxHRH Blog from April to October 2013. She recently completed her MPhil in Development Studies. Greer is particularly interested in migration and refugee law, and conducted fieldwork in Ghana on child trafficking policy and law during her master’s degree. She currently works as an Analyst at Benenson Strategy Group, a Democratic political consulting firm in the U.S.

Editor’s Pick:
Greer says: “So hard to pick just one favorite! I particularly enjoyed Justice Dhaya Pillay’s post on public interest law in South Africa. Justice Pillay provides a really insightful look into the successes and limitations of public interest law in addressing inequality in education and housing in South Africa (page 47). In the wake of Edward Snowden’s revelations about NSA surveillance, I also really liked John Laprise’s piece on the problem of “alleged care” surrounding the surveillance activities of the US intelligence community.”

Laura Hilly
Founding Editor, now Managing Editor
Laura was one of the founding Editors of the OxHRH Blog and has been delighted to hold the position of Managing Editor since late 2012. She is a DPhil Candidate in Law at the University of Oxford and her work considers the impact of gender diversity on the senior appellate judiciary in the UK, South Africa and Australia. She teaches human rights law and is an admitted practitioner in both Australia and the UK.

Laura says that “It has been an absolute pleasure working with such a fantastic team of editors and contributors to deliver the OxHRH Blog. Each and every contribution we receive opens up a new perspective on human rights law and the potential for new and exciting dialogue around some of the worlds most difficult, yet pressing, challenges.”

Editor’s Pick:
Laura has had the pleasure of reading each and every post on the OxHRH Blog, so she says that it is a difficult task to pick just one. However, she says “Shreya Atrey’s post ‘Lifting as We Climb’ (page 102) really stood out for me as one of the best. Her call for gender equality to be a project that is inclusive of all women, particularly the most vulnerable, is both compelling and urgent.”

Miles Jackson
Founding Editor, now Consulting Editor
Miles was one of the founding Editors of the OxHRH Blog and currently acts as a Consulting Editor. He is the Global Justice Research Fellow at St Anne’s College and convenor of the Oxford Transitional Justice Research Group. His doctoral research, supported by a Rhodes Scholarship, was on complicity in international law. Miles is a former clerk of the Constitutional Court of South Africa and a former chair of Oxford Pro Bono Publico. He currently teaches Criminal Justice and Human Rights for the faculty.

Editor’s Pick:
Miles’ favourite post is by Natasha Holcroft-Emmess’ ‘Extraterritorial Jurisdiction under the ECHR - Smith and Others v MOD (2013)’ (page 57). He nominates this for his Editor’s Pick “for the clarity of its engagement with the ECHR case law and brief but compelling evaluation of the issue.”

Sebastian Ko
Regional Correspondent
Sebastian is based in the Greater China Region, where a great invigoration of human rights and equality scholarship has paramount practical importance.

Editor’s Pick:
Sebastian’s favourite post thus far has been Davina Cooper’s opinion piece “Reanimating Equality” (page 38). “Using the example of public nudism, the piece challenges our thinking in respect of the realisation of equality in light of its entanglement with other norms –norms that are evolving dynamically and interacting with each other in complex ways!”
Meet the OxHRH Editorial Team

Tabeth Masengu
Regional Correspondent

Tabeth has been a Regional Correspondent for Southern Africa since early 2013. She is an admitted Attorney of the High Court of South Africa and is currently a Research officer at the Democratic Governance and Rights Unit (DGRU) based at the University of Cape Town. She holds an LLB from Rhodes University (Cum Laude) and an LLM in Human Rights (Cum Laude) from the London School of Economics and Political Science. She has spoken at various fora on gender transformation in the Judiciary with an expected journal article publication soon. In addition, expected publications in peer-reviewed journals and a chapter in a book are on the issues of women rights and constitutional processes and gender dynamics of Zambia’s constitutional processes. She is also the Secretary of the Women and Constitution Working group of the African Network of Constitutional Lawyers.

Editor’s Pick:
Tabeth’s favourite blog is ‘Stereotyping as Direct Discrimination’ by Tamas Szigiethi that looked at the entrance policy of a club in Hungary that violated anti-discrimination Legislation. She says that “Simply because the practice of allowing women free entry and making men pay is common everywhere, it made me think twice about what this actually implies. Unbeknown to women who would happily not part with a cent to enter a club, it actually objectifies them.”

Chris McConnachie
Founding Editor, now Consulting Editor

Chris was one of the founding editors of the OxHRH Blog and helped to recruit the very first editorial team in 2012. He stepped down in 2013 to concentrate on his DPhil work, but continues to play an important advisory role as a Consulting Editor, as well as contributing posts. After completing his DPhil, Chris will return to South Africa to begin pupillage in 2015, specialising in constitutional and human rights law. McConnachie was also the first editor of the blog, and helped to recruit the very first editorial team in 2012. He continues to play an important advisory role as a Consulting Editor, as well as contributing posts. He is also the Secretary of the Women and Constitution Working group of the African Network of Constitutional Lawyers.

Editor’s Pick:
Chris’ favourite post is “The Limits of Law” by Thomas on the one hand and “The Limits of Justice” by Claire on the other. It is a compelling piece that makes the reader think about the limits of law and justice in a world where laws are constantly being created and changed. It is a great read for anyone interested in the field of law.

Dhvani Mehta
Founding Editor

Dhvani was one of the founding editors of the OxHRH Blog in 2012. She was excited to have been involved in the Blog’s inception and would like to commend successive editors for having taken it from strength to strength.

Dhvani is a final year DPhil candidate in Law at Magdalen College, Oxford and hopes to work with human rights research and advocacy organisations on completing her thesis.

Editor’s Pick:
Dhvani’s favourite post is a post by a former OxHRH Blog editor, Chris McConnachie titled “The Rise of South Africa’s Education Adequacy Movement” (page 113). “The post describes cases brought by civil society groups in South Africa to compel the government to provide basic infrastructure in primary schools. The post excellently illustrates the strategies and challenges involved with the litigation of socio-economic rights and provides insights for both academics and practitioners.”

Claire Overman
Editor

Claire has been an Editor of the OxHRH Blog since November 2013, but has been writing for it since its inception in the summer of 2012. She is currently studying for the BPTC at Kaplan Law School in London, with aspirations to (hopefully!) practice in public and human rights law in future. Claire really enjoys what she does at the OxHRH Blog – editing pieces gives her the opportunity to discover areas of law which she wouldn’t otherwise know about, and it’s always a challenge editing contributions from experts and practitioners.

Editor’s Pick:
Claire’s favourite post so far has been Thomas Raine’s post: “Lord Sumption on ‘The Limits of Law’” (page 94). “The topic – clashes of institutional competence between national and European courts – is one that gets a lot of people riled, certainly in the UK. It is it is great to hear a balanced argument presented by Lord Sumption on the one hand and by Thomas’s critique of his arguments on the other.”

Celeste Robinson
Editor

Celeste was an Editor of the OxHRH Blog during Trinity term 2013 and through the following summer while she completed her dissertation. She also wrote for the Blog on the topic of mercenary politics and human rights abuse in West Africa. During her time at Oxford, she was a volunteer graduate researcher with Oxford Pro Bono Publico and an editor for the Globalist. Celeste received her MSc in Criminology and Criminal Justice (Research Methods) in September 2013 and has been serving as a senior strategist in the nonprofit sector since graduating last year. The blogs Celeste edited presented insights into new areas of human rights law and practice – covering intergenerational rights, reverse discrimination, new restorative justice initiatives, and the fascinating territory of drone law and robotic ethics. She feels privileged to have worked with distinguished authors on these compelling pieces.

Editor’s Pick:
Celeste’s favourite post was “Rape and Reform in India: No Legal Fix for a Systemic Problem” (page 102) on the limitations of a legal solution to the epidemic of rape and violence against women in India.

Adélaïde Remiche
Regional Correspondent

Adélaïde Remiche has been a Regional Correspondent for Western Europe since April 2013. She has also authored several posts for the Blog. She is currently a PhD Candidate at the Université Libre de Bruxelles (Belgium), writing on the justiciability of socio-economic rights in Belgium and beyond. She teaches constitutional and human rights law.

Adélaïde enjoys being part of the Oxford Human Rights Hub team as a Regional Correspondent – it allows her to learn more about new topics and provides a fabulous opportunity to meet interesting people.

Editor’s Pick:
Adélaïde’s favorite post so far has been Megan Campbell’s post entitled ‘Safety of Sex-workers and Prostitutes at the Heart of Bedford v Attorney General of Canada v Bedford’ (page 40). Adélaïde says that “The case analysis by Meghan asks us to look at prostitution through the prism of the health and safety of sex-workers instead than from a moral perspective. Such a move in our outlook may steer the public debate about prostitution onto new paths.”
Meet the OxHRH Editorial Team

Shanelle van der Berg
Regional Correspondent

Shanelle has been a Regional Correspondent for South Africa since April 2013. Shanelle first became interested in the far-reaching activities of the OxHRH Blog during a research visit to the University of Oxford in 2012, at which time she wrote her first contribution for the Blog. She is currently completing her LLD as a participant of the Socio-economic Rights and Administrative Justice Research Group at the Faculty of Law, Stellenbosch University, South Africa, in addition to lecturing third year constitutional law.

Besides being a Regional Correspondent, Shanelle is an avid reader of the Blog. She loves the fact that the OxHRH Blog truly illustrates the global impact of human rights issues. She believes that platforms such as the Blog can help cultivate an awareness of shared, global responsibility for human rights abuses. Moreover, the Blog has exposed her to many areas of foreign human rights law that she would not otherwise have encountered in her current research.

Editor’s Pick:
One of Shanelle’s favourite posts thus far has been “Spatial Justice in South African Evictions Jurisprudence” by Professor Sandra Liebenberg and Margot Strauss (page 119). “The post explores the important issue of spatial injustice in the South African context in which socio-economically vulnerable and racially marginalised residents are geographically concentrated in poorly serviced informal settlements on the periphery urban centres.”

Se-shauna Wheatle
Regional Correspondent

Se-shauna was Regional Correspondent (Caribbean) for the OxHRH Blog from 2013 to March 2014. She has recently completed her DPhil at the University of Oxford and is currently a Research Associate at Durham Law School. Most of her research is in the field of comparative constitutional law and human rights. Despite doing postgraduate work in the UK for the past five years, Se-shauna maintains a commitment to working on human rights issues in the Commonwealth Caribbean. Working with the OxHRH Blog has been a great experience, giving her the opportunity to engage with activists and academics who work on Caribbean issues, and providing a space for dialogue with human rights experts throughout the world.

Editor’s Pick:
Se-shauna’s favourite post so far is Maurice Tomlinson’s ‘HIV and Caribbean Law: Case for Tolerance’ (page 43). Se-shauna says “the law’s treatment of LGBT persons in the Caribbean has been the subject of a series of recent high-profile legal initiatives and Maurice’s post brings to the fore the implications of regressive anti-gay laws for the lives and health of the Caribbean region’s LGBT community.”

Rachel Wechsler
Editor

Rachel has been an Editor for the OxHRH Blog since November 2013, and she is grateful for the opportunity to learn about cutting-edge legal issues affecting human rights while editing experts’ Blog contributions. She is currently a first-year DPhil student in Criminology at the University of Oxford.

Editor’s Pick:
Rachel’s favourite post is “New Bill Shifts Focus to Survivors of Human Trafficking” by Mei-Ling McNamara (page 76). Human trafficking is an issue that is close to Rachel’s heart and is the focus of her doctoral research. She says “This exciting post describes a Scottish bill that truly embodies a victim-centered approach by prioritising the needs of trafficking victims for support and assistance.” Rachel wholeheartedly believes in the importance of empowering victims and acknowledging the primacy of their human rights.
The OxHRH Blog at a Glance

Global reach of the Oxford Human Rights Hub blog

24 seminars hosted, featuring 26 global leaders in human rights law, two conferences in 2013 and two planned for 2014

600+ subscribers to the newsletter, from more than 25 countries

100,000+ visitors to the OxHRH Blog, with more than 13,000 unique visitors in December 2013

2000+ followers gained

300 blog posts

Figures at December 2013

Blog posts per topic

Oxford Human Rights Hub
A global perspective on human rights
Chapter 1

Relationship Rights as Human Rights
Relationship Rights as Human Rights

Chapter one

11 Justice Edwin Cameron on the United Nations Free and Equal Campaign
   By Edwin Cameron
11 US Decision Widens Suspect Class to Afford Protection to Same-Sex Couples
   By Karl Laird
12 US Supreme Court Grants Certiorari in Windsor v United States – What Comes Next?
   By Karl Laird
12 Are Only the ‘Discrete and Insular’ Subject to Prejudice?: An Analysis of the Bipartisan Legal Advisory Group’s Brief in Windsor v United States
   By Karl Laird
13 What’s Love Got to Do With it?- Framing the Same-Sex Marriage Debate
   By Karl Laird
13 Could the Outcome in Windsor v US be a Hollow Victory?
   By Karl Laird
13 The Case on Everybody’s Lips – How Arguments in Windsor v US Have been Received by the Commentators
   By Karl Laird
14 The Questions Raised by Striking Down DOMA
   By Karl Laird
14 Is it Time for the US Supreme Court to Come Out of the Closet?
   By Karl Laird
15 Same-sex Marriage: Scaremongering and Sacrilege
   By Karen Monaghan
15 Brushing Off Moral Case for Pardon of Alan Turing May Well Turn into a Legal Case
   By Alex Bailin
16 Equality v Human Rights?: Same-Sex Marriage and Religious Liberty
   By Aidan O Neill
16 Marriage Equality in New Zealand – Part I: Religious Exemptions
   By Max Harris
17 Marriage Equality in New Zealand – Part II: Public Interest Litigation
   By Max Harris
17 Gender-Neutral Marriage and ‘Attenuated Discrimination’: Legal Developments in France
   By Daniel Bornilo
18 Same-Sex Marriage: Bill N°344 Amidst France’s Wider Political Landscape
   By Delphine Rooney
18 Same-Sex Marriage: Transforming to an Institution of Equals
   By Rob Clark
19 LGBTI Federal Anti-Discrimination Laws are a Significant First Step
   By Heidi Yates
19 Wedding Crashers in Canberra?
   By Ryan Goss
20 The Commonwealth v The Australian Capital Territory: Marriage Equality in the High Court
   By Ryan Goss
20 Reversing Roles: Bringing Men Into the Frame
   By Sandra Fredman
21 The Ironies of Gay Divorce in Israel
   By Amir Paz-Fuchs
21 Parents’ Sexual Orientation and Children Rights– Coming Out in Chile and the ICHR: Atala Riffo v Chile
   By Nicolas Espejo Yaksic
21 European Court of Human Rights Rules on Same-Sex Civil Partnerships
   By Menelaos Markakos
22 Transsexual Persons Can Get Married in Hong Kong in a Year’s Time
   By Brian Chan
22 The Liberty-Equality Debate: Comparing the Lawrence and Naz Foundation Rulings
   By Ajey Sangai
23 Of Koushal v NAZ Foundation’s Several Travesties: Discrimination and Democracy
   By Shreya Atrey
23 Naz Foundation: Reading Down the Supreme Court
   By Sudhir Krishnaswamy
24 The Crime of “Homosexuality” under Cameroon Criminal Law
   By Vincenzo Volpe
24 Ode v High Court of Ireland: the Right to Respect for Family Life is Alive and Kicking
   By Claire Overman
25 X v Latvia: Creative Harmony, Fortunate Result
   By Brett Crumley
The work is vigorous public education and awareness. On 2 July 2013, Duduzile Zozo, a young lesbian in Thokoza township, south-east of Johannesburg, was brutally murdered. Many are still raped and murdered in anti-lesbian hate crimes. The continent and in the global south, to afford gays and lesbians an immediate remedy, the majority shied away from this. It was also as a proudly gay man. As I started my law practice in 1983, I came out. And I embraced the fight for gay and lesbian equality as part of my human rights work under apartheid. I participated in the negotiations that culminated in the inclusion of LGBTI protection in the Constitution. And, at the end of the year in which South Africa became a non-racial, constitutional democracy, President Mandela appointed me, openly gay, a judge in the High Court.

Fifteen years later, I feel a sense of sombre sobrely about what we have achieved. South Africa aims to be an island of non-discrimination on a continental sea of hatred, ignorance and persecution. But we have very far to go. The ideal world is one in which young people growing into a sense of themselves will feel no stigma and no fear about a possible LGBTI identity. That is still very far away.

Our two greatest foes in attaining that ideal are invisibility and silence. Most LGBTI people, everywhere in the world, still cannot or dare not express their identity. They are invisible. Unlike gender and racial differences, which generally are visible, difference in sexual orientation mostly is not. This leads to spurious claims that homosexual identity is Western, or North American, or European. It is not. LGBTI people constitute between 5 and 10% of all people, in all countries, social classes, cultures and religions, everywhere. Free and Equal offers us all a chance to end invisibility.

Across my continent, LGBTI persons are becoming defiantly visible, and defiantly vocal. In Uganda, Cameroun, Gambia and elsewhere, this is leading to a terrible backlash. But our progress to equality is irreversible. Every family, every community, every workplace, every organisation has an LGBTI person or persons. Once we realise that LGBTI people are integral to our family and working and community lives, persecution and ignorance will abate.

Our dreams were exultantly realised when, in 1994, the words ‘sexual orientation’ were expressly included in the Zimbabwe elections and other pressing international issues. The focus was on the persecution, imprisonment, criminal prosecution, assault, torture and killing of lesbians, gays, bisexual, transgender and intersex people.

Consensual adult same-sex activity is still criminal in seventy-six jurisdictions. Forty of those are in the Commonwealth. In these countries, but also elsewhere, levels of hatred, ignorance and persecution are still terrifyingly high.

My own country, South Africa, is an anomaly. In the 1980s, activists fought a two-sided battle to secure lesbian and gay equality. In the LGBTI community, then largely white, male, middle-class and reactionary, a small group fought to convey the message that those seeking lesbian and gay rights should not be excluded. I am a lawyer, a judge and an activist. In my own country, I was the first openly gay person to be appointed to the Bench. I embraced the fight for gay and lesbian equality as part of my Human Rights work under apartheid. I participated in the negotiations that culminated in the inclusion of LBGTI protection in the Constitution. And, at the end of the year in which South Africa became a non-racial, constitutional democracy, President Mandela appointed me, openly gay, a judge in the High Court.

In an important judgment, Windsor v United States 70 U.S. (2012) 12, the Court of Appeals for the Second Circuit considered whether section 3 of the Defence of Marriage Act 1996 (‘DOMA’) violates the Fifth Amendment’s guarantee of equal protection. Section 3 of DOMA states:

> “[i]n determining the meaning of any Act of Congress, or of any rule, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word ‘marriage’ means only a legal union between one man and one woman as husband and wife, and the word ‘spouse’ refers only to a person of the opposite sex who is a husband or a wife.”

A majority of the Court struck down s.3 in an analysis that proceeded in two stages. Firstly the Court considered whether s. 3 of DOMA was subject to heightened scrutiny. It was noted that the Supreme Court utilises certain factors to determine whether a new classification qualifies as a quasi–suspect class. The factors that were listed to decide whether a new classification so qualifies are listed as follows:

- whether the class has been historically subjected to discrimination;
- whether the class has a defining characteristic that frequently bears a relation to ability to perform or contribute to society;
- whether the class exhibits obvious, immutable, or distinguishing characteristics that define it as a discrete group; and
- whether the class is a minority or is politically powerless.

The Chief Judge examined these four factors and concluded that each was present in the case of gays and lesbians as a class and thus review of s.3 of DOMA required heightened scrutiny. In the next stage of the analysis the Court considered whether s.3 of DOMA survived intermediate scrutiny review. To withstand intermediate scrutiny, a classification must be ‘substantially related to an important governmental interest’. Two primary arguments were advanced as to why Congress enacted DOMA. The first was that there was an interest in maintaining a consistent federal definition of marriage and by so doing preserving government resources by limiting the beneficiaries of government marital benefits and also preserving a traditional understanding of marriage. The second was the encouragement of ‘responsible procreation’. The Chief Judge gave short shrift to each of these justifications and indeed counsel for the defendant conceded in the course of the proceedings that s. 3 of DOMA would be unlikely to withstand heightened scrutiny.

The dissent of Judge Straub is valuable in that it highlights why this case is of such importance. Judge Straub did not agree with the majority that sexual orientation is a quasi–suspect class and as such in his view s.3 of DOMA merely had to withstand rational basis review. This it did easily. In his judgment, Judge Straub made the point that DOMA has never been held by the Supreme Court or any other Circuit Court to involve a suspect or quasi-suspect classification. Indeed at every opportunity it has had to do so, the Supreme Court has avoided having to determine whether gays and lesbians are a suspect class, first in Romer v Evans and then in Lawrence v Texas. So in this sense Windsor marks a significant departure from existing authority in that sexual orientation was held to constitute a quasi-suspect class. The case does not necessarily end there however, as the defendants have appealed to the Supreme Court. At last count there were ten cases concerning same-sex marriage before the Court and the Justices will consider all ten petitions at their private Conference on November 30. Windsor is unique however in two senses. Firstly, it struck down s.3 in the widest possible terms and secondly the Solicitor General has urged the Court to hear Windsor as the Government’s preferred case for reviewing the constitutionality of DOMA. It remains to be seen whether the Supreme Court will grant the petition in Windsor or alternatively in one of the other pending cases. Even if Windsor is not heard by the Supreme Court, it remains significant for its novel determination that gays and lesbians constitute a quasi–suspect classification for the purposes of the Equal Protection Clause.
US Supreme Court Grants Certiorari in Windsor v United States – What Comes Next?
By Karl Laird | 12 December 2012

Following on from his previous post considering the recent US Second Circuit Court of Appeal decision to widen the category of ‘suspect class’ to include the protection of same-sex rights, Karl Laird follows the legal progress of this case and offers some context for what is now set to be a landmark US Constitutional decision.

At their conference on 7th December, the Justices of the US Supreme Court granted certiorari in Windsor v United States 570 U.S. There are a number of options open to the Court as to how it might dispose of the case. In their order agreeing to hear the appeal, the Justices themselves opened up another avenue down which the case might go, one that would not require them to decide the substantive issue of whether DOMA violates the Fifth Amendment. The Court has extended the issues for review to include the question of whether the interveners have standing to bring the case under Article III of the Constitution.

This issue arises because in February 2011 President Obama directed the US Department of Justice to cease defending the constitutionality of DOMA. This led the Bipartisan Legal Advisory Group of the House of Representatives to instruct private counsel to defend DOMA’s constitutionality. The Court could avoid the substantive issue of whether DOMA violates the equal protection clause by disposing of the case on procedural grounds, however commentators have stated that this is unlikely to occur.

Another option open to the Court is to adopt the reasoning of the Second Circuit in its entirety and to hold that gays and lesbians form a quasi-suspect class and thus invalidate DOMA on the ground that it fails to withstand heightened scrutiny review. This option, however, raises two distinct issues. Firstly, the most important Justice in controversial cases of this nature is Justice Anthony M. Kennedy. Justice Kennedy was the author of the two previous opinions in which the Court invalidated provisions which impact on the rights of gays and lesbians. In both cases Justice Kennedy has decided the cases in such a way as to avoid articulating the justifications that would prevent DOMA from violating equal protection (and thus from exceeding federal authority) is uniquely reinforced by federalism concerns. Such reasoning is attractive as it would arguably appeal to both the liberal and the conservative sides of the Court and also has the benefit of avoiding the political backlash that might occur should gays and lesbians be held to constitute a quasi suspect class.

Of course another potential outcome is that DOMA will be upheld in its entirety. Whether this occurs largely depends upon Justice Kennedy and there will be much speculation from now until the case is heard in March as to what way his vote is likely to go.

Irrespective of the outcome, the case is likely to generate considerable controversy.

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Are Only the ‘Discrete and Insular’ Subject to Prejudice? An analysis of the Bipartisan Legal Advisory Group’s Brief in Windsor v United States
By Karl Laird | 27 January 2013

In the wake of the introduction of the Marriage (Same-sex Couples) Bill in the UK last week, Karl Laird continues to update OxHRH Blog readers on the progress of same-sex relationship rights on the other side of the Atlantic. In this piece Karl analyses the respondent’s brief in Windsor v United States 570 U.S.

The Supreme Court has announced that it will hear oral argument in Windsor v United States on 27th March 2013. While there will be much speculation as to what the Bipartisan Legal Advisory Group’s (BLAG) counsel of record, Paul Clement, will say to the justices on that Wednesday morning, a preview of his argument can be gleaned from analysing the brief that BLAG filed on 22nd January. What follows will serve to illustrate how BLAG’s analysis that the Court of Appeals for the Second Circuit was wrong to expand the list of quasi-suspect classes to include sexual orientation.

The brief notes that one of the criteria that the Supreme Court utilises in order to determine if a group is a quasi-suspect one is whether the group is politically powerless or otherwise suffers from an inability to attract the attention of lawmakers. The brief cites a number of recent examples to demonstrate that gays and lesbians have made significant political advances in the past two decades so that it can now be said that gays and lesbians have become one of the most influential, best-connected, best-funded and best-organized interest groups in modern U.S. politics. Particular focus is placed upon the fact that the federal government itself has abandoned defence of the Defence of Marriage Act (DOMA) and that three states recently voted to legalize same-sex marriage.

The brief seems to argue that because gays and lesbians are not politically disenfranchised, they cannot claim the protection afforded by quasi-suspect classification. This mirrors Justice Stone’s justification for heightened scrutiny in the famous footnote 4 in United States v Carolene Products. As is well known, Justice Stone stated that the judicial branch should only rigorously scrutinise a determination made by the elected branches when that determination adversely impacts on the interests of ‘discrete and insular minorities’. The role of the courts should be confined to ensuring that minorities are not excluded from the political process by majorities who are eager to perpetuate their dominance. If a minority’s participation is not so inhibited, then the judiciary has no right to engage in rigorous scrutiny of a legislative provision.

However, the problem with this conceptualisation of how to determine which groups ought to be able to claim suspect classification is that it makes an assumption about political effectiveness that has been heavily criticised by Bruce Ackerman. Ackerman states that the problem with the Carolene formulation stems from its under-inclusive conception of the impact of prejudice in American society. Just because a group is not discrete and insular and does have the ability to participate effectively in the political process, does not mean that it is not the victim of prejudice that fetters the channels of democracy. The Supreme Court itself stated in Romer v Evans that the primary reason for Colorado’s Amendment 2 was animus towards gays and lesbians. More recently, the Court of Appeals for the Ninth Circuit held that the sole rationale for the enactment of Proposition 8 was disapproval of gays and lesbians as a class. Although the brief is correct to argue that the goal of gay and lesbian equality has been advanced politically in the past, it is not the case that gays and lesbians do not suffer from prejudice that entitles them to the protection afforded by quasi-suspect classification. We will have to wait until June to find out if the Justices agree.

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Cumulatively these gains are cited to reinforce the point that gays and lesbians do not need the protection afforded by quasi-suspect status, but should seek to achieve their goals via the political process.
Could the Outcome in Windsor v US be a Hollow Victory?
By Karl Laird | 28 March 2013

Yesterday, the United States Supreme Court heard argument in Windsor v United States 570 U.S. 12. We have been closely following this case on the OxHRH Blog. Today’s post will analyze the transcript of the hearing to determine if we can get any hint of the direction in which this case might go.

The first half of the argument on the merits of the case was devoted to the issue of federalism. Specifically, whether the Defence of Marriage Act’s (DOMA) prohibition on the federal level violates states’ rights. Counsel for Bipartisan Legal Action Group (BLAG) sought to argue that s.3 of DOMA in fact upholds this position, as it ensures that the federal government treats marriages uniformly in all states.

Justice Ginsburg disputed the validity of this line of reasoning. In one of the more memorable moments of the hearing, she referred to a same-sex marriage recognised by the state but not the federal government as a ‘skim milk marriage’, given that DOMA denies to a married same-sex couple some 1,100 benefits conveyed by the federal government. Importantly, given that he will most likely cast the deciding vote, Justice Kennedy also expressed concern that DOMA violates states’ rights. He put to counsel for BLAG that DOMA is at ‘real risk’ of running into issues of conflict of laws. This view is supported by a 1996 decision where the issue is heightened given that the federal government is so intertwined with citizens’ day-to-day lives. This point was also made by the Court’s liberal members.

Counsel for Edith Windsor, Roberta Kaplan, focused on the equal protection section, arguing that DOMA falls even under rational basis review, which merely requires legislation to be rationally related to (any) legitimate governmental interest. The conservative members of the Court focused on the federalism issue, perhaps hoping to avoid the issue of what standard of scrutiny ought to be applied to legislation that impacts upon the interests of gays and lesbians. Chief Justice Roberts asked Kaplan whether the several states that voted for DOMA were motivated by their moral disapproval of gays and lesbians. Kaplan denied this and sought to argue that there had been a ‘sea change’ in society’s attitude towards gays and lesbians in that people now understand that gays and lesbians are no different from anyone else, a point that was perhaps lost on senators in 1996. While Justice Ginsburg attempted to assist Kaplan on this point, by asking how many States had now disavowed their anti-gay policies, Kaplan denied this and sought to argue that there had been a ‘sea change’ in society’s attitude towards gays and lesbians, as demonstrated by the fact that politicians are now ‘falling over themselves’ to endorse the cause. The reason this is such an issue is that one of the characteristics of a group that must embody in order to benefit from heightened scrutiny review, which is what the claimant really wants as it will make it easier to challenge the constitutionality of provisions that target gays and lesbians, is that they are ‘discrete and insular’, i.e. politically ineffective. The issues inherent in such reasoning have been examined in a previous blog post.

Justice Kennedy’s questioning of Paul Clement on the federalism issue comments on how loving, same-sex couples ought to benefit from heightened scrutiny review, which is what the claimant really wants as it will make it easier to challenge the constitutionality of provisions that target gays and lesbians, is that they are ‘discrete and insular’, i.e. politically ineffective. The issues inherent in such reasoning have been examined in a previous blog post.

The debate about same-sex marriage is primarily about marriage as an institution and it is here that the difference between marriage and civil partnerships can be found. Nussbaum states that marriage is taken to confer some kind of dignity or public approval on the parties and their union that makes the exclusion of gays and lesbians from the institution especially harmful and stigmatizing. However, given the ambiguity that the state demonstrates towards marriage, an exalted institution that almost anyone can enter into in, perhaps it is time to recognise its limitations. This is not to say that the extension of marriage to include people of the same-sex is not to be welcomed. The point is that it should not have taken so long to get here. By excluding people of the same sex from marriage, the State implicitly makes a moral judgment about heterosexual relationships given those whom it does permit to marry. The extension of marriage to include same-sex-couples is to be welcomed, not because it affords the capacity of people of the same sex to enter into loving and committed relationships, but because the exclusion of same-sex couples is a pernicious form of discrimination that should have been recognised as such and remedied long ago.

What’s Love Got to Do With It? Framing the Same-Sex Marriage Debate
By Karl Laird | 8 February 2013

While listening to MPs debating the Marriage (Same Sex) Couples Bill, it was interesting to note how many instances the phrase “loving same-sex relationships”, or some variation thereof, was invoked by those who supported the Bill.

For example, Steve Reed MP said “[t]o those who do not like gay marriage, I say, ‘Don’t marry someone gay, but please don’t stop the loving and committed gay and lesbian couples.”]

Such sentiment has been invoked in other contexts when discussing or debating same-sex marriage. For example, commenting on the legalization of same-sex marriage in Maine, Chief Justice David Souter said “[voters in Maine came to the common-sense conclusion that all people deserve the ability to make life-long commitments through marriage.” Justices have also included in their analyses of the issue comments on how loving, same-sex couples ought not to be excluded from the institution of marriage. In striking down legislative initiative measures that limited marriage to opposite-sex couples in California, Chief Justice George of the California Supreme Court stated that gay couples are just as capable as entering “loving and enduring relationships” as heterosexual couples.

While it would be specious to argue that such statements ought to be interpreted as limiting same-sex marriage, in those jurisdictions where it is lawful, to those couples that can establish that their relationship passes a test of love and commitment, and they are an example of the ambiguous attitude that the state demonstrates towards marriage. As Martha Nussbaum points out, marriage confers on a couple a number of tangible and intangible benefits. To benefit from heightened scrutiny review, which is what the claimant really wants as it will make it easier to challenge the constitutionality of provisions that target gays and lesbians, is that they are ‘discrete and insular’, i.e. politically ineffective. The issues inherent in such reasoning have been examined in a previous blog post.

Relationship Rights as Human Rights
Chapter one

The Case on Everyone’s Lips – How Arguments in Windsor v US have been Received by the Commentators
By Karl Laird | 6 April 2013

Over at the New York Review of Books, David Cole argues that the Court will eventually recognise that it is unconstitutional to exclude gays and lesbians from the benefits of marriage, but that it is unlikely to do so in the cases it hears last week. Cole believes that Justice Kennedy will vote to invalidate DOMA on the ground that it violates the states’ right to define marriage, but as was already pointed out in this blog, such a ruling would not necessarily lead to the invalidation of the laws that exist at state level restricting marriage to between one man and one woman.

At the Huffington Post, David Fontana states that even if the Court does not invalidate DOMA, Windo represents a milestone in that the arguments last week lacked the ‘polarizing moral denunciations of homosexuality’ that were evident on previous occasions when the Court considered the rights of gays and lesbians. Erwin Chemerinsky describes how he was struck during oral argument how weak the case for denying gays and lesbians the right to marry actually was and that, as such, the Court should recognise a constitutional right to same–sex marriage.

In a comprehensive analysis of the case, John Bursch at SCOTUS Blog argues that Justice Kennedy will provide the fifth vote necessary to invalidate DOMA. Interestingly, Bursch believes that the analysis Justice Kennedy invokes to invalidate DOMA i.e. that the right to define marriage is within the purview of the states rather than the federal government, will be invoked by him to uphold California’s prohibition on same-sex marriage. At the same blog, Gerard Bradley states that the Justices sought to place too much reliance on social science ‘data’ on same-sex marriage as a method of resolving a divisive moral question by appealing to a likelihood that a majority of Americans would object to allowing same-sex marriage. The speculation is that Justice Scalia made a calculation that Windsor was the right case at the right time in that the issues were such that the case presented an avenue by which Justice Kennedy could side with the Court’s liberal wing to invalidate DOMA, but (as has been pointed out on this blog) the impact of such a decision would be relatively minor as the Court would still not recognise a constitutional right to same-sex marriage.

At the Washington Post, Dana Milbank notes how obvious it was that Justice Kennedy will be the swing vote in the case, given how ‘solicitous’ both the Court’s liberal members and counsel were of him during the hearing.

Justice Ginsburg’s conception of a marriage recognised by the state but not the federal government as a ‘skim milk marriage’, once again something discussed on this blog, is dissected by Amy Davidson over at the New Yorker.

Michael Dorff of Cornell Law School is rather critical of the performance of the Solicitor General during the hearing and proposes answers that might have been given in questions that were put to him by the Chief Justice on the federalism issue.

At the New York Times, there is an interesting hypothesis into why the Court might have decided to hear the case in the first place. It is posited that it was in fact Justice Scalia who cast the deciding fourth vote that was necessary to grant certiorari.

The speculation is that Justice Scalia made a calculation that Windsor was the right case at the right time in that the issues were such that the case presented an avenue by which Justice Kennedy could side with the Court’s liberal wing to invalidate DOMA, but (as has been pointed out on this blog) the impact of such a decision would be relatively minor as the Court would still not recognise a constitutional right to same-sex marriage.

It will be 50 years until the Justices’ papers are released and it is known whether this hypothesis is correct, but it is interesting one nevertheless.

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It took Justice Anthony Kennedy just 26 pages to give Eline Windsor a chance to hear next year. One of the potential cases, Brewer v Diaz, today announces a further tranche of cases it has decided such bans ought to be subject to. Such uncertainty will entail challenged on equal protection grounds, and Windsor’s majority gets is to say that DOMA must be subject to ‘careful consideration’, the meaning of which remains unclear. This majority gets is to say that DOMA must be subject to ‘careful consideration’, which could entail what standard of scrutiny ought to be applied to measures DOMA was subjected to (for more on this it is a ‘confusing’ one because no mention is made of what particular attention. Justice Scalia states that if the majority to in oral argument as ‘skim milk marriages’. Building upon his later says DOMA requires ‘careful consideration’, which could make pains to point out that the issue of whether it is unconstitutional for States to deny same-sex marriage is not before the Court when, in his view, those States have not given clear guidance to lower courts and would have made for a conceptually and doctrinally more satisfying decision. However, the Court for some time has refused to add new groups to the list of quasi-suspect classifications. Even if it was willing to do so here, there is difficulty in ascertaining what characteristics a group needs to have been added to the list. In Windsor, the majority should have held that measures aimed at gays and lesbians ought to be subject to heightened scrutiny. This would have explicitly recognized that gays and lesbians have suffered from a history of discrimination and require the benefit, in equal protection terms, that heightened scrutiny affords. A brief perusal of LGBT youth suicide rates demonstrates that discrimination is not a thing of the past.

While Windsor’s place in the pantheon of great Supreme Court decisions seems assured, this will be because of its immediate practical impact, rather than because it has brought clarity to an area of the law fraught with difficulty. In an earlier post, I said it was unfortunate that the majority did not articulate the standard of review to which DOMA was invalidated. This, however, presupposes that DOMA was invalidated for violating the right to equality in the Fifth Amendment.

Do gays and lesbians constitute a suspect class? Windsor does not answer this question. In a dissent vibriodic even by his standards, Justice Scalia derides the majority as having ‘real cheek’ in assuring the nation that the constitutionality of State laws banning same-sex marriage is not before the Court when, in his view, those States have not. He says DOMA injures a class of individuals that those states in which same-sex marriage is lawful sought to protect. He cites his earlier judgment in Romer v Evans and says the state cannot enact legislation disadvantaging a particular group solely on the basis of animus and / or moral disapproval. It appears that Justice Kennedy is invalidating section 3 DOMA for failing even rational basis review. This might indicate that he does not think gays and lesbians constitute a quasi-suspect class. However, Justice Kennedy seems to contradict this supposition when he later says DOMA requires ‘careful consideration’, which could indicate a more rigorous standard of scrutiny. The judgment also references the ‘liberty of the person’, protected by the Due Process Clause of the Fifth Amendment. Justice Kennedy states DOMA causes same-sex-couples injury and indignity, which constitutes a deprivation of their right to liberty. So, the majority seems to invalidate DOMA on the basis that it is contrary to the Constitution’s guarantees of the right to equality and liberty. This is not so unusual. In discussing Justice Kennedy’s earlier judgment in Lawrence v Texas, Larry Tribe argued that the two rights coexist in a ‘legal double helix’. While the decision in Lawrence is an historic one for LGBT equality, it is not the end of the struggle. Indeed, it may only be the beginning.

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Is it Time for the US Supreme Court to Come Out of the Closet?
By Karl Laird | 24 July 2013

Now that a few weeks have passed since the US Supreme Court delivered judgment in Windsor v United States 570 U.S. 12, it seems appropriate to attempt to ascertain what exactly the majority decided. While we know that the Court invalidated section 3 of DOMA, what constitutional provisions were invoked?

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Was this the rationale invoked by the majority and if so, why did they avoid the question of what standard of scrutiny they applied?

Answering the former question first, Justice Kennedy says DOMA injures a class of individuals that those states in which same-sex marriage is lawful sought to protect. He cites his earlier judgment in Romer v Evans and says the state cannot enact legislation disadvantaging a particular group solely on the basis of animus and / or moral disapproval. It appears that Justice Kennedy is invalidating section 3 DOMA for failing even rational basis review. This might indicate that he does not think gays and lesbians constitute a quasi-suspect class. However, Justice Kennedy seems to contradict this supposition when he later says DOMA requires ‘careful consideration’, which could indicate a more rigorous standard of scrutiny.

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So why the obfuscation over the standard of scrutiny? The majority was faced with two options, neither of which might have been thought entirely satisfactory. Firstly, they could have held that DOMA failed even rational basis review. This would have enabled the majority to avoid the controversial issue of whether gays and lesbians constitute a quasi-suspect class. When a measure is subject to rational basis review the question is whether the enactment is rationally related to a legitimate governmental interest. However, ‘legitimate reason’ does not refer to the actual reason proffered by Congress for the enactment of the measure. Rather, it asks whether there is, ‘any conceivable state of facts that could provide a rational basis for the classification.’ This would mean that it was not entirely appropriate for the majority to rely upon observations made by Congressmen who supported DOMA to demonstrate that they were motivated by animus towards gays and lesbians in enacting it. The question for the Justices would be whether they could think of any rational basis for DOMA. It could be argued that DOMA is so pernicious that it fails to cross this low threshold, although perhaps one could think of some legitimate interest to which section 3 rationally relates.

The second option was to explicitly hold that gays and lesbians constitute a quasi-suspect class. This would have meant subjecting DOMA to heightened scrutiny, under which actual legislative intent would have mattered. This is what the majority should have done, as it would have given clear guidance to lower courts and would have made for a conceptually and doctrinally more satisfying decision. However, the Court for some time has refused to add new groups to the list of quasi-suspect classifications. Even if it was willing to do so here, there is difficulty in ascertaining what characteristics a group needs to have been added to the list. In Windsor, the majority should have held that measures aimed at gays and lesbians ought to be subject to heightened scrutiny. This would have explicitly recognized that gays and lesbians have suffered from a history of discrimination and require the benefit, in equal protection terms, that heightened scrutiny affords. A brief perusal of LGBT youth suicide rates demonstrates that discrimination is not a thing of the past.

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Same Sex Marriage: Scaremongering and Sacrilege
By Karen Monaghan | 17 June 2013

Editor’s note: This is an edited transcript of an address given by Karen Monaghan QC on Thursday 13 June 2013, at Matrix Chambers on ‘Same Sex Marriage and Religious Liberty’

At stake in debates about same-sex marriage is not the right of persons holding firm religious beliefs to hold them or manifest them. What the deniers want, is not merely to enjoy their own religion, but to stop others from enjoying the freedom on equal terms to marry.

Those who hold certain religious beliefs seek to affect the way others behave. They seek not merely to assert their own freedoms but to curtail others’ and they assert that as a ‘right’. And that characteristic is what underpins the objections of the ‘no go zone’ – that is a ‘right’ or a ‘freedom’ that can be enjoyed without constraint. To take an example, a person or institution may strongly believe that women are inferior beings to men or are ‘equal but different’ and so should assume only the role of homemaker. They would be entitled to hold that view but they would not be entitled to compel me to stay at home. To resist the same is not to restrict religion to the forum internum, it is to restrict the ability to rely upon it as a basis for undermining the rights of others. A religious ticket does not provide carte blanche to impose one’s views on others.

Nonetheless, a number of straw men have been erected to argue that permitting same-sex marriage will interfere with the religious freedoms of certain individuals and groups. These, in essence hold that same-sex marriage is wrong because it will compel those whose religious convictions require them to do otherwise, to conduct same sex marriages in Churches and promote same-sex marriage in schools, etc. In fact neither human rights law nor equality law would require the same. Numerous carve outs are already made for religious organisations under the Equality Act 2010. Cast iron guarantees are contained in the Marriage (Same Sex Couples) Bill (HL Bill 29) to protect those religious organisations who do not wish to conduct same-sex marriages.

But same-sex marriage objectors seek not merely to manifest their religious beliefs without interference by the State, they want to deny it to those who do not share their beliefs. They want the State to step in to stop it.

For those who want equal marriage, the reason is clear. It is to afford respect to those minorities who have historically been legally and socially excluded and disadvantaged. It is to long for legal equality but supposedly legal device of civil partnerships is not an inclusive measure but an exclusionary one. It perpetuates the social and political marginalisation of gay men and lesbians – reflecting their perceived difference.

Whilst it is true, of course, that much of the disadvantage attributable to a bar on same-sex marriage has been remedied by the Civil Partnership Act 2004 which affords civil partnerships most of the benefits afforded married partners it still remains an essentially exclusionary measure, denying gay men and lesbians access to the important social institution of marriage.

The ‘separate but equal’ philosophy underpinning civil partnerships sits uncomfortably with an equality agenda. This is because it fails to address the social and psychological effects of an exclusionary rule on a historically stigmatized group. Gay men and lesbians most certainly have been historically stigmatized. It is within the lifetime of many of us that being gay was criminalized; it was only in 2010 that the law was declared historically stigmatized. Gay men and lesbians most certainly have been historically stigmatized. It is within the lifetime of many of us that being gay was criminalized; it was only in 2010 that the law was declared.

There is, however, one very good argument against sanctioning same-sex marriage but not one founded in religious dogma but instead feminist principles. Marriage has historically been patriarchal in form and actuality which is no doubt why it is beloved of those religions which embrace the commitment to gender inequality; they are wedded to it, so to speak, precisely because of the patriarchy it celebrates. Under the common law doctrine of ‘coverture’, ‘marriage constituted a legal obliteration of women’s identity’ (S Fredman Discrimination Law (OUP, 2002) 27) such that “the very being or legal existence of the wife is suspended during the marriage (W. Blackstone, Commentaries on the Law of England cited in S Fredman Discrimination Law (OUP, 2002) 27). Related legal rules and presumptions reflected that fundamental principle and have remained in place, founding feminist concerns that the very institution of marriage is highly problematic for women.

If marriage it is not to be voidable, it must also be consummated by penile vaginal intercourse. This puts into law the expectation of penetrative and reproductive, reductive, sex in marriage. In same-sex marriages there is then the problem of identifying consummation. This has been addressed in the Marriage (Same Sex Couples) Bill (HL Bill 29) by excluding an absence of consummation from the grounds that celebrates. Under section 92 of the Protection of Freedoms Act 2012 a person may apply for their conviction under anti-homosexual laws (including the 1885 Act) to be “disregarded” if the relevant conduct is no longer an offence. The effect is very similar to a pardon. But section 92 applies only to living persons.

The Government’s intention when passing section 92 was to recognise the injustice of repressive old laws – even though they were validly passed at the time. So Lord McNally’s moral justification for refusing to pardon Turing no longer holds water. And it is legally unsound too – the power to grant pardons is not restricted by section 92.

It is perverse for the Minister to refuse to pardon Turing for reasons which are diametrically opposed to the law which currently applies to living persons. The point is even stronger because the Minister must exercise his discretion compatibility with the European Convention on Human Rights which does not permit criminal convictions for consensual homosexual acts between adults.

Turing famously said “we can only see a short distance ahead, but we can see plenty there that needs to be done”. Perhaps Professor Hawking’s plea will help the government overcome its blindness towards the un-remedied injustice of Turing’s stigma. If not, the courts may need to help it see.

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Brushing Off the Moral Case for Pardon of Alan Turing May Well Turn into a Legal Case
By Alex Bailin | 4 January 2013

Alan Turing was a brilliant mathematician and logician who led a team of dedicated code breakers in Bletchley Park during WWII. His team’s work helped crack the Enigma machine. Without them Britain may not have defeated the Nazis.

But Turing’s treatment shortly after the war by the very country he helped save was appalling and something needs to be done about it. If Parliament lacks the will, then the courts may have to step in.
Recognising the differences of approach between equality law and human rights law might at least allow a proper and genuine dialogue to open up between these holding divergent views on marriage equality and religious liberty.

Aiden O’Neill QC is a barrister at Matrix Chambers.

Marriage Equality in New Zealand – Part I: Religious Exemptions
By Max Harris | 1 May 2013

On 17 April, the New Zealand Parliament passed the Marriage (Definition of Marriage) Amendment Act 2013 following a powerful nationwide campaign—led by the Campaign for Marriage Equality, Legalise Love, and others. The Act received Royal Assent from the Governor-General (the standard procedure for legislation in New Zealand) on 19 April and will come into force four months later, making gay, bisexual, lesbian, transsexual and intersex marriages possible in New Zealand from 19 August 2013.

New Zealand became the 13th country in the world and the first in Asia-Pacific to make same-sex marriages legal, which has not only received widespread news coverage but has also provided a spur to other countries considering the issue (including France).

The Marriage (Definition of Marriage) Amendment Act is fairly simple; it amends the Marriage Act 1955 to clarify that marriage means the “union of 2 people, regardless of their sex, sexual orientation, or gender identity”. The effect of the associated amendment to section 3 of the gay and lesbian couple’s Act will now allow in same-sex marriages.

The question must also be asked: is such an exemption even contestable? If this requirement is interpreted objectively, how are “religious beliefs” (supposedly militating away from equality for GLBTI) to be construed? If so, the Act has been welcomed by rights activists and many others as an important advance in the achievement of equality for GLBTI. However, it also raises a key legal point that is worthy of further examination by human rights scholars and practitioners alike.

As other countries forge ahead with similar legislation, the nature of the religious exemption provision needs to be closely scrutinised. The exemption may end up coming before the courts in New Zealand. Important questions include: what does it mean for “the religious beliefs of the religious body” to be contravened? If this requirement is interpreted objectively, how are religious beliefs to be construed? And if the test isn’t solely objective, how will a court give weight to a celebrant’s or minister’s own conception of their religious body’s beliefs? No doubt assistance will be garnered here from how analogous issues have been dealt with in other jurisdictions.

The question must also be asked: is such an exemption even justified? Given that civil rights legislation has not traditionally allowed opt-out clauses for those maintaining racist views, should marriage equality legislation allow the denial of rights to marriage on the grounds of religious freedom? The New Zealand Bill of Rights Act 1990 (legislation that was drawn upon in the development of the UK’s Human Rights Act 1998) protects both freedom of religion and non-discrimination—unlike the US Constitution, which, although, interestingly, is not a freestanding right to equality in the Act. One possibility is that if New Zealand courts are unpersuaded by religious freedoms concerns, they may seek to read down the scope of the exemption, using s 6 of the Bill of Rights (which is similar in form to the UK Human Rights Act’s s 3).

These questions cannot be canvassed in full here. What is clear is that this moment of celebration, the New Zealand Marriage equality legislation should also prompt further thought about the ideal form of laws dealing with this delicate and important human rights issue.

Max Harris is a BCL candidate at Balliol College, University of Oxford and is a former co-chair of the JustSpeak Steering Group.
Marriage Equality in New Zealand – Part II: Public Interest Litigation
By Max Harris | 3 May 2013

Editor’s Note: Last week, Max Harris examined the religious exemptions of New Zealand’s recently passed Marriage (Definition of Marriage) Amendment Act 2013. Today, he takes a closer look at the issues that the Act raises about public interest litigation.

As noted last week, on April 17, the New Zealand Parliament passed the Marriage (Definition of Marriage) Amendment Act 2013, following a powerful nationwide campaign. From 18 August this year, gay, bisexual, lesbian, transsexual and intersex marriages will be legal. New Zealand’s legalization of same-sex marriages makes it the first country in Asia-Pacific to make the change and the 13th country in the world to do so; the new Act has therefore gained significant attention as other countries consider the issue (like France).

This was not the first time marriage equality had been raised as an issue in the New Zealand legal context.

In fact, in Quilter v Attorney-General [1998] 1 NZLR 523, the New Zealand Court of Appeal considered one of the key issues underlying the legislation: whether marriage that excludes same-sex couples is discriminatory. The New Zealand Court of Appeal had ruled, in an application brought by three lesbian couples, that the Marriage Act 1955 was not discriminatory (upholding the High Court finding). Three judges found that the Act was not discriminatory as per s 19 of the New Zealand Bill of Rights Act; one judge found that the Act was prima facie discriminatory but that this was justified under s 5 of the Bill of Rights (which allows reasonable limits on rights); and only one concluded that the Act represented unjustified discrimination, stating:

In this country, as in many societies throughout the world, marriage is the single most significant communal ceremony of belonging... To exclude from that status gays and lesbians who live in enduring and committed relationships, which can reflect all the qualities of heterosexual marriage other than procreation, is necessarily discriminatory. The exclusion is inescapably based on their sex or sexual orientation. Such a basis equally inescapably judges them less worthy of the respect, concern and consideration deriving from the fundamental concept of human dignity underlying all human rights legislation.

However, the dissenting judge, Thomas J, noted that it was not possible to reinterpret the Marriage Act (using s 6 of the Bill of Rights), claiming that the Act was too clear to justify such reinterpretation.

The case was cited during the marriage equality campaign in New Zealand, and the question arises: to what extent did it generate the legislative change in New Zealand? The question is an instance of a more general inquiry familiar to scholars of public interest law and socio-legal academics: namely, does litigation, even if unsuccessful, make a difference to social change, by bringing issues to public attention and airing arguments in the public consciousness (though there is room for debate, of course, over how far the words of a legal judge can be said to have seeped into that public consciousness), and it must have contributed in some way towards further raising the profile of the issue of marriage equality.

Such offhand speculation only gets us so far. What is needed (here and in other contexts) is a careful, empirical socio-legal analysis of whether and how the case made a difference to the campaign. That analysis would prove valuable both to lawyers and those interested in the general issue of how social change happens.

Max Harris is a BCL candidate at Balliol College, University of Oxford and is a former co-chair of the JustSpeak Steering Group.

Gender-Neutral Marriage and ‘Attenuated Discrimination’: Legal Developments in France
By Daniel Borrillo | 24 April 2013

During his election campaign, French president François Hollande announced as part of his political program:

I want to fight against all forms of discrimination and to make available new civil rights: I will make available to homosexual couples the rights to marriage and adoption.

Following this commitment, on November 7, 2012, the Prime Minister submitted to his cabinet a proposition for a law ‘making marriage available to same-sex couples’. In accordance with Hollande’s campaign promises, the future law is based on the argument of the struggle against discrimination and upon the principle of equality, even though, paradoxically, no mention is made to either of those ideals in the law’s preamble.

A status of legal inferiority persists for homosexual couples despite the adoption of the Civil Pact of Solidarity (PaCS), which grants them civil unions with some of the legal benefits of marriage. PaCS does not adequately ensure, support, or recognize for gay couples many of the legal rights, responsibilities, and privileges enjoyed by legally married heterosexual couples. Moreover, it does not recognize inheritance and other parental rights within homosexual families. Unlike PaCS, the Bill for gender-neutral marriage originates not from the legislative but from the executive branch of government and thus reveals the President’s interest in the matter. Despite fierce opposition from right-wing parties and an unprecedented mobilization of conservative forces, the senate approved the bill on April 12th and the National Assembly will vote on it at the end of May.

The text of the law provides an explanation of its supporting arguments, succinctly outlines the historical evolution of marriage, and stresses the fact that its aim – marriage equality – is supported by the majority of French citizens today (63% according to a poll conducted by Ifop). The law would essentially modify the civil marriage, family, and adoption code by using gender-neutral language such as « spouse » and « parent » on documents and certificates instead of traditional labels such as « husband », « wife », « father » and « mother ».

With respect to the right to a found a family, the new law limits same-sex spouses to adoption (plenary adoption in which all bonds to adoptee’s birth family are severed, as per civil code article 343); adoption of a spouse’s existing biological child per article 345-1; as well as simple adoption per article 360, by which the adoptee may still maintain a relationship to birth family). Thus, a lesbian couple, though married, will be refused access to medically assisted conception (such as artificial insemination). This is a matter the government expects to deal with as part of another reform measure planned for October.

Limiting the family planning of gay couples to adoption only is one of the most problematic aspects of the proposed law. If the law is adopted, another form of discrimination will be instituted between heterosexual and homosexual couples vis-à-vis access to medically assisted conception.

At its heart, the current Bill corresponds to a strategy that I would qualify as ‘attenuated non-discrimination’. This assimilationist political tactic tends to apply (in a limited fashion) the principle of equality within the current judicial and legal framework without creating any new rights or modifying existing ones. The content of the next reform of the family code, planned for the month of October, will determine if medically assisted conception will be available for female same-sex couples. Concerning gay couples, the president has already announced his opposition to surrogate motherhood. To be continued...

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Translation provided by Christopher Barros.

The Bill may appear to grant equality to same-sex relationships, but where parenthood is concerned, the new law will allow gay couples to have children together only through the means of adoption.
Same-Sex Marriage: Bill N°344 Amidst France’s Wider Political Landscape
By Delphine Rozoz | 19 April 2013

On 12 April 2013, the French Senate adopted Bill n°344, which opens marriage to same-sex couples—a key issue among François Hollande’s promises during the 2012 presidential campaign. Earlier, the French Constitutional Court had ruled that the prohibition of same-sex marriage was not contrary to the Constitution. It therefore had to be addressed by both the government or the Parliament, and ultimately decided by the latter.

Bill n°344 was thus submitted to the Parliament by the French Government on 7 November 2012; on 12 February 2013, the French National Assembly adopted the Bill and on 9 April, the Senate approved its core provision, Article 1, which will not be subjected to further discussion or amendment. Should the National Assembly express its final approval, the French Civil Code would provide that “marriage is contracted between two persons of different sex or of the same sex.”

Before the French National Assembly, although Article 1 was approved at an early stage by a vast majority (249-97), the Bill itself was adopted ten days later (opponents had introduced more than 5000 amendments) by a 229-229 vote. This apparent contradiction echoes the country’s underlying socio-political complexities.

Two groups of French citizens seem as sharply opposed as the main political parties: most representatives from the Socialist Party approved the Bill, whilst almost every member of the UMP (Union for a Popular Movement) voted against it; in the streets, the “manif pour tous” (demonstration for all) protestors and the “mariage pour tous” (marriage for all) counter-protestors both present the impression that they outnumber their opponents.

The intense, polemical and sometimes violent opposition between demonstrators however reflects neither French public opinion nor the intricacies of the national political landscape. Fintorici. The party now has to define its role as lead opponent to the Socialist party and the debate offers an opportunity to observe the evolution of the French political landscape.

Will the UMP reframe the political debate with the Socialist party on mostly economic grounds? Will it strengthen its speech on moral and religious values? Or did the issue of same-sex marriage reveal the inevitability of a schism within the French right-wing historical party? The recent behaviour of members of the UMP – predicting riots and a revolution or protesting against the “assassination of children” – might reinforce the third hypothesis, as developments unfold.

In the meantime, it is expected that the National Assembly will express its final approval in May 2013 and, in the wake of its legalization in New Zealand, France will likely become the 14th State to allow same-sex marriage.

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Same-Sex Marriage: Transforming to an Institution of Equals
By Rob Clark | 2 September 2012

There is a substantial amount of debate in Australia currently regarding same-sex marriage, with parliamentary discussion in the Federal Parliament ahead of a vote, and some states, such as Tasmania, South Australia and also the Australian Capital Territory, declaring that they intend to enact their own laws allowing same-sex marriage. This has led to some interesting and important public discourse on the issue.

While most of those attempting to engage in an argument against same-sex marriage talk at cross purposes (“my religion says x”, when in reality the change is merely to the pluralistic civil institution of marriage) or simply reach a conclusion (“I believe that marriage is between a man and a woman”), others do, intentionally or not, flesh out what is at stake. One example is the recent article in the Sydney Morning Herald of Patrick Parkinson, an alumnus of Oxford and Law Professor at the University of Sydney.

In that article, Parkinson rightly recognises that same-sex marriage represents a shift in the institution of marriage as traditionally understood. However, where he makes a mistake is to think that it is homosexuals, in demanding the right to marry, that will undermine the institution. Rather, same-sex marriage is the logical result of change to the institution of marriage over the last fifty or sixty years, change which has been for the better.

Parkinson refers to the loss of the historical legal and cultural meaning of marriage. However, for his argument to be consistent, he must assign to marriage a meaning which we would not tolerate today. Of course same-sex marriage makes no sense if you define marriage as a patriarchal institution that enforces clear gender roles, with women as subservient baby-makers. In that definition, having a man and a woman is important. Having a woman ‘obeys’ the man is important. Ensuring that the institution cannot be dissolved easily is important. Parkinson’s view of marriage is a pre-feminist and sexual revolution conception of marriage. However, that is not today’s definition of marriage. I think most people would consider marriage to be a lifelong commitment of two equals based on love, or be forced to do so when the alternative option were laid out before them, that is, a highly gendered view of marriage. Just because that definition is not one that Parkinson wants does not mean that it is no longer ‘marriage’.

Further, despite these long-term changes in the institution, what has not changed is the singular signalling quality of marriage. It grants legitimacy to relationships that a de facto status does not, thus the very desire for gays and lesbians to seek the legitimacy of it, and those who deny the legitimacy of homosexuality to seek to block their access. It is not a cultural cringe for gays and lesbians to seek to marry, rather it is a more recent assertiveness that there is nothing wrong with them, their love or their relationships, and so they have had enough of cultural institutions which would seek to suggest their inferiority e.g. the denial of marriage. It is unclear which side of this divide Parkinson is on, but he appears to accept the position of equality towards homosexuals. Therefore, the only way he can seek to deny marriage to them is based on an out-dated gendered view of marriage.

Parkinson has got to the rub of the matter, and in doing so, has demonstrated how same-sex marriage is not just important for gays and lesbians, but for all persons who accept basic equality between the sexes, and that marriage is an institution of equals. Those arguing against same-sex marriage do not seek just to deny the institution to gays and lesbians, they rail against how the institution itself has changed over time. A change that has been for the better, unless of course you are sexist, homophobic or a misogynist.

If the forces against same-sex marriage were to win, they would reshape the institution far more than allowing gays and lesbians to participate. In an ironic sense, it is they who are the radicals. I hope they lose.

Rob Clark is an Oxford BCL graduate and is currently working as a solicitor in Australia.

French media recently revealed that most organisations involved in the protest demonstrations are linked to religious and / or radical right groups.

Secondly, the French Right is not as united as it seems. Only few members of the UMP have expressed objections to adoption would inevitably be followed by legalization of medically assisted conception and surrogate mothers.

The issue of same-sex marriage hence reveals the bipolar nature of the UMP, which, for many years, managed to reunite liberal and conservatives under a common political rhetoric. The party now has to define its role as lead opponent to the Socialist party and the debate offers an opportunity to observe the evolution of the French political landscape.

If the forces against same-sex marriage were to win, they would reshape the institution far more than allowing gays and lesbians to participate. In an ironic sense, it is they who are the radicals. I hope they lose.
LGBTI Federal Anti-Discrimination Laws are a Significant First Step
By Heidi Yates | 11 April 2013

The proposed introduction of ‘sexual orientation’, ‘gender identity’ and ‘intersex status’ as protected attributes under the Sex Discrimination Act (SDA) is a significant step forward for many lesbian, gay, bisexual, transgender and intersex (LGBTI) Australians.

Over the past 17 years, these issues have been the subject of at least five government and parliamentary inquiries yet, for various reasons, legislation has never been introduced by the government of the day. The next three months present the ALP Government with its best (and only) opportunity to deliver on its election commitment to provide discrimination protection to LGBTI Australian before we go to the polls.

At the last election, similar commitments were made by the Coalition and the Greens, providing this minority parliament with a unique opportunity for tri-partisanship reform.

Last week, Professor Rice rightly articulated the various downsides of the SDA amendments, when compared to the proposed federal consolidation bill. However despite the SDA’s failings, I consider that for LGBTI Australians, inclusion in the SDA is all but ‘hollow’. Rather, in lieu of a consolidated federal discrimination act, these long overdue reforms provide important, practical protections against discrimination for the first time at the federal level.

State and Territory laws already provide similar anti-discrimination protections for LGBTI people but use a patchwork of definitions, often leaving significant gaps in protection for transgender and intersex Australians. The proposed SDA amendments adopt best-practice definitions and set a national standard to prevent LGBTI Australians falling through the gaps. This national standard, which in part replaces the previous term ‘sexual preference’, should be rolled out consistently across relevant pieces of federal legislation (including the Fair Work Act) that do not currently provide adequate protection for LGBTI Australians.

The proposed amendments to the SDA will, for the first time, ensure that discrimination protections extend to the Federal Government, its agencies and employees. This has been a glaring gap since a 2008 High Court finding that state discrimination laws do not cover the federal arena, leaving gaps in protection for LGBTI employees and customers of major agencies such as Centrelink and Medicare.

Last week, when announcing this Bill, the Attorney-General emphatically reminded Australia that it remained Government policy to ensure that religiously-run aged care providers do not discriminate in the provision of services. Such a statement is hardly revolutionary given Catholic Healthcare, Anglicare Australia and UnitingCare all have policies of non-discrimination and inclusion. Yet oddly, the Government has not yet addressed this issue in their bill.

Older LGBTI people, many of whom have faced discrimination throughout their lives, deserve bipartisan reassurance that they won’t face further unfavourable treatment at the hands of the people funded by Government to care for them in their twilight years. The Coalition’s George Brandis and Tony Abbott need to publicly declare bipartisan support for this aspect of reform which, as I’ve mentioned, remains strangely absent from this bill.

Indeed, as has been ably argued by David Marr, the existing Government policy to ensure aged care organisations cannot discriminate in service delivery should be extended to all organisations in service delivery, and to employment within those organisations. The Government has said it will consider the Senate Inquiry report recommendations. This includes a recommendation that religious organisations not be permitted to discriminate in the area of service provision and that where discrimination is permitted, that it occur with greater transparency than currently exists. One would hope such consideration could occur through amendments to this bill as it comes up for debate.

The proposed amendments to the Sex Discrimination Act, currently before a Senate Inquiry, are by no means preferred over the simplicity and coherence that a consolidated federal discrimination act would offer. Nevertheless, they are an important and long-awaited step in the right direction towards a society free where all LGBTI Australians can live their lives free of discrimination.

Heidi Yates is a Solicitor with the ACT Women’s Legal Centre and the Inaugural Chair of the ACT Government’s Lesbian, Gay, Bisexual, Transgender and Intersex Ministerial Advisory Council.

But there is a catch.

Australia’s national government, the Commonwealth of Australia, has today launched legal proceedings in the High Court of Australia challenging the ACT’s ability to legislate on marriage. Under the Australian constitution, the Commonwealth argues, national marriage legislation establishes a single and indivisible concept of marriage for the law of Australia, and the ACT cannot undermine that concept by providing for a new form of marriage. The new legislation, the Commonwealth argues, is inconsistent with the Commonwealth’s Marriage Act and other federal legislation.

The ACT has yet to respond formally to the Commonwealth’s writ. But based on past legal advice which it received with respect to a civil union law, the ACT can be expected to argue that there is no inconsistency here: the Commonwealth’s legislation regulates opposite-sex marriage, whereas the ACT’s law only applies to same-sex couples. As such, it could be said, there is simply no inconsistency.

The resolution of this litigation may well have consequences for how Australian law understands the concept of marriage, and for relationships between the Commonwealth and ACT governments. The result is difficult to predict. Depending on how the matter is resolved, the High Court’s ruling could also have implications for states, such as New South Wales and Tasmania, in which politicians are currently considering the possibility of marriage equality legislation.

Readers interested in the issues involved in this litigation can find, here, the Commonwealth’s argument, previous legal advice to the ACT, and recent legal advice to Tasmania.

The Commonwealth would like the High Court to hear its challenge before the end of 2013, with a preliminary ‘directions’ hearing to take place this week. It could be an eventful summer in Canberra.

Ryan Goss is a Lecturer in Law at the Australian National University, Canberra.
On Thursday the High Court of Australia effectively struck down the nation’s first same-sex marriage laws.

But there was a silver lining for marriage equality activists: in striking down marriage laws passed by a territorial parliament, the High Court firmly indicated that it was within the constitutional power of the Australian national parliament to legislate for same-sex marriage.

The Marriage Equality (Same Sex) Act 2013 was enacted by the legislature of the Australian Capital Territory (the A.C.T.) in October 2013. The law provided for a form of marriage equality within the A.C.T. and the first marriages under the legislation took place over the weekend of 7-8 December.

But there was a wedding crasher.

Shortly after the laws were passed, the federal Government (‘the Commonwealth’) announced a High Court challenge, arguing that the laws were inconsistent with existing federal legislation on marriage and divorce, and that those federal laws provided a comprehensive and exhaustive statement of the law for all of Australia. The Court reserved its decision for 10 days and a number of weddings took place in the interim.

In the reasons for judgment, a unanimous 6-judge panel distanced itself from political ramifications of the decision, clarifying that “The only issue this which this Court can decide is a legal issue. Is the Marriage Equality (Same Sex) Act 2013, enacted by the Legislative Assembly for the Australian Capital Territory, inconsistent with either or both of two Acts of the federal Parliament: the Marriage Act 1961 and the Family Law Act 1975?” The Court’s answer meant that, “[u]nder the Constitution and federal law as it now stands, whether same sex marriage should be provided by law...is a matter for the federal Parliament.”

At the oral hearing, the federal government and the A.C.T. Government had made their submissions on the basis that the Constitution’s reference to ‘marriage’ in s 51(xxi) gave the federal Parliament the power to make a law providing for same sex marriage. But, the High Court noted, parties for same sex marriage should be provided by law…is a matter for the federal Parliament.

The marriages of those who married under A.C.T. law while awaiting the High Court’s reserved decision will now have no legal effect. The Court’s decision will also force those Australian States contemplating State marriage equality legislation to think carefully about their legislative strategies.

It is important to be clear about what this decision does not do. The High Court’s decision does not amount to a prohibition of marriage equality, or to a statement that marriage equality would be unconstitutional. Instead, the Court has said that any changes to the Australian law of marriage will need to be made at the national level by the federal parliament. All eyes are now on Canberra’s Capital Hill.

Reversing Roles: Bringing Men Into the Frame
By Sandra Fredman  |  9 March 2013

On Tuesday 12 March, the fifty-seventh session of the Commission on the Status of Women (CSW57) turns its attention to the ‘equal sharing of responsibilities between men and women’. In anticipation of these discussions, Professor Sandra Fredman comments on recent European case law extending women’s parenting rights to men.

It is now readily acknowledged that women’s continuing primary responsibility for child-care is a major factor in perpetuating the gender stereotypes. The attempt to secure maternity rights has therefore been a major focus of decades of campaigning for women’s equality. However, it has always been of concern that maternity rights might reinforce rather than dispel the assumption of women’s responsibility for child care. The goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home. How do we bring men back into the frame?

A starting point is to distinguish between pregnancy rights and parenting rights.

Whereas pregnancy is unique and should be treated as such, a true application of substantive equality requires a levelling up option, extending women’s parenting rights to fathers.

Two recent cases in the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECHR) reflect this approach.

The CJEU case of Roca Alvarez C-104/09, concerned a Spanish measure giving employed women a right to time off for breastfeeding. It was agreed that in practice, leave was no longer used for breastfeeding, but as time off to look after babies. All employed mothers were entitled to the leave, but employed fathers could not claim it unless their wives were also employees. The husband of a self-employed woman complained that this was a breach of his right to equally under the Equal Treatment Directive. The Court upheld his claim.

Without engaging in the contortions of earlier case-law on the comparator, the CJEU had no hesitation in declaring that ‘the positions of a male and a female worker, father and mother of a young child, are comparable with regard to their possible need to reduce their daily working time in order to look after their child’. [24] The Spanish Government submitted that the aim of the measure was to compensate for the genuine disadvantages suffered by women in comparison to men. The Court, however, pointed out that to give this right only to an employed mother, and not an employed father, would be ‘liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.’ [36] Furthermore, this would mean that a mother would ‘bear the burden resulting from the birth of her child alone, without the child’s father being able to ease that burden.’ [37]

An equally robust approach is evident in the 2012 ECHR Grand Chamber case of Konstantin Markin (app. no. 50078/09), in which a Russian serviceman claimed the right to three years’ parental leave to look after his three children, for whom he was the sole carer after his divorce. The Russian Labour Code of 2001 has generous provisions for maternity and parental leave for civilian parents. While servicemen were entitled to the full package of maternity and parental benefits, the Act, servicemen were not. At most, a serviceman was entitled to three months’ leave if his wife had died in childbirth, or he was bringing up a child left without maternal care. The Grand Chamber held that this was discriminatory. In doing so, it drew a bright line between maternity leave, ‘which is intended to enable the woman to recover from the childbirth and to breastfeed her baby if she so wishes,’ and parental leave and allowances which ‘relate to the subsequent period and are intended to enable a parent concerned to stay at home to look after an infant personally.’ [152] This allowed the Court, like the CJEU in Roca Alvarez, to dispose of the comparator problem without much trouble. As in Roca Alvarez, the Government in Marklin claimed that the provision of maternity leave to servicewomen and not to servicemen was a measure of positive discrimination. The Grand Chamber gave short shrift to this argument. Instead, it agreed with the applicant that such difference has the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life. [141] The Court accepted that some limits on entitlement to parental leave may be necessary in relation to the armed forces, for example if military personnel were not easily replaced in their duties. However, any limit on their entitlement should apply to both men and women.

The goal of equal participation of women in the workplace needs to be matched by equal participation of men in the home. This is only possible if the conception of equality is shaped by a conscious and explicit commitment to the social value of parenthood. The provision of equal parenting rights for fathers is a crucial first step. However, equality is only as good as the substantive rights it supports. If real cultural change is to be achieved, the appropriate incentives must be provided to ensure fathers utilise their rights, whether by means of mandatory leave for men, non-transferable parental benefits, and sufficient levels of pay, accompanied by wide-ranging restructuring of the working day to permit a more flexible balancing of paid and unpaid work for both men and women.

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heterosexual couples. While many citizens of Israel may prefer to turn to civil courts in the case of a divorce, the court’s ruling may lead to this right being awarded only to gay couples. This reason is that the ruling is based on Ruth Halperin-Kaddari’s “non-recognition” thesis. According to this thesis, since religious courts refuse to recognize gay marriages, they lose jurisdiction over all relevant aspects including, of course, divorce.

Irry 3: But perhaps the decision would be understood more broadly, in a more liberal direction given by the court (which is rarely a true limitation, in any case)? In such a case, the court may be seen as awarding the right of all couples, gay or straight, to decide their marriage in a civil court. That would be dramatic development indeed. The irony here is, however, that while a narrow interpretation of the ruling would probably be treated with what Alon Harel referred to as “defensive interests of the child, care and custody,” widespread change of policy may well lead to a backlash, an issue discussed (in the American context) in Karl Ladd’s earlier post. As Harel notes, tolerance of the gay legal revolution was possible “because the legal changes were perceived as insignificant, given the deeply conservative nature of the Israeli society. Yet, the very same character is the gay legal revolution to bring forward issues of sexuality the political discourse undermined the conditions that facilitated its success.

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Parents’ Sexual Orientation and Children’s Rights – Coming Out in Chile and the ICHR: Atala Riffo v Chile

By Nicolás Espejo Yaksic | 11 December 2012

Atala Riffo y Niñas vs. Chile, a case in which the Inter-American Court of Human Rights (ICHUR) condemned the Chilean Supreme Court for discriminating against parents, is one of two landmark decisions by the court this year concerning children rights and family life under the American Convention on Human Rights (ACHR).

Ms Atala’s decision to publicly express her homosexuality had led to the withdrawal of her custody rights to her children. At the domestic level, the Chilean Supreme Court had sustained that, based on the impact of Ms Atala’s “coming out” on her children, withdrawing custodian rights was best interests. In particular, the Chilean Supreme Court held that in the conservative social context, Ms Atala’s public homosexuality was damaging for the rights of her children and that a same-sex parental environment could provoke a confusion of parental roles, incompatible with the best interests of the child.

In contrast to the domestic decision, the ICHR held that Ms Atala had violated Ms Atala’s right to be heard (8º), right to private and family life (17º), right to equality before the law (24º), and the rights of her children (19º) in contravention of Chile’s obligations to respect and guarantee, without discrimination, the rights set forth in the ACHR.

The ICHR maintained that the determination of the best interests of the child always should be based on concrete parental conduct and any real or proven harm on the child. Accordingly, the ICHR held that when determining the best interests of the child, judges could not base their decisions on speculations, presumptions, and stereotypes or generalizations about the persons or groups of parents or any dominant cultural preferences concerning certain traditional conceptions of the family. Following the ECHR’s decision in Salgueiro Da Silva Mouta v. Portugal, the ICHR emphasised that the best interests of the child could never be used to justify discrimination based on sexual orientation. Further, the Court reaffirmed the established principle in human rights law that the social practices of discrimination or intolerance in our societies shall never be used as justification for the restriction of fundamental rights.

Finally, the ICHR considered that the ACHR does not privilege one particular conception of family over another, allowing several forms and spaces for the development of private and family life. Based on this open textured interpretation of family life, the ICHR rejected the disproportionate invasion on the private and family life of Ms Atala and her children, consolidating a substantial defence of difference in family relations. No doubt, this is an important step for children’s rights and family life in the Americas.

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European Court of Human Rights Rules on Same-Sex Civil Partnerships

By Menelaos Markakis | 14 November 2013

In the case of Vallianatos and Others v. Greece (app. no. 29381/09, the Grand Chamber of the European Court of Human Rights held that the legal recognition of different-sex civil partnerships to the exclusion of same-sex civil partnerships is incompatible with the European Convention on Human Rights.

The applications were lodged by four different couples living in Greece.

They alleged that Law no. 3719/2008 which provided for different-sex civil partnerships was incompatible with Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 8 (right to private and family life). In such unions could be entered into only by two adults of different sex.

The Government sought to justify the exclusion of same-sex couples from the scope of the impugned legislation on two grounds. First, it argued that same-sex partners could enjoy the same rights as different-sex civil partners by means of ordinary contracts which would regulate their economic relations and inheritance issues. Second, it argued that, as same-sex partners could provide a comparable legal relationship between parents and children to marriage itself, couples would no longer have to marry out of fear that their children would lose protection by being born out of wedlock. This would strengthen the institution of marriage, by reserving it for cases of genuine marital love and commitment. Consequently, in the government’s view, ‘the biological difference between different-sex and same-sex couples, in so far as the latter could not have biological children together’ served to justify limiting the availability of civil partnerships to different-sex couples (para. 62-68).

Relying on this well-established case law, the Court noted that a difference in treatment on grounds of sexual orientation requires ‘particularly convincing and weighty reasons’ by way of justification to meet the Convention standards (para. 77). It held that civil partnerships had an ‘intrinsic value’ for the applicants irrespective of the legal effects’ in that the option of registering a civil partnership would allow them to formalize their relationship (para. 81). The impugned legislation was ‘primarily aimed at affording legal recognition to a new form of non-marital partnership’ and it regulated numerous aspects of the civil partners’ relationship, without differentiating between civil partners who had children and those who had not (paras. 86-88).

The Court further noted that the government did not show that the exclusion of same-sex couples from the scope of the impugned legislation was necessary in order achieve the aim of protecting children born out of wedlock. In the Court’s view, the legislature could have extended civil partnerships to same-sex couples, while at the same time laying down specific provisions for the protection of babies born out of marriage (para. 89). Moreover, the Court held that a trend was emerging in relation to the legal recognition of same-sex relationships and that of the nineteen members of the Council of Europe whose legislation protected no persons as ‘children’, only Greece and Lithuania had reserved this possibility solely for different-sex couples (para. 91).

In the light of the above, the Grand Chamber held by sixteen votes to one that there had been a violation of Articles 14 and 8 of the Convention. However, one should note that the Court ‘delimited the scope of its own analysis by holding that the question of whether there was a positive obligation to legally recognize same-sex partnerships remains to be left open’ (para. 75). Accordingly, the effect of the Grand Chamber’s ruling is limited to those countries which have provided for different-sex civil partnerships to the exclusion of same-sex civil partnerships, namely Greece and Lithuania.

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Transsexual Persons Can Get Married in Hong Kong in a Year’s Time
By Brian Chan | 3 August 2013

On 16th July, the Hong Kong Court of Final Appeal in W v. The Registrar of Marriages [2013] HKECA 36 made a declaration that the words “woman” and “female” in the Matrimonial Ordinance must be read and given effect so as to include a post-operative male-to-female transsexual person whose gender has been certified by an appropriate medical authority (para 11). Such declaration serves as a safeguard of the rights to marry enshrined in Article 37 of the Hong Kong Basic Law (the mini-constitution of the region) and Article 19(2) of the Hong Kong Bill of Rights (an equivalent to Article 23(2) of the International Covenant on Civil and Political Rights).

The triumph of the appellant Miss W did not come easy. She failed in both the Court of First Instance and the Court of Appeal. Her reliance on the international jurisprudence was not accepted, despite the written submission from the International Commission of Jurists to the Hong Kong court – “Corbett should not now be regarded as good law in Hong Kong since it has been overturned by the ECHR in Goodwin and called into question by the House of Lords in Bellinger and since then superseded by statute” (para 147 in the Court of Appeal). Reference was also made to Japan, Singapore, the PRC, South Korea, and that “most Asian countries permit a transgender individual to marry in his or her acquired gender or have erected no legal barrier” (para 149), which was also rejected as evidence of having societal consensus in Hong Kong in construing the words “woman” and “female” inclusive of Miss W.

The Court of Final Appeal adopts a more liberal approach. To quote from the summary, the court held that in enacting the relevant matrimonial laws in dispute, the legislative intent was to adopt the decision of the English court in Corbett v Corbett. Yet, the nature of marriage as a social institution had undergone far-reaching changes and the importance of procreation as an essential constituent has much diminished. To restrict the criteria for ascertaining a person’s gender to merely biological factors would be inconsistent with the constitutional right to marry. The Court should consider all circumstances relevant to assessing a person’s sexual identity at the time of the proposed marriage, including biological, psychological and social elements and whether any sex reassignment surgery has occurred.

This decision will come into effect in 12 months.

In the meanwhile the Legislature is considering whether Hong Kong should follow the United Kingdom’s Gender Recognition Act 2004 and formulate tests to decide questions regarding the implications of recognizing an individual’s acquired gender for marriage purposes.

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The Liberty-Equality Debate: Comparing the Lawrence and Naz Foundation Rulings
By Ajey Sangai | 31 July 2013

Last month marked the 10 year anniversary of Lawrence v Texas 539 U.S. 558, where the US Supreme Court ruled that laws that criminalised sodomy were unconstitutional. Like June 26 2013 June 26 2003, was also a historic day for the LGBT rights movement. For many LGBT rights activists, Lawrence was their Brown, the historic civil rights case that found racial segregation in US public schools unconstitutional.

In Lawrence, the majority opinion of the US Supreme Court invalidated the prohibition on homosexual intercourse using the constitution’s due process clause predicated on liberty, but did not engage with equal protection claims. Catherine MacKinnon argues that majority’s singular reliance on due process to examine for substantive validity of law indicates that ‘empty formalism of legal equality… is the limit of equal protection’s visible horizon.’ Conversely, Justice O’Connor held the law ultra vires the ‘equal protection clause’ as it ‘branded’ one class of persons as criminal based solely on the State’s moral disapproval of that class and the conduct associated with it. Because the US Supreme Court approached liberty and equality as isolated values, I shall call its ruling a ‘detached view’.

An example of a different approach, where liberty and equality are seen as integrated, rather than detached concepts, can be seen in Naz. In this case the High Court gave an integrated reading of Articles 14 (equality), 19 (free speech, association, etc.) and 21 (life and personal liberty) of the Indian Constitution, bringing, in a sense, due process and equal protection together. It looked at the criminalization of sodomy from different optics including dignity, privacy, liberty and equality. By holding that the legislation interfering with liberty ought to satisfy the demands of fairness, reasonableness, and proportionality, Naz, like the majority opinion in Lawrence, relies on due process. Yet, it proceeds further to integrate it with a substantive conception of equal protection. It notes that anti-sodomy laws inevitably target the homosexual identity branding them criminals and causing pervasive prejudice leading to their marginalization and persecution. These laws force LGBT individuals to conceal their identities and pass as heterosexual persons. The fear of violence pushes them ‘underground’ and also dissuades them from accessing AIDS prevention material and treatment. This, the court noted, makes homosexual persons more vulnerable to, inter alia AIDS than their heterosexual counterparts. These are systemic issues where infringement of liberty and denial of equality are intimately connected. Here the integrated approach of Naz seems more suitable than the detached one in Lawrence.

At a deeper level though, it remains under-appreciated by both the US and Indian Courts that inequality here pertains to heteronomativity which presumes heterosexuality as ‘normal’ and homosexual relations as immoral and deviant. The expectations this ideology entail mean that inequality exists not merely in individual relations but also permeates social institutions and systems. Justice Scalia in Lawrence observes that legalizing homosexual intercourse is not limited to sexual relations but extends to the organization of the family and family law including marriage, adoption and inheritance laws.

The recent Windsor ruling, interestingly, at several places, integrates liberty and equality (see pp. 20, 21, 25). However, given the constraints of federalism, it is unclear if it would benefit LGBT people living in States that have not recognized same-sex marriages.

The inequality of power that manifests in LGBT persons’ inability to determine or change the organizing principles of society (for example, marriage and family) by exercising one’s autonomy, strikes at both issues of access and opportunity. In the context of structural and systemic discrimination, taking a detached view of liberty and equality at best yields incremental gains. A multi-focal and integrated view, that questions the organizing principles and supporting legal and social structures, seems a more holistic judicial strategy.

The significance of the Lawrence ruling, however, is not restricted to the US.

In this post, I shall reflect on Lawrence’s conclusions and compare it with the approach taken in the Naz Foundation case (decided by the High Court of Delhi, India which decriminalized consensual sex between homosexual partners). In comparing these two rulings, I examine the interpretation of liberty and equality provisions found in the US and Indian constitutions.

In Lawrence, the majority opinion of the US Supreme Court invalidated the prohibition on homosexual intercourse using the constitution’s due process clause predicated on liberty, but did not engage with equal protection claims. Catherine MacKinnon argues that majority’s singular reliance on due process to examine for substantive validity of law indicates that ‘empty formalism of legal equality… is the limit of equal protection’s visible horizon.’ Conversely, Justice O’Connor held the law ultra vires the ‘equal protection clause’ as it ‘branded’ one class of persons as criminal based solely on the State’s moral disapproval of that class and the conduct associated with it. Because the US Supreme Court approached liberty and equality as isolated values, I shall call its ruling a ‘detached view’.

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The Liberty-Equality Debate: Comparing the Lawrence and Naz Foundation Rulings
By Ajey Sangai | 31 July 2013

Last month marked the 10 year anniversary of Lawrence v Texas 539 U.S. 558, where the US Supreme Court ruled
Of Koushal v NAZ Foundation’s Several Travesties: Discrimination and Democracy
By Shreya Atrey | 12 December 2013

There are many things wrong about the 98 page decision of the Indian Supreme Court in Suresh Kumar Koushal v NAZ Foundation.

The Court’s extensive quotation but tenuous refusal to engage with the text of the Delhi High Court judgment (of which this case is an appeal); reciting but refusing to analyse the arguments made before the Court in any depth; the “self-restraint” in exercising judicial review which bleeds into the abdication of the constitutional mandate to review laws at the altar of fundamental rights; a misplaced reliance and eventual misapplication of the presumption of unconstitutionality; and the glaring absence of any well-considered constitutional analysis based on fundamental rights leading to the final decision of overlooking the decision below that read down s 377 of the Indian Penal Code to de-criminalize consensual sex between consenting homosexuals.

All these aspects present a wide template for criticising a rather unexpected, and deeply shocking decision. Barely a day after celebrating the Human Rights Day and a few down registering a win for Indian democracy through the Delhi Assembly Elections with an impressive debutant Barely a day after celebrating the Human Rights Day and a few down registering a win for Indian democracy through the Delhi Assembly Elections with an impressive debutant Baringly a day after celebrating the Human Rights Day and a few down registering a win for Indian democracy through the Delhi Assembly Elections with an impressive debutant Barely a day after celebrating the Human Rights Day and a few down registering a win for Indian democracy through the Delhi Assembly Elections with an impressive debutant Barely a day after celebrating the Human Rights Day and a few down registering a win for Indian democracy through the Delhi Assembly Elections with an impressive debutant

Naz Foundation: Reading Down the Supreme Court
By Sudhir Krishnaswamy | 13 December 2013

There is no doubt that the Supreme Court in Suresh Kumar v NAZ Foundation (Civ App No.10972 of 2013) held that section 377 of the Indian Penal Code, which criminalizes ‘carnal intercourse against the order of nature,’ was constitutionally valid. The court overruled the 2009 Delhi High Court decision which had read down section 377 to exclude ‘consensual sexual acts of adults in private’ as a violation of Articles 21, 14 and 15 of the Constitution.

The Supreme Court judgment has sparked widespread outrage. In this post I do not critically evaluate the reasoning in this case. Instead I propose that we should read down the judgment as being premised on the specific facts of the case. This would hopefully have the effect of encouraging prosecutors not to target consensual homosexual activity.

We must begin by noting that the court does not take the view that LGBT people do not exist or that they are unworthy of respect.

We do not hear that LGBT people are an invented minority or that we are engaged in a ‘culture war’ and that Indian people have the right to protect themselves against a ‘homosexual agenda.’ However, just like Justice Scalia’s dissent in Lawrence v Texas, the court does conclude that the appropriate forum to settle this question is the legislature, rather than the judiciary (para 56).

Significantly, the rest of the judgment seems to reach factual conclusions similar to those reached by Justice Kennedy’s majority opinion in Lawrence. The court stated that section 377 has not been enforced against consenting adults engaging in private sexual activity, and nor did it target the homosexual community. Like Bowers, and unlike Texas, the case before the Supreme Court was not one in which the individual had been prosecuted under section 377. The absence of sufficient evidence that the provision had been used to target homosexual conduct led the court to sustain the constitutional validity of the statute on the ground that no constitutional injury had been shown. These factual claims lie at the core of the court’s conclusion in this case.

In para 38, the court concluded that the section primarily applied to non-consensual acts where coercive violence was used. The court held that ‘in light of the plain meaning and legislative history of the section… Section 377 IPC would apply irrespective of age and consent’ but that ‘we are apprehensive of whether the court would rule similarly in a case of proved consensual intercourse between adults.’ (para 38). These statements seem to establish two propositions. First, section 377 ‘does not criminalize a particular people or identity or orientation.’ Second, if the record did show that police and the prosecutors targeted consensual homosexual acts under section 377, then the court would strike down the statute. Much of the judgment turns on the failure of the pleadings ‘to furnish the particulars of the incidents of discriminatory attitudes exhibited by the State agencies towards sexual minorities.’ (para 40) While the court fails to appreciate the concept of disparate impact discrimination arising out of a facially neutral statute more generally, it concludes that the available evidence is ‘wholly insufficient for recording a finding that homosexuals, gays, etc., are being subjected to discriminatory treatment either by State or its agencies or society.’ (para 40) So at least for the equality argument under Article 14 and 15, the court’s primary concern is the lack of factual evidence.

On the Article 21 analysis it appears that more evidence would not influence the conclusion. While the court embraced a substantive due process reading of the right to life and personal liberty it concluded that ‘harassment, blackmail and torture (against) certain persons, especially those belonging to the LGBT community… is neither mandated by the section nor condoned by it and the mere fact that the section is misused by police authorities and others is not a reflection of the vices of the section.’ (para 51)

There are therefore two reasons for reading down the Supreme Court judgment to rest only on the facts of this case. First, prosecutorial discretion must be exercised so as not to target private sexual conduct of consenting adults in a discriminatory fashion. Second, a review court may reassess these factual claims and potentially reach different conclusions.

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The Crime of “Homosexuality” under Cameroon Criminal Law
By Vincenzo Volpe | 16 December 2013

According to Human Rights Watch there are 76 countries in the world that prosecute people for having consensual sexual relations with a person of the same sex. In Cameroon, the rate of enforcement of anti-homosexual laws is amongst the highest on the globe. Over the past three years, charges have been brought against 28 people under article 347 bis of the Cameroon Criminal Code.

While the provision is said to prosecute “sexual relations with a person of the same sex”, the offence itself is labelled as one of “homosexuality” and carries a maximum sentence of 5 years’ imprisonment and a fine of 200,000 CFA francs (approximately US $400).

According to evidence collected by local associations such as Alternatives-Cameroon, most convictions are not actually supported by evidence of sexual activity. Charges are triggered by the slightest suspicion that someone belongs to the homosexual minority, and evidence is subsequently obtained through torture and ill-treatment. Cases of flagrant délit are in reality set-ups: the police forces require complainants to “date” suspects, who are then arrested for “attempted homosexuality”.

Discrimination on the ground of sexual orientation is further accompanied by a high number of procedural infringements within the criminal justice system. Cameroon is a party to the International Covenant on Civil and Political Rights, which prohibits arrests on the ground of sexual orientation. The constitution of Cameroon does not simply incorporate the Covenant in domestic law, but also provides, under article 45, that international treaties override national law where there is a conflict.

The 28 past and outstanding charges against presumed homosexuals in the Cameroon courts are therefore not simply unlawful from an international law perspective, but are also unconstitutional under Cameroon law itself. In 2012, President Biya spoke of a “change of mind” towards homosexuality. However he did not take any steps towards its decriminalisation. Numerous recommendations have been made to the President, the Parliament, the Legal Department and the Supreme Court to repeal article 347 bis, drop the existing charges and release any convicted persons. Unfortunately, both international and domestic organisations lack the powers to deal with the situation effectively. A petition to decriminalize homosexuality was brought by Alternatives-Cameroon to the National Assembly in 2009, and was ignored. The UN Human Rights Council evaluated the failure of Cameroon to comply with the 2009 Universal Periodic Review (UPR) recommendations to decriminalise homosexuality. These recommendations were restated at the UPR held in Geneva in May 2013, and included the protection of lawyers acting on behalf of those charged under 347 bis.

Legal representation is a crucial issue. Since 2012, the number of lawyers who are willing to defend homosexuality cases has fallen dramatically. There have been two reported instances of counsel receiving threats of violence for defending presumed homosexuals, and for bringing motions of unconstitutionality against Article 347 bis. Most accused are therefore either unrepresented or have very inhibited legal representation, with the obvious consequence that most procedural irregularities never come to light.

The fact that Cameroon’s society is characterised by a strongly homophobic climate is unhelpful. Homosexuality is not only condemned by the media, but also strongly opposed by religious figures. Police officers and civilians are instigated to oppress the LGBT community on the misconception that, as homosexuals are not recognised, they do not hold legal rights. This represents a clear breach of Article 2 of the

Africa Charter on Human and People’s Rights, which states that the principle of non-discrimination provides the foundation for the enjoyment of all human rights.

In the few instances where appeals against conviction are successful, the courts are reluctant in releasing written judgments. This prevents defendants involved in new actions from relying on important legal precedent. Moreover, such conduct clearly obstructs the administration of justice. Even when charges are dropped, it is often too late to remedy their disastrous impact. As the media are abused to publicise those charged, defendants find themselves “outed” to a homophobic society and are often rejected by their own families and friends.

Ultimately, the Cameroon government should consider the repeal of Article 347 bis as a legal imperative, in order to preserve the dignity of its people. However, on the basis of the existing evidence, such a course is unlikely.

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There is a constant undercurrent of scepticism in the UK regarding the role of human rights in the legal system.

Many see them as a tool to be exploited by litigants to somehow cheat the system. However, the recent case of Ode v High Court of Ireland (2013) EWHC 3718 (Admin) presents a pleasing example of judicial commitment to the spirit of the European Convention on Human Rights in extradition cases, an area in relation to which public scepticism is often at its highest.

The appellant in this case was ordered by the District Judge to be extradited to Ireland to stand trial for a fraud offence. The main argument on appeal was that the District Judge had failed to consider the applicant’s rights under Article 8 of the European Convention.

Article 8(1) provides that ”Everyone has the right to respect for his private and family life, his home and his correspondence.” The Appellate Judge in this case acknowledged that facts were unusual. The reason for this was that the appellant claimed a violation of his Article 8 right, not because of any effect of his extradition on him personally, but rather, because of the effect it would have on his wife and son. The appellant’s 17-year-old son suffered from Attention Deficit Hyperactivity Disorder and severe autism, leading to pronounced behavioural problems. A consultant psychologist concluded that the removal of the appellant from the family home would provoke major panic attacks and outbursts in his son, which, given his age and physical maturity, would leave his wife unable to cope.

The Judge acknowledged that Article 8 arguments were commonly asserted in extradition appeals. He elaborated: “it is very common for an argument to be run that if a male fugitive is extradited to the country in which he was convicted, or in which he is accused of an offence, leaving behind children in the sole care of their mother, the mother would find is difficult to cope.” Moreover, he pointed out that such arguments rarely succeeded. However, on the unusual facts of this case, it did. First, there was compelling evidence that the appellant’s wife would indeed be unable to cope. In particular, there had been a previous incident in which the police were called to attend to the son’s violent behaviour. Second, although the Judge pointed out that the fraud with which the appellant was charged was not trivial, it was nevertheless on the less serious end of the spectrum. If he had been tried in the UK, an English judge would have been very reluctant to impose an immediate custodial sentence on him, precisely because of the “very pressing need for him to be at home in order to assist with the care of his autistic son.” On the basis of these facts, the order of the District Judge was set aside.

Several interesting conclusions may be drawn from this case. First, it demonstrates that, despite the regularity with which Article 8 arguments are put forward in extradition cases, judges are not unduly sceptical, and will consider whether there are circumstances in which such argument will succeed. Second, it shows a willingness to engage purposively with the protection that Article 8 should offer. Whilst the appellant’s extradition would not personally affect him in the way which usually engages an individual’s Article 8 rights, the detrimental effect that it would have on his wife and son engaged his right to respect for his family life. By taking an expansive view of what constitutes “the right to respect” for family life, the jurisprudence in this area demonstrates commitment to treating the Convention as a source of practical and effective rights, rather than seeking to interpret it formally.

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X v Latvia: Creative Harmony, Fortunate Result

By Brett Crumley | 6 December 2013

In X v Latvia the ECtHR (app. no. 27853/09) held that a domestic Latvian order requiring the applicant to return her daughter to Australia (‘the order’) violated her right to family life under Article 8 of the European Convention on Human Rights (§ 52).

The applicant had moved from Australia to Latvia, taking with her her daughter, without the knowledge of the child’s father. Latvia made the order requiring the applicant to return the daughter to Australia under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which aims to protect children’s best interests. The Latvian courts initially stayed the order as evidence suggested that carrying it out and separating the daughter from her mother would cause the daughter psychological trauma (§ 24). However, when the father then came to Latvia and himself took the daughter back to Australia, the Latvian court permitted the order notwithstanding the new evidence of psychological trauma (§§ 30, 116–7).

The ECtHR examined the case in light of the Convention. It held that, according to Article 8, while the events certainly interfered with the applicant’s right to family life, such interference may be lawful if it is in accordance with the law and (…) necessary in a democratic society in the interests of (…) one of the legitimate aims in Article 8(2). The Hague Convention’s aims were accepted as legitimate (§§ 63, 67). However, the majority considered the proportionality assessment to be the decisive issue in this case (§§ 70, 119). To resolve this, the ECtHR asked whether the Latvian courts, in considering the order, satisfactorily examined the ‘grave risk’ to the child in the event of her return to Australia (§ 115). If not, the responding State could not show that their interference was a proportionate response in light of the Article 8 infringement.

The ECtHR held that the order was a heavy response to the Hague Convention’s protective aims. As Latvia refused fully to review the order’s necessity in light of the evidence concerning the risk of psychological harm to the daughter upon separation from her mother, it is unknown whether it could be satisfactorily justified. The order was therefore disproportionate (§ 119).

Despite the satisfactory result, this seems an unnecessary interference by the ECHR.

Judge Albuquerque suggests the mother’s behaviour was not capable of amounting to abduction under the Hague Convention, so the order was baseless. The ECtHR is, however, bound to interpret harmoniously with other international law principles (§§ 94, 106). The ECtHR will admonish domestic courts that rely on these disparities to avoid a proper review. Such castigation may ultimately integrate varying domestic approaches with admirable international targets to improve human rights protections.

The family now resides in Australia. The mother’s access to her daughter is restricted, and her Article 8 rights were held to have been violated. The ECtHR rightly berated Latvia, especially since a fuller judicial enquiry at the initial stages may have avoided the interference and psychological risk altogether.

Brett Crumley is an alumnus of Nottingham Law School.

The applicant had moved from Australia to Latvia, taking with her her daughter, without the knowledge of the child’s father. Latvia made the order requiring the applicant to return the daughter to Australia under the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which aims to protect children’s best interests. The Latvian courts initially stayed the order as evidence suggested that carrying it out and separating the daughter from her mother would cause the daughter psychological trauma (§ 24). However, when the father then came to Latvia and himself took the daughter back to Australia, the Latvian court permitted the order notwithstanding the new evidence of psychological trauma (§§ 30, 116–7).

The ECtHR examined the case in light of the Convention. It held that, according to Article 8, while the events certainly interfered with the applicant’s right to family life, such interference may be lawful if it is in accordance with the law and (…) necessary in a democratic society in the interests of (…) one of the legitimate aims in Article 8(2). The Hague Convention’s aims were accepted as legitimate (§§ 63, 67). However, the majority considered the proportionality assessment to be the decisive issue in this case (§§ 70, 119). To resolve this, the ECtHR asked whether the Latvian courts, in considering the order, satisfactorily examined the ‘grave risk’ to the child in the event of her return to Australia (§ 115). If not, the responding State could not show that their interference was a proportionate response in light of the Article 8 infringement.

The ECtHR held that the order was a heavy response to the Hague Convention’s protective aims. As Latvia refused fully to review the order’s necessity in light of the evidence concerning the risk of psychological harm to the daughter upon separation from her mother, it is unknown whether it could be satisfactorily justified. The order was therefore disproportionate (§ 119).

Despite the satisfactory result, this seems an unnecessary interference by the ECHR.

Judge Albuquerque suggests the mother’s behaviour was not capable of amounting to abduction under the Hague Convention, so the order was baseless. The ECtHR is, however, bound to interpret harmoniously with other international law principles (§§ 94, 106). The ECtHR will admonish domestic courts that rely on these disparities to avoid a proper review. Such castigation may ultimately integrate varying domestic approaches with admirable international targets to improve human rights protections.

The family now resides in Australia. The mother’s access to her daughter is restricted, and her Article 8 rights were held to have been violated. The ECtHR rightly berated Latvia, especially since a fuller judicial enquiry at the initial stages may have avoided the interference and psychological risk altogether.

Brett Crumley is an alumnus of Nottingham Law School.
Chapter 2

Equality, Non-Discrimination and Human Rights
By Max Price

A prelude to Fisher v Texas from the US Court of Appeal Sixth Circuit?
By Karl Laird

Fisher v University of Texas: What the Parties Submitted
By Claire Overman

Fisher v University of Texas: What the Judges Asked
By Claire Overman

Fisher v University of Texas: A Glimmer of Hope for Affirmative Action in the United States?
By Claire Overman

Why Fisher v University of Texas is Irrelevant Outside the US
By Chris McConnachie

Fisher v University of Texas: A Glimmer of Hope for Affirmative Action in the United States?
By Claire Overman

Gene Patenting Overruled but Leaves Lasting Repercussions for Minorities
By Caroline Huang

A Restriction of the Status Quo: Fisher v University of Texas
By Reva Siegel

Affirmative Action versus Equality in Malaysia
By Dimitrina Petrova

Women's Rights in the Gulf Cooperation Council: A Dialogue
By Nazlia Ghanea

George Galloway's Walkout and Discrimination on the Basis of Nationality
By Reuven (Ruvi) Ziegler

The Inter-American Anti-Discrimination Conventions and the Concealed Challenges Ahead
By Awaz Raoof

Election of the New Belgian Judge to the ECtHR. An All-Male Short List Demonstrates Questionable Commitment to Gender Equality
By Adelaide Remiche

Unprecedented Step Taken in South Africa to Address Gender Transformation in the Judiciary
By Tabeth Masengu

Engendering the Judiciary – a South African Perspective
By Tarryn Barrister

Laurie Ackermann, Human Dignity: Lodestar for Equality in South Africa
By The Oxford Human Rights Hub

International Human Rights Law and National Equality Legislation: Mapping the Gaps
By Natasha Holcroft-Emmess

Women's Rights: A Look Back at Emily Wilding Davison's Leadership
By June Purvis and Liz Chapman

The More, the Murkier: Of Several Draft Laws on Disability in India
By Shreya Atrey

Reanimating Equality
By Davina Cooper

OSCE Special Representative Maria Grazia Giammarinaro on the Role of Discrimination in Human Trafficking
By Maria Grazia Giammarinaro

Article 14 ECHR: the Elusive Other Status
By Claire Overman

European Court of Human Rights Says Dismissal of HIV-positive Employee is Incompatible with the Convention
By Menelas Markakis
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>42</td>
<td>Safety of Sex-workers and Prostitutes at the Heart of Bedford v Attorney General of Canada</td>
<td>By Meghan Campbell</td>
</tr>
<tr>
<td>42</td>
<td>Sex Workers Have Human Rights Too</td>
<td>By Stacey-Leigh Manoek and Gcobisa Silwana</td>
</tr>
<tr>
<td>42</td>
<td>Sex Abortion Law Reforms in Ireland</td>
<td>By Mairead Enright</td>
</tr>
<tr>
<td>43</td>
<td>Criminalising Cross-Dressing in Guyana: Quincy McEwan et al vs. Attorney General of Guyana</td>
<td>By Seshauna Wheatle</td>
</tr>
<tr>
<td>43</td>
<td>HIV and Caribbean Law: Case for Tolerance</td>
<td>By Maurice Tomlinson</td>
</tr>
<tr>
<td>44</td>
<td>Racial Profiling: More Than a Numbers Game</td>
<td>By Faiza Patel</td>
</tr>
<tr>
<td>45</td>
<td>Floyd v City of New York: Promise and Challenges in Reforming Stop and Frisk</td>
<td>By Nicole Smith Futrell</td>
</tr>
<tr>
<td>45</td>
<td>XYZ or HJ: How do EU and UK Refugee Law Stack up on Identity Issues?</td>
<td>By Will Tolcher</td>
</tr>
</tbody>
</table>
Universities: What Does Race Represent?

As admissions policies have been making global headlines, the University of Cape Town (UCT) has come under considerable scrutiny. Unlike elsewhere in the world, the main controversy in South Africa is about the established place of disadvantage in the selection process. Rather, it concerns the use of race as a marker for disadvantage and redress.

Thus while there are good reasons why we ought to move away from a race-based policy, we should accept it in the interim only if there is no better solution, and only if the advantages outweigh the disadvantages. UCT is currently again investigating better proxies for inequality that can underpin our redress measures. So far we have not been able to validate an alternative set of criteria that are more reliable than race.

Finally, one cannot dispute that policies using race or disadvantage will reduce the number of white students gaining entry. But we must not forget the context in which white students are already benefiting from 45% of the student body at UCT. Any reduction in opportunities for white students as a result of affirmative action is not nearly as great as it would be if the township and middle-class advantage had already been corrected and there were half a million more qualified black applicants competing for the same number of university places. We need to recognise where the primary unfairness lies.

Dr Max Price is the vice-chancellor of the University of Cape Town. For a more in-depth discussion of these key issues, please see www.mg.co.za/uctadmissions.

A prelude to Fisher v Texas from the US Court of Appeal Sixth Circuit?

By Karl Lant | 21 December 2012

In Coalition To Defend Affirmative Action v Regents of the University of Michigan 652 F.3d 607 (2011) an extremely divided Court of Appeals for the Sixth Circuit in an 8 to 7 decision invalidated an amendment to the Constitution of Michigan that prohibited any use of race, sex, colour, ethnicity, or national origin in the admissions policies of that state’s public universities and colleges on the basis that it was contrary to the Fourteenth Amendment.

Reacting to the Supreme Court’s 2003 decisions upholding the constitutionality of affirmative action measures in college admissions policies, voters in Michigan amended their state’s constitution in 2006 to ban such policies by a margin of 58% to 42%. The question for the court was whether the amendment violated the guarantee of equal protection by removing the power of university officials to even consider using race as a factor in the admissions process, something they were specifically entitled to do.

Writing for the majority, Cole J. held that the amendment violated the Equal Protection Clause of the Fourteenth Amendment as it impermissibly restructured the political process along racial lines. In an earlier case, the Supreme Court held that the Equal Protection Clause does not simply require the political process to treat all persons equally, but also prohibits the state from subtly distorting governmental processes in such a way as to place special burdens upon the ability of minority groups to achieve the enactment of beneficial legislation. The Court noted that it is axiomatic that the Constitution does not protect minorities from political defeat, but what it does protect minorities from is a majority that has won but then seeks to rig the political process to perpetuate its success indefinitely. The Court held that an enactment will only deprive a minority group of the equal protection of the laws when it:

1. has a racial focus, that targets a policy or programme that inures primarily to the benefit of the minority; and
2. reallocate government power or reorders the political decision making process in such a way that places special burdens on a minority group’s ability to achieve its goals through that process.

Cole J found that both these factors were present in the case at hand and contrasted two situations to demonstrate why. A student seeking to have her family’s alumni connections considered in her application to one of Michigan’s public universities could do one of four things to have the school adopt a legacy-conscious admissions policy: she could lobby the admissions committee, she could petition the leadership of the university, she could seek to influence the school’s governing board, or, as a measure of last resort, she could initiate a statewide campaign to alter the state’s constitution.

In contrast, the same could no longer be said for a black student seeking the adoption of a constitutionally permissible race conscious admissions policy. The only option open to the black student would be to seek to have Michigan’s Constitution amended in order to reverse the prohibition on taking race into account in college admissions. It is the discrepancy that exists between these two situations that violates the Fourteenth Amendment.

The dissenting judges disagreed with the majority’s application of the ‘political process’ test and a number seem to use the case in order to question the constitutionality of affirmative action itself.

The Attorney General of Michigan has petitioned the Supreme Court for a writ of certiorari. It seems likely that the Court will agree to hear the case as the decision conflicts directly with various rulings upholding California’s affirmative action ban both by the Court of Appeals for the Ninth Circuit and the Supreme Court of California. An attempt by the AG to have the case fast tracked has failed and as such a decision as to whether it will be heard is not due until after February 2013. Does the decision by the Court not to fast track the case give an indication as to how Fisher v Texas may be decided? We will have to wait and see.

Karl is a Lecturer in Law at Pembroke College, Oxford and a regular contributor to the OxHRH Blog.

Equality, Non-Discrimination and Human Rights
Chapter two

By Max Price | 1 July 2013

There are three fundamental arguments against the use of race as a basis for affirmative action. The first is that racial categorisation undermines our national commitment to non-racialism since it forces us to view the world and each other through a racial lens. Secondly, there is no legal mechanism for classifying people by race and so we rely on self-classification. This is increasingly open to abuse with applicants classifying themselves in order to benefit from the affirmative action policies. Thirdly, affirmative action based on race will include black students who are not disadvantaged, who may come from wealthier homes than most whites, and who may have had the benefits of 12 years of private-school education. This then unfairly disadvantages a hard-working, and perhaps less well-off, white student in favour of a black student who has achieved lower marks, solely because the latter is black.

This argument has an underlying assumption: the selection of applicants from privileged schools should be race-blind because there is no longer any educational disadvantage for black students in private schools. But the reality is different, and in the South African setting, the problem is that educational disadvantage can last for generations and has been the consequence of many determinants.

In fact, the matric marks at the University of Cape Town’s top 30 feeder schools nationally show black students performing an average of seven percentage points lower than white students.

So the question we have to confront is this: Why is there a difference in the performance by race even in students from the same privileged schools and middle-class socio-economic status?

In an article for the Mail & Guardian, I concluded that it does not reflect different talent, and generally not different motivation, but rather the legacy of different parental education, differences in cultural capital and the effects of racial stereotypes, which are all direct consequences of our apartheid past.

But how do you measure the aggregate effect of all these subtle deprivations? Here and elsewhere in more depth, I again investigating better proxies for inequality that can underpin our redress measures. So far we have not been able to validate an alternative set of criteria that are more reliable than race.

Finally, one cannot dispute that policies using race or disadvantage will reduce the number of white students gaining entry. But we must not forget the context in which white students are already benefiting from 45% of the student body at UCT. Any reduction in opportunities for white students as a result of affirmative action is not nearly as great as it would be if the township and middle-class advantage had already been corrected and there were half a million more qualified black applicants competing for the same number of university places. We need to recognise where the primary unfairness lies.

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In contrast, the same could no longer be said for a black student seeking the adoption of a constitutionally permissible race conscious admissions policy. The only option open to the black student would be to seek to have Michigan’s Constitution amended in order to reverse
Fisher v University of Texas: What the Parties Submitted
By Claire Overman | 23 November 2012

Last month, the Supreme Court of the United States heard oral arguments in the case of Fisher v University of Texas 133 S.Ct. 2411 (2013). The case concerns “affirmative action” measures taken by the University, which incorporated racial criteria into its admissions process in order to increase the racial diversity of its student body. Ms. Fisher, a white student whose application was rejected, argued that this violated the Equal Protection Clause of the Fourteenth Amendment, which holds that no State shall “deny to any person within its jurisdiction the equal protection of the laws.”

Counsel for Ms Fisher’s submission emphasised that, in the field of university admissions, strict scrutiny was appropriate. This would require the University of Texas to demonstrate both that its use of racial criteria in admissions decisions was “necessary to further a compelling government interest,” and that the means chosen to accomplish the asserted purpose were “specifically and narrowly framed.” Counsel submitted that these conditions were not made out. Concerning the compelling interest, they submitted that the University’s admissions programme was nothing more than “racial balancing,” with a purely representational goal, rather than pursuing an “educationally-based diversity interest” which was held to fulfill the first condition in the previous case of Grutter v Bollinger. In that case, the Supreme Court had held that a university admissions policy which involved a commitment to racial and ethnic diversity, but which also took into account many other individualised factors, was not unconstitutional. Moreover, Counsel for Ms Fisher argued that the measure was in any event unnecessary since the University was already one of the most diverse public universities prior to the inclusion of race into the admissions system.

Ms Fisher’s team further submitted that the second condition – the specific and narrow framing of the measure – was also unfulfilled. They argued that its limited practical results demonstrated that race-neutral means would be just as effective, and that, in any event, the University could never achieve its desired level of diversity through constitutional means.

In its submissions, the University agreed that strict scrutiny should apply. But it relied on the previous case of Regents of the University of California v Bakke to submit that universities have a compelling interest in promoting student body diversity, and that the University may consider the race of applicants in an “individualised and modest” manner. It disputed Ms Fisher’s claim that its objective was outright “racial balancing,” as it did not set quantitative goals for minority admissions. Rather it referred to “profoundly important societal interests” in ensuring that students were exposed to the full educational benefits of diversity.

With regard to the issue of narrow tailoring of the measure, the University argued that the racial criterion had only a “modest and nuanced role” in admissions decisions, whilst still having a “meaningful impact” at the University. Moreover, the University pointed to the existing authority of Grutter and Bakke in order to argue, from a rule of law perspective, that the overruling of these cases would be an “extraordinary” step by the Court. In reply, Ms Fisher argued that, rather than contesting Grutter, her submission focused on the failure of the measure to fulfill the strict scrutiny conditions.

In anticipation of the Court’s decision, this post takes a closer look at the transcript of the oral hearing of Fisher v University of Texas 133 S.Ct. 2411 (2013) to see if it sheds any light on what the Justices’ preliminary positions might be on this landmark case. The Court was comprised of Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito and Sotomayor. Justice Sotomayor recused herself from the case, as she was involved in the submission of a brief supporting the University of Texas when the case was before a lower court.

As expected, oral argument centred upon the question presented: whether the measures taken by the University of Texas in its admissions process were compatible with the Supreme Court’s previous decision in Grutter v Bollinger. Five of the current Justices (Scalia, Kennedy, Thomas, Ginsburg and Breyer) sat on this decision, with Justices Ginsburg and Breyer forming part of the 5-judge majority which held that an admissions policy which considered racial backgrounds, amongst other individualised factors, did not violate the Fourteenth Amendment’s Equal Protection Clause. In contrast, Justice Thomas formed part of the dissenting minority. However, questioning from the characteristically interventionist bench suggests that the case will rise and fall on the following themes: (a) the goals of university admissions programmes; (b) the permissibility of the use of racial statistics; (c) the institutional issue of how far the Court should interfere with universities’ decisions.

In the early stages of counsel for the petitioner’s submissions, Justice Ginsburg questioned whether the University of Texas’ programme was substantially different from that in Grutter, which had been held to be constitutional by the majority in that case. Justice Scalia also raised the issue of whether racial balancing was of itself a permissible interest. In connection with this, Justice Sotomayor asked whether or not UT’s programme was setting numerical quotas, or rather other kinds of goals. The issue was raised again during the course of counsel for the respondent’s submissions, with counsel submitting that the goal of UT’s admissions programme was to realise the “educational benefits of diversity.” This prompted Justice Scalia to ask how this was to be measured. Justice Alito also pointed out that UT’s “Top Ten Percent” plan, under which the top ten percent performing high school students are guaranteed a place, regardless of race, already admitted many minority students.

The Institutional Question

The Justices’ focus upon these themes suggest that they are to be given prominence when the Supreme Court hands down its judgment. They are clearly seen by the Court to be of critical importance when addressing the future role of affirmative action in the US.

Claire Overman is a BCL student at the University of Oxford and a frequent contributor to the OxHRH blog.

Fisher v University of Texas: What the Judges Asked
By Claire Overman | 25 November 2012

In the case of Fisher v University of Texas 133 S.Ct. 2411 (2013) the question of “affirmative action” in the US will be of critical importance when addressing the future role of affirmative action in the US.

The Judicial Question

This issue was raised before counsel for the petitioner and counsel for the respondent. When questioning counsel for the petitioner, Justice Sotomayor asked whether it was the Supreme Court’s job to tell universities how to run, and how to weigh qualifications. Counsel replied that its job was merely to examine the alternatives available. Again, when questioning counsel for the respondent, Justice Sotomayor made the point that the issue was when the Court should stop deferring to UT’s opinion that race was still a necessary factor.

Counsel replied that this would be when the educational benefits of diversity were realised.

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This case raises many interesting issues.

In particular, it will provide an insight into whether the aim of increasing racial diversity in a student body is a valuable aim in its own sake, or whether it must, as a separate and additional requirement, enhance the educational experience of its students. More importantly, however, the outcome of the case will have a huge impact on the legality of affirmative action measures, and will reshape the understanding of the nature of discrimination in the United States.

Claire is a BCL Candidate at the University of Oxford and a frequent contributor to the OxHRH blog.
Fisher v University of Texas: A Glimmer of Hope for Affirmative Action in the United States?
By Claire Overman | 24 June 2013

The US Supreme Court has today handed down judgment in the eagerly anticipated case of Fisher v University of Texas 133 S.Ct. 2411 (2013). It concerns the compatibility of the university’s admissions programme with the Equal Protection Clause of the Fourteenth Amendment. This programme combines a “Personal Achievement Index,” which takes an applicant’s race into account, and automatic admission to any student who achieves the top 10% of high school grades, regardless of other factors. By a majority of 7-1 (with Justice Ginsburg dissenting and Justice Kagan recusing herself), it remanded the judgment to the Court of Appeals for redetermination.

The reason given for holding the Court of Appeals’ initial judgment to be incorrect was that it did not apply “the correct standard of strict scrutiny.” This was based on its holding that the previous case of Grutter v Bollinger, in which the Supreme Court upheld the constitutionality of an admissions programme which used racial considerations to promote the educational benefits of student diversity and required courts to give substantial deference to universities. This deference was held by the Court of Appeals to be twofold: both in respect of the “compelling interest” which racially classificatory acts must serve, and in the “narrow tailoring” to this interest which it must demonstrate. These are the two prongs of the “strict scrutiny” test which the Supreme Court has consistently, since Adarand Constructors v. Peru, held to apply to all cases which involve differential treatment on the basis of race, no matter their underlying purpose.

Why Fisher v University of Texas is Irrelevant Outside the US
By Chris McConnachie | 26 June 2013

The US Supreme Court’s decision in Fisher v University of Texas 133 S.Ct. 2411 (2013), released on Monday, has received much international attention. As Claire Overman and Reva Siegel explain in their recent posts, the decision was not the end to race-based affirmative action in the US that many feared, nor was it the ringing endorsement of Grutter that many had hoped for. The case has been remanded to the Court of Appeals where it will resume its slow climb up the judicial ladder, generating even more attention along the way.

While lawyers outside the US have followed the case closely, the truth is that this decision and the decisions to come will have no real impact on discrimination law in other countries.

The US Supreme Court’s approach to race-based affirmative action, and discrimination law more broadly, is already so far outside the international mainstream that few courts or legislators ever look to it as a source of inspiration. In this post I will explore the three features of the US approach, clearly revealed in Fisher, that separate it from this mainstream.

1) Race-blindness
The first is the US courts’ obsession with the appearance of race-blindness and the belief, endorsed by the majority in Fisher, that all racially-based distinctions are inherently wrong, requiring meticulous justification. In his concurring judgment, Justice Thomas went so far as to suggest that there was no meaningful difference between the University of Texas’ admission programme and 1950s-style school segregation.

These views are not widely shared by courts and law-makers outside the US. The International Convention on the Elimination of Racial Discrimination (CERD) provides that measures to advance disadvantaged racial groups are not discriminatory. In a similar vein, the South African, Indian (primarily in the context of caste) and Canadian constitutions, among others, expressly authorise affirmative action measures, recognising that equality requires concerted efforts to address existing patterns of racial disadvantage.

2) Strict scrutiny
The US Supreme Court subjects all racially-based distinctions to “strict scrutiny”, an intense form of judicial review, as a result of its belief that all of these distinctions are inherently wrongful. Only those racial distinctions that serve a ‘compelling’ purpose and are ‘narrowly tailored’ to this purpose are allowed. This is in contrast with jurisdictions such as Canada, South Africa, and India where courts have adopted far more deferential standards of review. For example, in Canada, racially-based distinctions are permissible so long as they are rationally connected to an ameliorative purpose and are targeted at disadvantaged groups (R v Kapp [41]). These deferential approaches are often based on the express constitutional authorisation of affirmative action, combined with courts’ aversion to interfering with such complex issues of social policy—an aversion that the US Supreme Court does not share.

3) Diversity as the be-all and end-all
Finally, the US Supreme Court has significantly narrowed the legal debate over racially based affirmative action by entrenching the ‘educational benefits of diversity’ as one of the only ‘compelling interests’ that can justify these measures. Many weighty reasons for affirmative action recognised by courts and law-makers around the world are banished from the legal debate in the US. The need to compensate for racial discrimination in society is, according to the majority in Grutter and Fisher, not a good reason, as are the needs to address existing racial inequalities, to promote role models, or to make state institutions representative of the communities they serve, among others. As one commentator describes it, “[the] diversity rationale kept affirmative action afloat [in the US], but it sank any chance of an honest exploration of the reasons we might need it.”

As comparative law scholars will be quick to remind us, the mere fact that the US approach is outside the mainstream is not itself a reason to reject it. Nonetheless, the gulf between these approaches and their underlying assumptions means that, in reality, few lawyers, courts, or law-makers outside the US will seriously look to Fisher and the associated case law for guidance, apart from using it as a distancing device, showing that ‘this is not us’.

Given this lack of legal relevance, what accounts for non-US lawyers’ fascination with Fisher? One explanation is that the US Supreme Court’s warning factions of conservatives and liberals always provide good judicial drama, particularly on an issue as charged as affirmative action. Perhaps a deeper explanation is that we are all nostalgic for a time when US discrimination law actually had something to teach the rest of the world.

Chris McConnachie is a South African DPhil candidate at Lincoln College, University of Oxford. He is also an editor of the OxHRH Blog.

Equality law in the US remains strictly symmetrical
Justice Kennedy, delivering the majority judgment, held that this was an incorrect reading of Grutter. He stated that the diversity rationale kept affirmative action afloat in the US, but it sank any chance of an honest exploration of the reasons we might need it.

This judgment is more encouraging than many supporters of affirmative action had feared. The Supreme Court has not ruled that racial diversity in higher education is an impermissible interest, which would have been the death knell for affirmative action in the United States. Only Justice Thomas, in his concurring opinion, would have ruled that the use of race in university admissions was categorically prohibited by the Equal Protection Clause. Rather, the majority opinion has made it clear that equality law in the US remains strictly symmetrical in its approach: no leniency is to be given to measures that seek to use racial classifications to promote diversity within educational institutions.

Claire Overman is currently reading for the BCL at the University of Oxford and is a regular contributor to the OxHRH Blog.
Affirmative Action versus Equality in Malaysia
By Dimitrina Petrova | 22 November 2012

The Bumiputra (Malays and natives of Sabah and Sarawak) continue to benefit from decades-old affirmative action policies that have outlived their legitimacy. Article 153 of the Federal Constitution guarantees specific educational privileges established by British colonial rule, the King of Malaysia to safeguard the special position of the Malays.

Following race riots of May 1969, Article 153 of the Constitution was interpreted in the form of wide-ranging pro-Bumiputra New Economic Policy (NEP) of 1971. The NEP was intended to be a temporary measure “to reduce and eventually eradicate poverty” and to restructure “Malaysian society to correct economic imbalance, so as to reduce and eventually eliminate the identification of a ‘non-economic function’”. The key elements of the NEP were quotas for Bumiputra in admission to state universities and schools, in the granting of scholarships and in public sector employment; a statutory share of 30% of corporate equity for Bumiputra; employment quotas in the private sector; quotas in the tendering of government contracts and business licences; preferential treatment in the allocation of public housing; and discounts for the purchase of residential properties. Article 153 contains some checks and balances, but these are weak and ambiguous in a number of ways and have often been overlooked.

The privileges are entrenched in Malaysian law in a way making repeal very difficult. For example, any Bill undermining Malay privileges would be caught by the law of sedition, and the Constitution permits Parliament to prohibit the questioning of any matter, right, status, position or privilege protected by Article 153.

A report published on 12 November by The Equal Rights Trust (a London-based international organisation) in partnership with the Malaysian NGO Tenaganita analysed a 400 page report Washing Trust in an ambitious project called Sharing Clinical Reports; the project aims to recreate the company's database by an individualized admissions process. The reviewing court upheld the admission to the University the top ten percent of the graduating class in the state's high schools. Because of residential segregation, this “facially neutral” Ten Percent Plan produced a more diverse incoming class. After the Supreme Court upheld consideration of race in university admissions in Grutter, Texas added a second admissions component that considered race as a factor in a candidate’s profile, along with other aspects of leadership and life experience, with the goal of increasing the diversity of students in various sectors of campus life. The constitutionality of this admissions component is in issue in the Fisher case. The lower courts had upheld the program, reviewing the program under the presumption that it had been adopted in good faith, and in deference to the University's pedagogical judgments.

In Fisher, Justice Kennedy reversed and remanded on the grounds that the lower courts had given too much deference to the University’s judgments. A reviewing court should, defer to a university’s judgment that diversity is essential to its mission, but not defer to the means by which the university accomplishes that goal. Fisher always required a reviewing court to verify that a program is narrowly tailored, meaning, among other things that a university demonstrate that considering race is necessary to achieve diversity. A court is to examine with care, and not defer to, a university’s consideration of workable race-neutral alternatives.

A Restriction of the Status Quo: Fisher v University of Texas
By Reva Siegel | 25 June 2013

Many expected a major ruling on the constitutionality of affirmative action from the United States Supreme Court in Fisher v. University of Texas 133 S.Ct. 2411 (2013). But the Court substantially upheld precedent prior to an opinion by Justice Anthony Kennedy, with Justice Ruth Bader Ginsburg dissenting, and Justice Elena Kagan recused from the case.

The parties had not directly challenged the Court’s 2003 ruling in Grutter v. University of Michigan, which allowed affirmative action to promote diversity on its campus. The Texas legislature, subject to strict scrutiny designed to minimize the role of race in the design of the programs and to ensure applicants are considered through an individualized admissions process. Grutter is noteworthy for applying strict scrutiny, yet giving a presumption that it had been adopted in good faith, and in accordance with the goal of increasing the diversity of students in various sectors of campus life. The constitutionality of this admissions component is in issue in the Fisher case. The lower courts had upheld the program, reviewing the program under the presumption that it had been adopted in good faith, and in deference to the University's pedagogical judgments.

In Fisher, Justice Kennedy reversed and remanded on the grounds that the lower courts had given too much deference to the University’s judgments. A reviewing court should, defer to a university’s judgment that diversity is essential to its mission, but not defer to the means by which the university accomplishes that goal. Fisher always required a reviewing court to verify that a program is narrowly tailored, meaning, among other things that a university demonstrate that considering race is necessary to achieve diversity. A court is to examine with care, and not defer to, a university’s consideration of workable race-neutral alternatives.

The Supreme Court ruled for the lower court to consider whether the University had offered sufficient evidence that it needed to consider race to achieve diversity in admissions, or might have instead relied on the Ten Percent Plan alone. It is this aspect of the judgment which will be at issue on remand. It remains to be seen whether kinds of evidence schools may be expected to provide, and how exacting review will be. Justice Ginsburg’s dissent focused on this feature of the Court’s ruling, objecting that it failed to accord appropriate deference to the judgments of educational administrators.

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Gene Patenting Overruled but Leaves Lasting Repercussions for Minorities
By Caroline Harley | 19 June 2013

Last month, Angelina Jolie penned an op-ed piece in The New York Times in which she described the genetic testing for BRCA mutations (breast cancer susceptibility genes 1 and 2), which greatly increase the risk of breast and ovarian cancer. She also explained her choice to undergo a prophylactic mastectomy after testing positive for a harmful BRCA1 mutation and learning that her estimated breast cancer risk was 87%.

As intended, her piece cast a public spotlight on genetic testing and treatment choices for hereditary breast and ovarian cancers. One of the issues specifically highlighted was financial access to genetic testing; the company Myriad Genetics had exclusive rights to BRCA testing, which priced around US$3000 a test. With a high cost made BRCA testing prohibitively expensive for many women.

Last Thursday, the US Supreme Court issued a decision that invalidated Myriad’s patent on the BRCA genes. In a 9-0 decision in Association for Molecular Pathology v. Myriad Genetics 133 S.Ct. 2107 (2013), the Court held that naturally occurring human genes can’t be patented, though synthetically created complementary DNA can be patented. The ruling should expand access to genetic testing by enabling competitive pricing; in fact, several companies have already announced plans to offer BRCA testing at a fraction of Myriad's price.

One unresolved question is how much the ruling will help patients who receive a result of ‘variants of unknown/ uncertain significance’ (VUS). A VUS result is just what it sounds like: researchers can’t interpret whether this variant increases the patient’s risk of cancer or not. But the reason why the variant can’t be interpreted partly has to do with the monopoly that Myriad held on BRCA testing. Because Myriad was the only US company allowed to offer BRCA testing, all patients in the US whose results revealed it tested were the only tests that could be clinically examined and subsequently added to its internal BRCA mutation database. In consequence, researchers designed to compare their results and researchers were actually prohibited from testing for the BRCA mutations for which Myriad was not testing. Any testing that did happen was done quietly, and the results could not be shared with other researchers.

Minorities (African Americans, Hispanics, Asians, and Native Americans) in particular have been systematically disadvantaged by these practices because minority women are less likely to have a genetic test than their white counterparts. Additionally, we know that black and Native American women are more likely to die from breast cancer than white women and are less likely to utilize BRCA-related genetic services. Having limited access to genetic services could have been compounded by the increased likelihood of receiving an uninformative test, leading to fewer minority women choosing to pursue expensive testing and possibly contributing to the disparate mortality rates. In sum, minorities (African Americans, Hispanics, Asians, and Native Americans) in particular have been systematically disadvantaged by the practice of limiting access to genetic information in an affordable and meaningful way, which may have had serious health consequences.

Fortunately, the ability to study and share BRCA mutation results publicly is an important consequence of the Court’s ruling. This is directly related to one way VUS results become interpretable results: Myriad confirms the significance of a mutation by running it on a computer in at least 20 people and investigating their cancer histories. However, Myriad refuses to share its expansive BRCA mutation database, which prompted researchers to launch an ambitious project called Sharing Clinical Reports; the project aims to recreate the company’s database by amassing information from Myriad’s previously issued clinical testing reports. Testing companies, research laboratories, and clinicians can begin to pool their data alongside Sharing Clinical Reports's slow accumulation of Myriad information. Even without Myriad’s cooperation, these collaborative efforts will play an important role in uncovering future VUS results. These researchers may face an upward battle initially, though: non-Myriad entities have comparatively less data to contribute in the aftermath of the testing monopoly. (One Myriad trade report suggests Ewrc testing, the subset of BRCA mutations for which Myriad has exclusive rights to BRCA testing, or patents – have a VUS rate of 20% compared to its rate of 5%, one could presumably imagine American testing services would have rates even lower at that high.)

The American Civil Liberties Union argues that Myriad violated individual patients’ rights by preventing gene patents from impeding access to medical information and care. Though gene patents have been rejected by the Court, Myriad’s monopoly on BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing of Myriad’s BRCA testing remains a legacy of the homophobic testing.
At this stage, the polls suggest the government won’t be returned to power, so it is unfortunate that it didn’t use the Bill as an opportunity to make a final grand gesture towards improving human rights and eradicating discrimination. Should a new government decide to take the first step and modernise Australia’s anti-discrimination laws, there is a Bill eagerly awaiting enactment.

Dominique Allen is a Senior Lecturer at Deakin University, Melbourne, Australia and teaches and researches on anti-discrimination law.

**Equality, Non-Discrimination and Human Rights**

Chapter two

**Australian Discrimination Law Reform Abandoned by Government**
By Dominique Allen  | 21 March 2013

Late last year, I wrote about the proposed changes to modernise Australia’s ageing anti-discrimination laws which, unlike most of their overseas equivalents, have stagnated since they commenced operation.

Today, it appears that these reforms, while not dead, are certainly comatose.

The Human Rights and Anti-Discrimination Bill 2012 (Cth) was the result of two years of consultation and subject to a public inquiry by the Senate Committee on Legal and Constitutional Affairs which reported in February 2013. Controlled by government Senators, the Committee unsurprisingly supported the Bill. In contrast, the Opposition Senate only supported the Bill on the basis of protecting anti-discrimination, describing the Bill as “fundamentally flawed” and “riddled with... errors” in their dissenting report. So why did the Attorney-General announce that the Bill would be shelved for the time being?

Certainly the Bill had its critics. The shifting burden of proof took the first punches. It was attacked for imposing a “reverse burden of proof” which would require employers to prove their innocence and lead to a “flood” of unmeritorious claims. These criticisms were quickly addressed through submissions to the Senate Committee’s inquiry and through expert testimony before the Committee.

When former judge James Spigelman identified a clause which potentially limited the right to free speech in December, the Bill was rightly subjected to a new round of criticism from which it never recovered.

Clause 19(2)(b) said discrimination can include conduct that “offends, insults or intimidates” another person because of a protected attribute, such as race or sex. The potential effect of such a clause would be to limit freedom of speech. Facing universal criticism of the clause, the then Attorney-General Nicole Roxon asked her Department to redraft the clause but the damage was done. The media, the Opposition, and conservative lobby groups took this opportunity to savage the Bill and take aim at the national human rights institution for failing to protect free speech.

By the time the Senate Committee released its report, the Attorney-General had resigned (ostensibly for family reasons but the bungling of the Bill was said to have played a part) and her replacement did not respond immediately to the Committee’s report.

Without clause 19(2)(b), the Bill is no longer controversial; it is simply a consolidation exercise of blending five Acts into one. So why abandon it?

The politics surrounding the Bill must be seen in light of a government facing defeat at the election in September 2013 with the latest two-party preferred at 44% for the government and 56% for the Opposition. The government entered into power with a minor party last month, it is having trouble maintaining the support of the Independents which it relies on in the hung parliament, and it is presently having great difficulty getting laws to regulate the media off the ground. So a government which is desperately trying to hang onto power and popularity has given up the fight to protect human rights and prohibit discrimination.

This is extremely disappointing from the same government that conducted (though principally under the previous Prime Minister, Kevin Rudd) the first parliamentary inquiry into the effectiveness of the Sex Discrimination Act, removed discrimination against same-sex couples from federal laws, ratified the Convention on the Rights of Persons with Disabilities and the Optional Protocol, signed the Optional Protocol to the Convention Against Torture, held a nationwide inquiry into protecting human rights, implemented a national disabilities and the Optional Protocol, signed the Optional Protocol, sanctioned the optional protocol to the Convention on the Rights of Persons with Disabilities and the Optional Protocol.

Discrimination Acts remain largely the same as when they were enacted, though there has been some tinkering with provisions. The primary problems are the inconsistencies in defining discrimination and the areas in which discrimination is prohibited; the waste of litigation; the likelihood of a low compensation award; the onus of proof rests on the complaining except in relation to indirect sex, age and disability discrimination; and the Australian Human Rights Commission cannot advise or assist complainants so the system relies on the individual complainant for enforcement. As a result, most claims are settled or withdrawn so the courts hear few cases each year.

**Hits and Misses in Proposed Australian Anti-Discrimination Law**
By Dominique Allen | 21 November 2012

On November 20, 2012 the Australian government released its long-awaited Bill which combines the five federal anti-discrimination Acts into one streamlined Act and improves existing protections. The Bill is the result of a public consultation a year ago that stemmed from the 2009 human rights consultation which failed to result in a human rights Act, hence the new Bill’s title – Human Rights and Anti-Discrimination Bill 2012– even though it is solely about discrimination.

Despite ongoing criticism, Australia’s federal anti-discrimination Acts remain largely the same as when they were enacted, though there has been some tinkering with provisions. The primary problems are the inconsistencies in defining discrimination and the areas in which discrimination is prohibited; the waste of litigation; the likelihood of a low compensation award; the onus of proof rests on the complaining except in relation to indirect sex, age and disability discrimination; and the Australian Human Rights Commission cannot advise or assist complainants so the system relies on the individual complainant for enforcement. As a result, most claims are settled or withdrawn so the courts hear few cases each year.

At this stage, the polls suggest the government won’t be returned to power, so it is unfortunate that it didn’t use the Bill as an opportunity to make a final grand gesture towards improving human rights and eradicating discrimination. Should a new government decide to take the first step and modernise Australia’s anti-discrimination laws, there is a Bill eagerly awaiting enactment.

Dominique Allen is a Senior Lecturer at Deakin University, Melbourne, Australia and teaches and researches on anti-discrimination law.

The Bill reflects the government’s goal of consolidating separate Acts into a single Act and much of the text is just about that. Amongst this, there are positive changes. The Bill contains a single, simplified definition of discrimination which specifically avoids using the terms ‘direct’ and ‘indirect’ discrimination; a general defence of ‘justification’ meaning conduct will not be unlawful if it is undertaken in good faith for the purposes of achieving a legitimate aim in a manner proportionate to that aim; a shifting burden of proof once the complainant has established a prima facie case; an improved remedies provision which directs courts to focus on systemic orders; and it protects two additional attributes - sexual orientation and gender identity. In addition, the Bill includes mechanisms aimed at compliance but the government was adamant it would not increase the regulatory burden on business, so they are voluntary. Of note, the Australian Human Rights Commission will be able to issue guidelines, review an organisation’s policies and procedures, and develop compliance codes for industry which will limit liability if a claim is made.

Undoubtedly due to the government’s focus on decreasing regulation for business and streamlining the existing laws, the Bill continues to rely on the individual complaints system to address discrimination. The Australian Human Rights Commission will not have a role in enforcing the law either by assisting complainants or taking action in its own name and it can only intervene in proceedings related to the Bill if human rights proceedings leave of the court. The Bill will not redirect the law at promoting equality. This is evident in the Bill’s title and the absence of any real reference to equality apart from an objects clause which continues to recognise both the principle of equality and that special measures may be required to achieve substantive equality. The government rejected the introduction of a right to equality before the law, continuing to limit this to racial equality (enshrining the right to equality for Indigenous peoples in the Constitution is the subject of a separate inquiry). The government also rejected introducing a positive duty to eliminate discrimination and promote equality.

At this stage, the polls suggest the government won’t be returned to power, so it is unfortunate that it didn’t use the Bill as an opportunity to make a final grand gesture towards improving human rights and eradicating discrimination. Should a new government decide to take the first step and modernise Australia’s anti-discrimination laws, there is a Bill eagerly awaiting enactment.

While the positive changes described above are welcomed, it is important that this Bill is seen as the first step in modernising Australia’s aging anti-discrimination laws so that they target disadvantage and inequality.

Dominique is a Senior Lecturer at Deakin University, Melbourne, Australia and teaches and researches on anti-discrimination law.

**In this context, the Bill is received with cautious optimism**

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On 27 February 2013, Nazila Ghanaee attended the Women’s Rights Research Seminar (WRRS) at Oxford University. The seminar was held to discuss the impacts of UN human rights treaty ratification on domestic women’s rights in the Gulf Cooperation Council (GCC) member states of the Gulf Cooperation Council. 

Nazila Ghanaee is a University Lecturer in International Human Rights Law and she teaches on the Masters in International Human Rights Law. She is currently part of a 2-year research project considering the domestic impact of UN human rights treaty ratification on the member states of the Gulf Cooperation Council.

George Galloway’s Walkout and Discrimination on the Basis of Nationality

By Reuvra Ziegler | 27 November 2013

On 20th of February, George Galloway, MP for Bradford West, walked out of a debate at Christ Church, Oxford.

He arrived (an hour and a half late) in order to debate Eylon Aslan-Levy (a finalist reading Politics, Philosophy and Economics at Brasenose College). Upon realising that Levy was an Israeli citizen, he announced: ‘I don’t debate with Israelis’, and left the debating chamber.

Mr Galloway knew well in advance of his appearance the topic of discussion (the motion that ‘Israel should withdraw immediately from the West Bank’); indeed, he was quoted as saying: ‘I immediately from the West Bank’; indeed, he was quoted as saying: ‘I wanted to address the House before I left the chamber.’

While Mr Aslan-Levy is not a state official, for Mr Galloway his ascribed nationality sufficed.

Mr Galloway has an intriguing record of grasping controversial official figures with his presence (such as saluting Saddam Hussein for his courage, strength and indefatigability), and his controversial preferences will hopefully be considered by his constituents (though, as this caricature suggests, other helpful approaches may be adopted in view of his positions...). He would like to address the question why Mr Galloway’s decision to leave the debate was branded as ‘racist’ and condemned even by the ‘Boycott, Divestment and Sanctions’ Movement (which noted in a statement issued on 21 February that ‘BDS does not call for a boycott of individuals because she or he happens to be Israeli or because they express certain views’).

Section 3(1) of the Race Relations Act 1976 defines ‘racial grounds’ as ‘colour, race, nationality or ethnic or national origins’. The unease arising from using the label ‘racism’ to describe discrimination on the basis of ethnic origins was evident in the Supreme Court’s landmark 5-4 decision in the JFS case, concerning school admission policies (where Lady Hale, Lord Phillips and Lord Clarke emphasised that the decision should not be interpreted as labelling the Chief Rabbi as a ‘racist’). Notably, the Equality Act 2010 lists ‘race’ in section 4 as part of a list of protected characteristics which also include age, disability, gender reassignment, marriage and civil partnership, pregnancy and maternity, religion or belief, sex, sexual orientation. It defines race in section 9(1) as including (a) colour, (b) nationality and (c) ethnic or national origin.

The choice to legally define nationality as a sub-category of race, rather than as a separate protected characteristic, is not an obvious one, not least for the ‘labelling’ reason mentioned above. Nevertheless, the conceptual basis may lie in a parallel between legal criteria for the physical immutability of race and the legal (near) immutability of ‘nationality’. In contradistinction, other characteristics are protected because they are fundamental to human dignity so that no person should be compelled to forsake even if it is legally possible to do so (this may apply, for instance, to religious practices).

The world is exhaustively divided between sovereign states, and each state determines its membership criteria. The vast majority of persons have their nationality ascribed at birth either on the basis of their birth on the territory of the state (ius soli) or by patrilineal or matrilineal descent (ius sanguinis). While Article 15 of the Universal Declaration of Human Rights proclaims that ‘everyone’ has a right to acquire and retain nationality, the choice of which particular ‘nationality’ is assigned is not within an individual’s control. Hence, even if a person is legally permitted to renounce her citizenship (provided that it does not lead to her statelessness), other states are generally not obliged to grant her citizenship.

In a global legal order where rights to permanent security and protection are granted her citizenship (provided that it does not lead to her statelessness), other states are generally not obliged to grant her citizenship.

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Election of the New Belgian Judge to the ECtHR: An All-Male Short List Demonstrates Questionable Commitment to Gender Equality

By Adelaide Remiche | 12 August 2012

Although the European Convention does not, in itself, require member states to present a multi-sex shortlist of potential appointees, PACE Resolution 1386 (2004) states that it ‘will not consider lists of candidates where the list does not include at least one candidate of each sex’. Following an Advisory Opinion of the ECtHR (2008), Resolution 1386 was amended in order to allow a narrow ‘exception to the rule that the under-represented sex must be represented’ (§54).

Accordingly: “single-sex lists of candidates of the sex that is over-represented in the Court [will be considered by the PACE] in exceptional circumstances where a Contracting Party has taken all the necessary and appropriate steps to ensure that the list contains a candidate of the under-represented sex, but has not been able to find a candidate of that sex who satisfies the requirements of Article 21 § 1 of the European Convention on Human Rights.”

The Belgian Government relied (unconvincingly) on this provision to justify the presentation of an all-male short list.

It explained that after an open and transparent procedure (a public call for candidatures widely published in the Official Gazette and the special-interest press; the call remaining open for a month; and interviewing all nominees without short-listing on the basis of the CV), only one woman came forward. According to the Government, although the sole female candidate met the competence requirement set forth in Article 21 § 1 of the Convention, it considered that she ‘could be classed as not possessing equivalent competence to the three [male] candidates’ eventually shortlisted.

Accordingly, she was not short-listed. The Government sought to strengthen its position by highlighting that women were not anymore underrepresented on the Bench since ‘the Court includes 19 women, i.e., over 40% of the judge now serving’.

The justification put forward by the Government is not convincing for several reasons. First, the Belgian Government failed to demonstrate any ‘exceptional circumstances’ leading to its decision to put forward an all-male short-list other than relying on a lack of female candidates self-nominating for the position. Arguably, this passive approach towards the selection of candidates fails to amount to a demonstration that ‘all necessary and appropriate steps’ were taken to present a list of candidates including both sexes, as required by Resolution 1386.

Second, it is only if the Contracting Party is not able to find a candidate of the under-represented sex that satisfies the competence requirement set forth in Article 21(1) of the ECtHR that the PACE will consider single-sex lists composed entirely of candidates of the over-represented sex. Yet, the Government acknowledged that the sole female candidate to have come forward did meet these requirements. If the Belgian Government were to finally decide that the sole female candidate did actually not possess the necessary competences to be elected as a judge to the ECtHR (quod no) it should have, in the least, considered re-opening the selection procedure and adopting more proactive measures to encourage well-qualified women candidates to apply.

Third, the argument that the current composition of the Court (where approximately 40% of women are serving) would justify the presentation of an all-male short-list misses the point. According to the Resolution 1386, as amended by the Resolutions 1426 and 1627, each State is required to present a list of candidates which includes at least one candidate of each sex, with two exceptions being allowed. First, a Contracting Party may present a single sex list ‘when the candidates belong to the sex which is under-represented in the Court, that is the sex which is under 40% of the total number if Members belong (Resolution 1426). Second, a State may present a single-sex list of candidates of the over-represented sex in exceptional circumstances when the State is unable to find a candidate of the under-represented sex who satisfies the competence requirement (Resolution 1627).

Hence, the Resolution 1386 does not allow a Contracting Party to derogate from the rule to present a sexually diverse list of candidates on the basis that the Court is composed of 40% of women. Achieving this threshold of 40% of women serving on the court would only impede Contracting Parties to present all-female lists, as they could do as long as the Court was composed of less than 40% of women.

Finally, ten judges will be appointed before the end of 2012. If the Government of each appointing State fails to respect, as Belgium did, the rule according to which the list of candidates they present must contain at least one candidate of each sex, there is a real risk that the number of women serving on the Court will drop dramatically below the threshold of 40%.

This disappointing decision by the Belgium Government demonstrates a lack of long-term commitment to gender equality in the European Court of Human Rights and is in flagrant disregard of its obligations under PACE Resolutions.

Adélaïde Remiche is a PhD Candidate at the Center for Public Law at the Université Libre de Bruxelles. She is currently leading a project for the Center for Public Law at the Université Libre de Bruxelles which examines gender diversity in continental European judiciaries.

Unprecedented Step Taken in South Africa to Address Gender Transformation in the Judiciary

By Tabeth Masengu | 8 January 2013

On the 12th of October 2012, the South African Commission for Gender Equality (CGE) was served with an unprecedented complaint regarding the lack of Gender Transformation in the Judiciary.

The Commission of Gender Equality was created by Chapter 9 of the South African Constitution of 1996 as a means of supporting Constitutional Democracy. Its duty is to promote the respect for and the protection, development and attainment of gender equality.

The Democratic Governance and Rights Unit (DGRU) of the University of Cape Town and its partner Sonke Gender Justice filed the complaint after previous efforts to bring attention to the dismal number of female judges in the country had failed.

This complaint was extraordinary not only because it was novel but also because it cited the President, Minister of Justice and Constitutional Development, the Chief Justice and the Judicial Services Commission (JSC) as Respondents.

Section 174(2) of the South African Constitution of 1996 requires that appointments to the judiciary reflect broadly the racial and gender composition of South Africa. The drafters of this Constitution saw the need to move from an Apartheid era that was plagued with inequality and discrimination to a new era that would be inclusive, democratic and non-discriminatory. While there have been great strides made in the racial dynamics of the judiciary, the gender aspect has largely been ignored.

As of October 2012, a paltry 28% of the judges in the country were female with only two of the 11 Constitutional court judges being female.

When the court was set up in 1994, it had the exact number of female judges and at no time in the last 19 years have there been more than three women sitting on the court. The likely argument that there are not enough qualified women has proved flawed, as time and time again competent, qualified women have been turned down in favour of a man despite the alarming figures available.

Our complaint to the CGE requested amongst other things that the Commission constitute an appropriate investigation into what appears to be gender discrimination in the appointment of judicial officers.

The CGE has responded to our complaint by requesting a meeting with us to discuss how we can work with various stakeholders in order to address the problem. We hope that this is a genuine request that will be the start of holistic approach to ensuring that our courts eventually broadly reflect the gender composition of our country.
Engendering the Judiciary – a South African Perspective
By Taryn Bannister | 3 May 2013

Recent statistics and debates in South Africa highlight that the country’s transformative vision has not stretched as far as the judiciary and legal sector. Since this is the very sector tasked with protecting and enforcing the rights enshrined in the Bill of Rights so as to bring about social justice and the transformation of society-at-large, the facts are cause for worry.

Despite the South African Constitution’s commitment to establishing a society based on non-sexism and the prohibition against discrimination on the grounds of gender and sex, the South African judiciary has failed to adequately represent South Africa’s female population. Speaking at the Commonwealth Law Conference in Cape Town in April, former Constitutional Court Justice Kate O’Regan specifically highlighted the lack of gendered transformation within the Constitutional Court. She pointed out that while there had been racial transformation, the gendered demographics of the bench are the same in 2013 as they were in 1994, with nine male judges and two female judges. As apex courts and ultimate guardian of the constitutional rights and the project of transformation through law, this state of affairs is surely inexcusable.

In addition to this, only 9 of the 473 senior counsel, from whose ranks candidate judges are selected, were black women, while throughout the whole of South Africa, there are an estimated 500,000 black women practising as senior counsel. The Democratic Government and Rights Unit pointed out that as of October 2012, women made up only 28% of all judgeship candidates. This gender imbalance within the legal profession is untenable, given the growing rate of female law graduates within South Africa in the context of a transformative, constitutional democracy. The Judicial Service Commission (JSC) has pointed to government for the dismal demographics at play, whereas the Justice Department has in turn blamed ‘exclusive clubs’ for failing to provide opportunities for female advocates to move up the ladder. But as the Democratic Government and Rights Unit points out, while the JSC is not solely responsible for transforming this gender imbalance, it is empowered to advise national government ‘on any matter relating to the judiciary or the administration of justice. The JSC could therefore be expected to engage proactively with other stakeholders in order to address the systemic constraints facing women within the legal profession. What is clear is that urgent action, dialogue and collaboration among all stakeholders is necessary in order to address the deep patterns of gender inequality within South Africa.

No higher constitutional claim is made for the theological perspectives than for the secular philosophical, but are presented in an attempt to establish as broad as possible an “overlapping consensus” (in the Rawlsian sense) as possible. These concepts are then further explored and illustrated in the comparative context of South African, German and Canadian constitutional jurisprudence.

Clashes and tensions between rights inevitably occur when the elements of a Bill of Rights are applied horizontally, that is between subjects of the State themselves. The most obvious examples are clashes between the rights of equality and non-discrimination of one subject, and those of the freedom, privacy and property rights of another. This can arise, by way of example, when a white seller of immovable property seeks in the deed of sale to prohibit the seller from in turn re-selling the property to a black purchaser. The human dignity of the contestants plays a vital role in resolving such tensions and conflicts. Reliance in this regard is placed on the pioneering work of the late Louis Henkin of Columbia University; and the role of human dignity in resolving clashes between competing horizontal rights of subjects is defended as “a neutral principle of constitutional adjudication” in the sense that this concept has been developed by Herbert Wechsler and Kent Greenawalt.

Constitutionally mandated restitutory (compensatory) equality is examined and it is argued that it should be perceived as a public law mechanism of unqualified enrichment, but with its own unique remedies. It is contended that seeing the remedy as a restitutionary one will help to dispel the negative and often hostile perceptions of those who are called upon to make restitution. Human dignity has a determining function when applying constitutionally mandated restitutory (compensatory) equality and when determining what the legitimate extent and duration of such restitution is. The dangers of simplistically importing the concept of “affirmative action” from the USA are highlighted.

A distinction has to be drawn between a political majority applying restitutory or compensatory remedial equality against its own interest and a political majority applying it in its own favour. When it is a political majority applying restitutory equality in its own favour, it behaves such majority to take particular care not to infringe the human dignity of those called upon to make restitution. Wherever possible provision should be made for “special cases.” These issues are also considered in a comparative constitutional context.

It is incumbent on those who are sceptical of the human dignity concept and its use in constitutional law to pay closer attention to the compelling arguments of Amartya Sen and Amartya Sen is invoked in this context.

The aspiration, Dr. Petrova argued, ought to be to establish a unitary human rights framework in equality.

This would resolve tensions and inconsistencies between international human rights law approaches and equality approaches to non-discrimination. One initiative which embodies this goal is the Declaration of Principles on Equality 2008. This document, facilitated by the Equal Rights Trust and endorsed by a multitude of human rights advocates and experts, elaborates principles through which to establish a unified legal framework on equality. The principles have since been endorsed by the United Nations General Assembly.

The next step for equality law is bridging the gap between legal approaches which aim to reduce status inequalities on a global scale and those that aim to reduce status inequalities within individual States. This would facilitate a more comprehensive framework with stronger equality law.

Dr. Petrova noted the contemporary interest in attempting to measure the ‘human rights record’ of States. In her presentation, Dr. Petrova aimed similarly to categorise States from the point of view of their national equality legislation, in order to assess to what extent there is measurable progress in enacting legal frameworks which advance the cause of equality, and how far States have yet to go in order to achieve comprehensive equality laws.

Dr. Petrova stressed that an understanding of the historical development of equality law, and how this evolved independently of the human rights movement, is crucial to appreciating the differences and complementarities. Dr. Petrova analysed the development of equality law thus: the first generation established formal equality in the Aristotelian sense of treating all equally; second generation developments promoted equality of opportunity (the removal of barriers to equality); the third generation advances the goal of comprehensive substantive equality; and finally, the fourth generation cultivates transformative equality, in the sense of equality of capability and participation, made possible through the recognition of positive duties. It is towards this latter development that Dr. Petrova suggested many jurisdictions are hopeful of progressing.

To support this inference, Dr. Petrova indicated several major global trends in equality law: there have been movements away from individualistic anti-discrimination laws to increasingly collectivist and pro-active equality laws; from a patchwork of norms to a unitary framework; and towards a synthesis of equality and human rights. This has been made possible to observe greater modern convergence of human rights discourse and equality laws. For example, ever-increasing numbers of authorities in the field of international human rights law are using concepts of direct and indirect discrimination in the same manner as does equality law.

These developments go some way towards closing the gaps between ideas of equality and human rights.

Laurie Ackermann, Human Dignity: Lodestar for Equality in South Africa?
By The Oxford Human Rights Hub | 13 December 2012

This book, by a retired Justice of the first South African Constitutional Court, provides an in-depth analysis of human dignity and its relationship to equality in South African law. While concentrating on the South African law, it is also a contribution to the development of a comprehensive Canadian and German jurisprudence (widely defined).

A lack of proper linguistic and logical analysis on the part of lawyers has rendered the legal discussion of equality and non-discrimination confused (and confusing), unnecessarily sceptical, and needlessly complex. The main contention in this regard is that, in a special logico-grammatical sense, the noun equality and the adjective equal cannot be used substantively, but only in an attributive sense. Put more simply, intelligible meaning can only be given to equality, as applied to humans, if the antecedent question “Equality of what?” is first asked, or, more expansively, “In respect of what are you asserting the equality of what?” or “In respect of what may no-one be discriminated against?” The author argues that human dignity is the attributive key that unlocks the constitutional meaning of equality and unfair discrimination. The work, in different fields, of Peter Geach, Philipps Foot, and Amartya Sen is invoked in this context.

International Human Rights Law and National Equality Legislation: Mapping the Gaps
By Natasha Holcroft-Emmess | 11 February 2013

On Wednesday 6th of February, the Oxford Human Rights Hub welcomed Dr. Dimitrina Petrova, founding Executive Director of The Equal Rights Trust, who delivered an engaging presentation highlighting the development of major global trends in equality laws.

The philosophical and Abrahamic religious roots of these concepts are investigated.

The philosophical and Abrahamic religious roots of these concepts are investigated.
The Quick and the Dead in Britain’s Global Future
By Helen Mountfield | 20 November 2012

David Cameron told the CBI on 19 November 2012 that he ‘got the need for changes of attitude in government, which he claimed were needed to strengthen Britain in a “global race”, in which “you are either quick or you’re dead”. The detail of his proposals have serious ramifications for those who care about the winners and the losers, as well as for democratic accountability and the rule of law.

The Code of Practice on Consultations 2008, which explicitly stated that there was ministerial discretion as to when consultation was required:

- To reduce costs to the taxpayer in a time of general budgetary restraint. This is certainly a legitimate aim but are the measures being taken proportionate? A financial penalty on employers who breach the law, as envisaged in the ERR Bill, could be used to subsidise the tribunals and reduce the fees now being imposed on claimants. The disproportionate cuts in the funding of the EHRC threaten to destroy many of the achievements of the past half-century.

In this cold climate there is a need to stress and build upon the many positive achievements of anti-discrimination and equality law, for example by campaigning for more women on company boards and in senior positions, and mandatory pay audits for all large employers, as well as using the new power to be given to the tribunal to order these against employers found to have discriminated. The EHRC needs to use its remaining powers to conduct investigations and inquiries and to work with organizations to bring about change. The public sector equality duty needs to be strengthened and strategic litigation used to force the pace of change. The threats to the infrastructure of equality are more important to mobilise all disadvantaged groups around equality as a fundamental human right.

Professor Sir Bob Pepple QC, FBA is the Chair of the Equal Rights Trust. His most recent book is Equality: The New Legal Framework (Harv, 2011)

There seem to be three driving forces behind the attack on the infrastructure of equality:
- To appease the small business lobby which has persistently claimed over many decades that employment regulation stops them from hiring workers. This is an assertion for which no hard evidence is produced, simply heard. The UK claims to have the most ‘flexible’ labour market in Europe. What competitive advantage is there for a country in denying victims of unfairness and discrimination access to justice?
- To appease the anti-EU lobby by refusing to ‘gold plate’ equality law beyond the minimum obligations under EU law. The Treaty and directives on discrimination are a restraint on the UK’s freedom to act in the single market in Europe. What competitive advantage is there for a country in denying victims of unfairness and discrimination access to justice?
- To reduce costs to the taxpayer in a time of general budgetary restraint. This is certainly a legitimate aim but are the measures being taken proportionate? A financial penalty on employers who breach the law, as envisaged in the ERR Bill, could be used to subsidise the tribunals and reduce the fees now being imposed on claimants. The disproportionate cuts in the funding of the EHRC threaten to destroy many of the achievements of the past half-century.

In this cold climate there is a need to stress and build upon the many positive achievements of anti-discrimination and equality law, for example by campaigning for more women on company boards and in senior positions, and mandatory pay audits for all large employers, as well as using the new power to be given to the tribunal to order these against employers found to have discriminated. The EHRC needs to use its remaining powers to conduct investigations and inquiries and to work with organizations to bring about change. The public sector equality duty needs to be strengthened and strategic litigation used to force the pace of change. The threats to the infrastructure of equality are more important to mobilise all disadvantaged groups around equality as a fundamental human right.

Professor Sir Bob Pepple QC, FBA is the Chair of the Equal Rights Trust. His most recent book is Equality: The New Legal Framework (Hart, 2011)
The Public Sector Equality Duty is an essential tool to eliminate discrimination, advance equality and foster good relations in a society.

An analysis of the evidence submitted by various groups and organisations to the Government’s call to assess the effectiveness of the PSED clearly shows that the duty is working. Evidence includes a joint submission by disability charities highlighting how a requirement to involve disabled people in decision-making has proven crucial for delivering inclusive services. The charities show how involving disabled people in the planning for substantial regeneration work ensures access requirements are considered at outset, avoiding potential expensive retrofitting. Stonewall’s response also lists a number of examples where the duty has shaped local authorities’ initiatives to tackle incidents of homophobic bullying. The Office of the Children’s Commissioner argue that the PSED is needed to tackle equality issues uncovered by their investigations on children living in poverty and children and young people being subjected to bullying and harassment. More generally, the Citizens Advice Bureau has extensive contact with public bodies to deal with clients’ needs around debt, housing, welfare and education, and emphasises the importance of the PSED for informing decision-making and practical solutions so that services and decisions empower consumers and meet their needs. They argue that there is “a very positive story to be told about the PSED and that it makes a real difference where it matters on the ground”. Evidence presented about the success of the PSED in driving equality and inclusion strategies also includes the Olympic Delivery Authority (ODA). This shows how, through public procurement, equality objectives can be a positive effect on communities and local economies by increasing business opportunities for SMEs and local employers.

More recently the PSED was invoked by Amnesty International UK, Refugee Action and Freedom from Torture to challenge the Home Office ‘go home’ campaign targeting illegal immigrants. In a letter to the Guardian published on 5th August they denounced this campaign as likely to generate “hostility and intolerance” in our communities pointing out the Home Office’s legal obligations to eliminate discrimination, advance equality opportunity and foster good relations.

All this demonstrates the importance of the PSED in promoting the changes needed to advance equality and foster good relations within our society but also in keeping public authorities accountable for their actions. Finally, the review of the PSED should not be considered in isolation but seen as part of a wider government discussion calling into question the Human Rights Act which makes the case for a robust framework of equality legislation even more compelling.

By Professor Simonneta Manfredi and Kate Clayton-Hathway, PhD student and Research Assistant at the Centre for Diversity Policy Research and Practice, Oxford Brookes University.

The Need for ‘Hard Evidence’ of Public Sector Equality Duty Outcomes

By Kate Clayton Hathway | 26 September 2013

The Public Sector Equality Duty (PSED) Review report, published 6th September, was met with cautious relief. Until it was issued, many charity and campaigning groups were concerned the Duty, which requires public bodies to have due regard for need to eliminate discrimination and advance equality for people from different groups, would be “too early to make a final judgement” on its impact, recommending a formal evaluation in three years’ time when it is more firmly embedded. This sounds a sensible conclusion which, had it been achieved prior to embarking on this review, would have saved public money.

The coming three years offer an opportunity to work with service users and employees of public authorities to assess the impact that the Equality Duty has had on them.

Notably, the panel cited that there is “little hard evidence” to show how the PSED is leading to improvements in policy and delivery, despite extensive “softer evidence” showing increased engagement with staff bodies, networks and similar groups. Indeed, there is plenty of evidence showing such engagement. Moreover, it is understandable that much of this relates to establishing consultation mechanisms and initiating policies, procedures and baseline data collection so soon after the Duty’s introduction.

This is particularly true for newly included equality characteristics such as age and sexual orientation. Progress on this aspect of the Duty that was submitted to the review as evidence included Age UK identifying a large number of local authorities which set age-related equality objectives and involved older people in consultations on local planning. Stonewall’s many examples include a university running workshops to identify issues faced by LGB staff and students.

The panel also expressed concern that the PSED could result in a burden on business.

What seems to have been overlooked entirely is that equality considerations through the procurement process can have a positive effect on businesses. A good example of this is Transport for London’s approach to equality and supplier diversity, which is well-documented in an article by the former Head of Contracts and Procurement (Streets) showing how such an approach benefited a range of businesses. One such business is Enterprise Mouchel, a national highway maintenance company which in 2010 won an Excellence Award for Corporate Social Responsibility.

What the panel identify as missing is “concrete examples” of “improved outcomes”, with much of the evidence submitted to the review relating to feedback from equality and diversity professionals or others who generally support the Duty. A gap in research on the impact of the Duty ‘on the ground’ and its effect on services was also highlighted by the Equality and Diversity Forum in their evidence dossier in 2011, and a wide analysis of current research shows that this is still the case.

The coming three years offer an opportunity to work with service users and employees of public authorities to assess the impact that the Duty has had on them and also to identify cases of good practice in the private sector which are the result of applying the PSED to the process of public procurement.

By Simonetta Manfredi and Kate Clayton-Hathway, PhD student and Research Assistant at the Centre for Diversity Policy Research and Practice, Oxford Brookes University.

Plenty of Evidence to Support the Public Sector Equality Duty

By Simonetta Manfredi and Kate Clayton Hathway

14 August 2013

The Public Sector Equality Duty (PSED) is a key feature of the Equality Act 2010 and an essential tool to achieve legislation’s objectives of eliminating discrimination, advancing equality and fostering good relations in a society which, as highlighted by the 2011 Census, is becoming increasingly diverse. Nonetheless, the purpose and effectiveness of the duty are being questioned by the coalition government through inclusion in their ‘Red-Tape Challenge’ review.

It will be important to use this time to gather the ‘hard evidence’ needed to keep the Duty in place for good.

This piece was written by Kate Clayton-Hathway, PhD student and Research Assistant at the Centre for Diversity Policy Research and Practice, Oxford Brookes University.
The CEDAW Committee Holds an Uncomfortable Mirror to the UK
By Meghan Campbell | 13 September 2013

On July 26th, 2013 the CEDAW Committee released concluding observations on the UK’s compliance with CEDAW.

The UK is obligated to publicize the findings of the Committee, although the Concluding Observations have received very little media attention. In the Seventh Concluding Observations the Committee demonstrates a keen understanding of the major governmental policies in the UK and their impact on gender equality in the country.

The need for a public sector equality duty, the effects of the legal aid cuts and general measures of austerity have all been canvassed in many forums but the Committee is unique in discussing these legal developments in the UK from a gender equality perspective. For example, with regards to the public sector equality duty (PSED), the Committee recommends that the UK ‘ensure the gender equality component of the [PSED] is properly prescribed for public authorities. . .[and] bring into force the provision of the Equality Act relating to the introduction of a new public sector duty on socio-economic inequality.’ The Committee is thus implicitly drawing the connection between positive duties, socio-economic rights and gender equality. In this way, the Committee opens up an interesting new line of argument: a commitment to gender equality could form the basis for acquiring the Conservative government to bring the PSED into force.

The Committee also notes that austerity measures and budgetary cuts in the public sector have disproportionately affected women and urges the UK to balance the impact of austerity and review policies which may undermine the provision of specialised women’s services. With these recommendations the Committee is demonstrating a sophisticated understanding of substantive equality. Due to the continuing cycles of discrimination—unequal and low paid jobs, concentration in part-time work and the responsibility for unpaid care-giving—women rely more on publicly funded services. Therefore, cuts to these services while seemingly gender neutral specifically entrenched women’s disadvantaged positions in society. The Committee has rightly highlighted these missing links to the UK government.

The Committee also offers an insightful gender equality analysis of the Legal Aid Sentencing and Punishment of Offenders Act, 2012. The Committee is concerned about the requirement of proof of domestic violence and a proposed residency requirement. The concern is that this “will push women, particularly ethnic minority women, into informal community arbitration systems” which will not conform to CEDAW standards. However, the Committee falls short of recommending that the UK repeal this legislation. Instead it only recommends that the government ensure women have access to justice and that it monitors the costs for their impact on gender equality.

The Concluding Observations also address the traditional areas of gender discrimination and inequality.

The Committee calls for temporary special measures to improve the representation of women, particularly black, ethnic minority women and women with disabilities, in Parliament, the judiciary, and private companies. In education, the Committee recommends mandatory sex education, programmes and policies to deal with bullying, measures to increase girls’ participation in science, math, engineering and technology.

The UK is called to intensify efforts to encourage men to take a more active role in parenting, to eliminate occupational segregation and narrow the gender pay gap and to provide affordable child care options.

There are several aspects where the Committee demonstrates that it is a strong advocate for women’s overall development. Thus, its attention spans from the issue of female genital mutilation in the UK, to the stereotypical images and objectification of women in the media. It further assesses how the Universal Credit system of welfare benefits, which is only paid to a single member of the family, can undermine women’s agency, particularly if she is in an abusive relationship. Issues pertaining to women of different identities—race, ethnicity, age, women in prison and migrants, are also specifically addressed.

While the UK has made some advances in gender equality over the past four years, there is still much work to be done. The Committee has directed the attention of the UK government to the advances that are yet to be made in women’s empowerment. The Committee’s comprehensive and nuanced understanding of the issues in the UK will serve a great deal in advocating for gender equality in every front of the governmental policy.

Meghan Campbell is a DPhil Candidate at the University of Oxford and Administrator of the OxHRH.

Women’s Rights: A Look Back at Emily Wilding Davison’s Leadership
By June Purvis and Liz Chapman | 29 June 2013

Women’s rights are human rights although they are not always articulated that way. This was the case in regards to the campaign for the parliamentary vote for women in Edwardian Britain which had as its key aim the granting of votes for women on the same terms as it was or may be granted to men. There were two wings of the women’s enfranchisement campaign. The National Union of Women’s Suffrage Societies (NUWSS) formed in 1887 and led by Millicent Garrett Fawcett, admitted men as well as women. Its members, known as ‘suffragists’, favoured constitutional, legal tactics such as lobbying MPs. The Women’s Social and Political Union (WSPU), on the other hand, founded in 1903 by Emmeline Pankhurst and her eldest daughter Christabel, was for women only.

Tired of the failure of ‘ladylike’ constitutional tactics, which had been adopted for some thirty years before the formation of the NUWSS, Emmeline and Christabel decided on more assertive, confrontational tactics, including the heckling of MPs.

When the Liberal Government of the day refused to yield on their question, the ‘suffragettes’ of the WSPU with their cry of ‘Deeds, not words’, engaged from 1912 in more violent forms of protest, such as firing empty buildings, window-smashing or destroying mail in postboxes. Throughout the campaign, Emmeline Pankhurst, the WSPU’s charismatic leader, emphasised that human life was sacred and never to be threatened. Further, the WSPU’s aims were much broader than just the parliamentary vote for women. The ‘militant’ suffragettes wanted equality for women in all walks of life – in education, employment, the law and public life.

It was almost inevitable that Emily Wilding Davison would be drawn to the WSPU (for an account of her life see June Purvis ‘Remembering Emily Wilding Davison’ freely available online). A clever, talented, athletic woman, with a sense of humour, at the age of nineteen, she was awarded a bursary to attend Holloway College to study for the Oxford Honour School in English Literature. Unfortunately, she had to leave her course half way through when her father died and her mother could not afford to continue paying the £20 per term fee. At Holloway, Emily undoubtedly met like-minded women like herself, keen to develop their talents. She then saved enough to pay for a term at St Hugh’s, a women’s college recently found at Oxford, only to experience at first hand the secondary status of women in Edwardian society; she passed her Oxford University examinations with first class honours in English Language and Literature but was unable to be awarded her degree since, at that time, only men at Oxford were granted that honour. Determined to succeed, Emily then studied at London University, which did award women degrees on equal terms with men, graduating from there with honours in classics and mathematics.

When Emily decided to work full time for the WSPU, in 1909, she gave up her teaching job and from now on faced financial insecurity. Over the next four years, she embarked on some of the most daring of exploits. She was imprisoned eight times, went on hunger strike seven times and was forcibly fed forty-nine times. A risk-taker, she probably did not intend to take her life that Derby Day of 1913. Nonetheless, she had come to believe that only the sacrifice of life would bring an end to the torture of the forcible feeding that her comrades endured when they went on hunger strike in prison. Although we shall never know what went through her mind that day, it was highly unlikely that Emily Davison intended to commit suicide since it would mean that she, a deeply committed Anglican could not be buried in the consecrated ground of a churchyard.

Equality for women was at the heart of the suffragette struggle – and is still an important issue today. The right to the parliamentary vote is still denied women in some countries, such as Saudi Arabia, while women are still under-represented in most areas of public life. Equal pay for equal work is still not a reality for most women who remain the poor work is still not a reality for most women who remain the poor.

Equal pay for equal work is still not a reality for most women who remain the poor work is still not a reality for most women who remain the poor. Prostitution, sex trafficking and violence against women, which the suffragettes emphasised exploited women, have still not been eradicated. The human rights issues that were at the heart of the suffragette campaign are still relevant today, 100 years after Emily Wilding Davison’s death.

Professor June Purvis (University of Portsmouth, UK) and Liz Chapman (Director of Library Services at LSE) are co-curators of the Emily Wilding Davison exhibit at the London School of Economics & Political Science.
The More, the Murkier: Of Several Draft Laws on Disability in India
By Shreya Atrey | 11 October 2012

India has finally been taken over by the wave of legislative engagement with the rights of persons with disabilities (PwDs), several years after ratifying the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) in 2007. This has resulted in three concrete proposals. The first, the Rights of Persons with Disabilities Bill 2011 (Committee’s Bill), was produced by a committee appointed by the Ministry of Social Justice and Empowerment to draft new legislation replacing the present Persons with Disabilities Act 1995. The Draft Bill of the Committee of Experts for Persons with Disabilities Bill 2012 (Ministry’s Draft), is a revised version of the Committee’s Bill prepared by the Department of Social Justice with the help of experts. By September 2012, the Ministry informed Parliament that the Draft Bill of the Committee of Experts for Persons with Disabilities Bill 2012 (DRG Proposal) was prepared by the Disabled Rights Group, led by the disability rights activist Mr Javed Abidi, and was also unveiled in September 2012.

A notable difference between these drafts is their differing formulations of the right to life provision. Section 10 of the Ministry’s Draft is a restatement of the right to life to be found in Article 21 of the Indian Constitution; but it does not contextualise it to reflect the concerns of PwDs. The DRG Proposal makes no mention of the right. On the other hand, the Committee’s Bill contains a different right to life, which is based on the absence of a right to life provision in the UNCRPD or the Convention on the Rights of Persons With Disabilities 2012 (CRPD). For the time being, both the Ministry and the CRPD drafts reflect the views of the disability rights community.

First, the right to life under Article 21 of the Indian Constitution is seen as the source of all other rights such as the rights to education, health, and a livelihood, among others. The Supreme Court, however, has held that the right to life is also important to the development of disabled persons. The CRPD has become a bulwark of human rights enforcement and has inspired the drafting of human rights legislations including the Right to Education Act 2010 and the Sexual Harassment Bill 2010. Thus, if other rights are derived from the right to life, there is no universal right to the right to life. There are two reasons why the inclusion of such a provision is crucial.

The bare right to life in section 10 of the Ministry’s Draft and the absence of a right to life provision in the DRG Proposal fail short of implementing the UNCRPD. Article 10 which requires a more robust formulation to ensure the effective enjoyment of the right to life by PwDs on an equal basis with others in its case rest. Section 22 of the Committee’s Bill, the ‘Draft of the Rights of the Persons with Disabilities’ 2012 (DRG Proposal) was prepared by the Disabled Rights Group, led by the disability rights activist Mr Javed Abidi, and was also unveiled in September 2012.

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Article 14 ECHR: the Elusive Other Status
By Claire Overman | 9 August 2012

The recent judgment of Swift v Secretary of State for Justice [2012] EWHC 2000 (QB) raises some interesting questions regarding the operation of article 14 of the European Convention on Human Rights (‘ECHR’). The case concerned a claim for tortious damages under s(3)(b) Fatal Accidents Act 1976. As the claimant, the deceased’s unmarried partner, had not fulfilled the statutory requirement of two years’ cohabitation, she was unable to make a claim. She argued, inter alia, that this violated her right to non-discrimination under Article 14 ECHR, compared with a partner who had cohabited for the requisite two years.

Under Article 14, enjoyment of ECHR rights must be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” One issue to be resolved was whether length of cohabitation constituted “other status.” As Eady J noted at [43], the list in Article 14 was not intended to be exhaustive. This gives rise to the issue of exactly what constitutes a relevant characteristic.

At first glance, a clear limit appears to have been set on the types of characteristics that do count. At [45], Eady J, building upon the decision of R (Cillit) v Secretary of State for the Home Department [2007] 1 AC 484, noted the need to “guard against delineating a status or personal characteristic simply by reference to the differential treatment.” It thus appears that the types of characteristic which constitute “other status” are those inherent in the individual, rather than being more circumstantial in nature. In the present case, the claimant simply hadn’t fulfilled the statutory criteria. This, as compared to a claimant who had, was therefore not a “personal” characteristic.

However, this distinction is not so clear-cut. Eady J admitted at [46] that the test was not “completely water-tight.”

This leaves room for manoeuvre, which seems correct given the open nature of the list in Art 14. However, the corollary is that it is no clearer what kinds of characteristics do count. The judgment fails to specify how widely or narrowly the relevant characteristic must be defined in the first instance. The fact that the claimant hadn’t cohabited for the required two years, when compared with an individual who had, was held not to amount to a personal characteristic so as to constitute “other status” for the purposes of Art 14. But if the fact of cohabitation were considered in general, compared to an individual who was married, it may well fulfil the test. An individual’s choice to cohabit rather than marry may be deemed as much a personal characteristic as his or her religious beliefs, the latter undoubtedly being considered inherent in the individual.

This aspect of the case was dealt with briefly, due to the finding that in any case the distinction was objectively justified.

Nevertheless, it highlights the need for more guidance as to which characteristics can or cannot be added to the list in Art 14.

Claire Overman is a BCL Candidate at the University of Oxford.

European Court of Human Rights Says Dismissal of HIV-positive Employee is Incompatible with the Convention
By Menelaos Markakis | 29 October 2013

In the case of I.B. v. Greece (app. no. 552/10), the European Court of Human Rights held that the dismissal of an HIV-positive employee due to pressure exercised by his fellow employees on the employer to dismiss him was incompatible with the European Convention on Human Rights.

The applicant was working for a jewellery manufacturer. He confessed to three of his fellow employees his fear that he might have contracted HIV. The three employees sent a letter to their employer stating that the applicant ‘had AIDS’ and requesting that he be dismissed. Meanwhile, word spread around the workplace about the applicant’s health status, leading to other employees requesting that the HIV-positive employee be dismissed. In an effort to calm tensions, the employer invited a doctor to talk to the company’s employees about the modes of transmission of the infection and precautions that could be taken to minimise the risk of transfer. However, the company’s workers continued to request that the employer fire the applicant. Eventually, the employer sought to transfer the HIV-positive employee to another department of the company. However, this prompted the head of that department to threaten to resign. Consequently, the employer asked the HIV-positive employee to quit his job. She subsequently sought to help him start his own profession by financing his vocational training as a hairdresser.

The HIV-positive employee commenced legal action against his now former employer. Relying on Greek civil law, he won the case in the lower courts but the Court of Cassation ruled in favour of the employer. Noting the ‘contagious’ nature of the disease which had led the company’s employees to ask their boss to dismiss the applicant, the Court of Cassation held that the dismissal was ‘fully justified’ by the interests of the employer, in that she sought to re-establish a peaceful situation within her business enterprise to ensure its good functioning.

The applicant took his case to the European Court of Human Rights, relying on Articles 8 and 14 of the Convention (right to private life) in conjunction with Article 14 (prohibition of discrimination). The ECtHR noted that there was no risk of infection and the reactions of the applicant’s co-workers were not threatened by the reactions of his fellow employees (paras. 86-87). In the ECtHR’s view, the Court of Cassation had not adequately sought to strike a balance between the interests of the employer and the interests of the applicant in a manner compatible with the Convention (para. 90) and therefore concluded that there had been a violation of Articles 8 and 14 of the Convention.

In its reasons it also highlighted that the Court of Cassation had based its judgment on a ‘manifestly inaccurate premise’, i.e. on the allegedly ‘contagious’ character of the applicant’s illness (para. 88). The ECtHR also emphasises the expressive harm that arose in this case. Although the Greek Government sought to argue that a judgment to the contrary would have made no practical difference in the circumstances of the case, in that the applicant would still have to face a hostile working environment if rehired, the Court noted that ‘we cannot speculate on what the attitude of the company’s employees could have been, had the Court of Cassation upheld the judgments of the lower courts and, what is more, had a statute or a well-established body of case-law protective of HIV-positive persons in the workplace existed in Greece’, thereby highlighting the potential expressive value of a judgment to the contrary (para. 89).

There are two points which are of particular importance here.

First, the European Court of Human Rights did not hold that every dismissal of an HIV-positive employee because of his health status would have been incompatible with the Convention. One could suggest that, had the performance of the employee deteriorated substantially or had there been a serious risk of contagion, the dismissal may have been compatible with the Convention. However, even in such cases, the national courts should be required to justify why the interests of the employer should take precedence over those of the employee. Secondly, the assumption on which the Court’s conclusion is premised is that prejudices and popular misconceptions cannot serve as an adequate justification to a discriminatory treatment. The Convention standards should therefore be upheld by the courts regardless of public opinion or the economic concerns of businesses.

Menelaos Markakis is a DPhil student at the University of Oxford and a frequent contributor to the Oxford Human Rights Hub Blog.
Safety of Sex-workers and Prostitutes at the Heart of Bedford v Attorney General of Canada
By Meghan Campbell | 17 January 2014

Earlier this year, I argued that the ONCA gave a comprehensive and nuanced assessment of Canada’s criminalization of 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.

The Criminal Code provisions were found by the Canadian Supreme Court to increase the risk of harm to sex-workers. 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 purpose of living off the avails of prostitution are consistent with the principles of fundamental justice: proportionality and breadth. The Court explains that the law is overbroad as it captures relationships that could be protected, while failing to capture those which are considered harmful. The provisions are also grossly disproportionate as they remove an essential part of the applicants’ livelihood.

The purpose of the prohibition against brothels was to prevent violence and sexual assault by clients. The Court notes that the law has the effect of making it impossible for sex-workers to properly screen potential clients. They are 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 or improper screening potential clients. This decision is one step further than the ONCA as the Supreme Court ruled the provisions on brothels 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 or improper screening potential clients. This decision is one step further than the ONCA as the Supreme Court ruled the provisions on brothels unconstitutional.

Sex Workers Have Human Rights Too
By Stacey-Leigh Manoeke and Gobcuda Silwana
30 August 2012

South African law criminalises sex work. In terms of the law both the sex worker and the client commit offences, yet it is sex workers who bear the consequences of this criminal status.

This is one of many cases where sex workers experience human rights violations at the hands of the police as a result of the criminalisation of their work. 7 in 10 sex workers who have approach the Women’s Legal Centre have experienced some kind of physical or sexual assault by the police. They report being pepper sprayed during arrest, assaulted, and subjected to sexual violence at the police station and sometimes stripped naked in public when being searched. On the afternoon of the 28th July 2012, a 26 year old female sex worker was working on the streets of Parrow (outside Cape Town in South Africa) when a police officer finally stopped to get her attention, after passing by four times in an unmarked police vehicle. The police officer instructed the sex worker to get into the car and threatened to arrest her if she did not have sex with him. When she pointed out that she shouldn’t be arrested since she wasn’t caught committing a criminal offence, the police officer demanded oral sex in exchange for release. The police officer also stole R 170.00 from the sex worker’s purse before he told her to get out of the car. The sex worker reported the matter and a criminal case of rape was then opened. At the first court appearance the police officer received bail of R1000, and the sex worker is currently waiting on the Independent Police Investigative Directorate to conduct an ID parade.

Police officers commit these crimes with impunity.

They remove their name tags so that sex workers are unable to identify them, and they instil fear in the sex workers so that these crimes are not reported to the authorities. The existing legal framework encourages police corruption due to the option of bribes and demands of sex.

A report which finds that police officers in South Africa are the main violators of sex workers’ human rights was released yesterday at the National Sex Work Symposium in Johannesburg.

In order to address these human rights violations, South Africa should decriminalise the selling and buying of sex because the current legal framework leaves sex workers vulnerable to police violence, harassment and abuse, and does not provide them with the protection that they require. It is apparent that the current legal system must be reformed to bring the treatment of sex workers in line with our constitutional obligations and reduce police abuse of sex workers. South Africa must shift from approaching sex work through the lens of criminalisation and instead treat sex work as a form of labour that is governed with the same rights and responsibilities as all other forms of work.

Stacey-Leigh Manoeke is an Attorney and Gobcuda Silwana the Communications and Media Officer at the Women’s Legal Centre in Cape Town, South Africa, a not-for-profit law centre committed to advancing equality for women.

Sex Abortion Law Reforms in Ireland
By Mareeád Enright | 18 July 2013

In A, B & C v. Ireland (app. no. 25579/05) the European Court of Human Rights held that Ireland must end its 20-year delay in legislating for the limited constitutional right to abortion, recognised by the Supreme Court in a case famously known as X. The Dáil passed the Protection of Life During Pregnancy Bill on Friday July 12th, in the middle of legislative silly season.

Under the Bill, termination of pregnancy in Ireland is a crime attracting 14 years imprisonment, except in two exceptional circumstances:

1) Life-threatening physical illness: Where an obstetrician and a medical practitioner of the relevant specialty jointly certify in good faith that there is a real and substantial physical risk to the life of the woman of which a reasonable opinion, can only be averted by terminating her pregnancy. The doctors must, in making their decision, have regard to the need to preserve the foetus’ life if possible.

2) Suicide – Where an obstetrician and two psychiatrists (one a specialist in the care of pregnant women) jointly certify in good faith that there is a real and substantial risk to the life of the woman by way of suicide, in their reasonable opinion, can only be averted by terminating her pregnancy. Again, the doctors must have regard to the need to preserve the foetus’ life if possible. Two referendum designed to remove the suicide provision in X have been rejected by the Irish people. Nevertheless, opponents of the Bill – including conservative lobby groups within the medical profession – have sought to prevent legislation in this area by undermining X, by suggesting alternative draconian statutory regimes to provide for the very small number of women who would be able to access this provision, and by introducing a certain misogyny into public discourse.

In each case, a woman who is refused a termination can appeal for joint certification to a further panel of doctors. The Irish Human Rights Commission has expressed concerns about the accessibility of this procedure to children in the care of the state, asylum seekers and those with intellectual disabilities, who are less able to travel to Britain and therefore more likely to depend on the new statutory scheme.

Arguments for the extension of the Bill to cover foetuses with fatal abnormalities were rejected. This Bill does nothing for the vast majority of Irish women who travel to Britain for abortions, often in very traumatic circumstances. Pro-choice campaigners are determined to see the Irish people liberalise the constitutional position. Such a referendum stands a strong chance of success. Although media commentators frequently assert that Ireland is ‘divided’ over abortion, the vast majority of the population support the current Bill. Nevertheless, the Catholic hierarchy and wealthy campaigning groups of religious laity have had a profound impact on the flow of public debate, and can be expected to retain influence.

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Criminalising Cross-Dressing in Guyana: Quincy McEwan et al vs. Attorney General of Guyana
By Se-Shauna Wheatle | 21 September 2013

2013 has been a busy year for lesbian, gay, bisexual and transgender rights (LGBT) in the Commonwealth Caribbean. As noted in a previous post by activist and attorney-at-law Maurice Tomlinson, there is a series of cases in which laws that adversely affect the Caribbean LGBT are being challenged in the Caribbean Court of Justice. In one of those cases, Quincy McEwan et al vs. Attorney General of Guyana, a Guyanese law criminalising cross-dressing has been unsuccessfully challenged before the High Court of Guyana.

Section 153(1)(iv) of the Summary Jurisdiction (Offences) Act, Chapter 8:02 of the Laws of Guyana makes it a criminal offence for a man to wear ‘female attire’, and for a woman to ‘male attire’, in public, for an ‘improper purpose’. The applicants in McEwan v AG argued that the law violated several sections of the Constitution of Guyana, including the rights to equality and non-discrimination under Articles 149 and 149D. It was also argued that the law violated the rule of law, due to the uncertainty in its references to ‘female attire’, ‘male attire’, and ‘improper purpose’.

However, the applicants had to confront a savings law clause in the Constitution, which presented a serious hurdle to their submissions that the law violated the Constitution. This clause grants immunity from challenge on the ground of inconsistency with the provisions in articles 138 to 149 (inclusive) of the Constitution, to laws existing prior to the Constitution. The applicants confronted this hurdle by making several arguments about the scope of the savings law clause. One of these arguments was that section 153(1) had lost its ‘existing law’ status due to the amendment of the section in years subsequent to the Constitution. It was also submitted that the law not only violated sections of the Constitution, but also undermined the constitutional principle of the rule of law. It was maintained that the savings law clause does not protect laws from challenge under an implied constitutional principle.

The Acting Chief Justice, who presided over the case, rejected these arguments, holding that the cross-dressing law did not violate the Constitution.

He found that there was a violation of the rights of the four litigants in the case because when they were arrested and the police failed to inform them as soon as reasonably practicable of the reasons for their arrest, as required by Article 139 (3) of the Constitution. However, the challenge to the cross-dressing law itself was rejected, in a judgment that only cursorily addressed the issues and arguments raised in the case.

On the issue of equality, the judge held that since section 153 is directed against both men and women, there was no discrimination on the ground of gender. His reasoning omitted analysis of the prescription of gender roles to individuals according to their sex, and the resulting requirement that individuals dress according to those prescribed gender roles. There was consequently no discussion of the manner in which the law reflects this assignment of gender roles or the impact of this dynamic on transgender persons who do not identify with that binary representation of gender.

The judge simply held that section 153(1) (iv) was immune as an existing law. The judge would have contributed to jurisprudence on the scope of the savings law clause by addressing the argument that the clause does not save laws that are inconsistent with the implied constitutional principle, the rule of law, the interpretation of laws by the courts, and the scope of the equality provisions in the Constitution of Guyana.

The applicants have already indicated their intention to appeal the judgment of the High Court. Apart from the hope that an appeal would yield a victory for supporters of LGBT rights in the Caribbean, it is also hoped that an appellate judgment would deliver more forthright engagement with the issues surrounding the interpretation of the savings law clause and the scope of the equality provisions in the Constitution of Guyana.

Se-Shauna Wheatle is a Lecturer in Law at Exeter College, University of Oxford. She is also the Caribbean Regional Correspondent of the Oxford Human Rights Hub.

HIV and Caribbean Law: Case for Tolerance
By Maurice Tomlinson | 29 August 2013

In the western hemisphere, the Anglophone Caribbean maintains some of the most regressive anti-gay laws in the world. The Republic of Trinidad and Tobago as well as Belize both have laws that prohibit homosexuals from even visiting. Same-gender intimacy, regardless of consent or physical location, is criminalized with sentences ranging from life imprisonment to 10 years at hard labour. There are also laws against cross-dressing and constitutional bans on legal recognition of same-sex relationships.

These punitive laws exist in a context where the Caribbean has the second highest HIV prevalence rate after Sub-Saharan Africa. UNAIDS and even local Ministries of Health in the Caribbean region have identified that anti-gay laws drive the pandemic by creating toxic homophobic environments which restrict LGBT from engaging in health-seeking behaviour. Jamaican men who have sex with men (MSM) now have the world’s highest HIV prevalence rate among this vulnerable population (32.9%). Unpublished research by Professor Peter Figueroa, head of Public Health at the University of the West Indies, Mona indicates that nearly 60% of these men also form relationships with women and many do so as a cover for their homosexuality. This provides an opportunity for HIV to bridge between the heterosexual and homosexual populations.

AIDS-Free World has been working in the Caribbean to eliminate laws and policies that inhibit a more effective HIV response. In 2011 we filed a petition at the Inter-American Commission on Human Rights to challenge the Jamaican anti-sodomy law (A.B., S.H. v Jamaica P-1249-11). We have also initiated several domestic court challenges to laws that adversely affect LGBT persons. We launched the first-ever constitutional claim for LGBT rights under the 2011 Jamaican Charter of Fundamental Rights and Freedoms (Tomlinson v TVJ, CVM and Another 2012 HCV 00567). This case was heard from May 27-30, 2013 and a decision is expected in September.

The facts of the constitutional claim are relatively simple: AIDS-Free World produced an ad in which I appeared that called for respect of the rights of gay Jamaicans. The island’s two (2) private TV stations who operate under government license refused to air the paid ad citing, among other things, their right to freedom of expression in the form of editorial discretion. The national broadcaster, Public Broadcasting Corporation of Jamaica, made a similar argument.

Sections 13 (2) (c) and (d) of Jamaica’s new Charter guarantees the right to freedom of expression as well as a novel right to seek receive and disseminate information through any media. The Charter also contains a provision that requires private citizens to guarantee the rights and freedoms of others. For the purpose of the Charter, TV stations are private citizens.

This case will be the first opportunity for Jamaica’s Constitutional Court to define the test for how the competing rights of citizens should be balanced. It is therefore a landmark case for several reasons.

AIDS-Free World has also launched a domestic challenge to Jamaica’s anti-sodomy law (Javed Jaghai v Attorney General of Jamaica 2013 HCV 00650), as well as an action before the Caribbean Court of Justice to have the anti-homosexual sections in the Immigration Acts of Trinidad and Tobago struck down (Maurice Tomlinson v Belize AND Maurice Tomlinson v the State of Trinidad and Tobago CCI Application Nos. OA1 & OA2 of 2013). We also supported the first-ever domestic challenge to the Belizean anti-sodomy law. A case against the Guinean cross-dressing law was also heard in early June.

All these legal initiatives have as a significant goal a paradigm shift in the way LGBT human rights are recognized in the Anglophone Caribbean. This includes the right to health. These cases were made necessary because of steadfast refusal by Caribbean governments to buck public opinion and provide for the rights of LGBT persons, even when this refusal was clearly having dire public health implications.

Maurice Tomlinson is an attorney-at-law and has been involved in LGBTI and HIV and AIDS activism in Jamaica and the Caribbean for over 14 years. He is Legal Advisor, Marginalized Groups for AIDS Free World, co-founded by Stephen Lewis and Paula Donovan.
Racial Profiling: More Than a Numbers Game
By Faiza Patel | 21 August 2013

Although minority communities have long complained of racial profiling by police, their claims have generally been dismissed until proven by empirical evidence. And so it was with the New York City Police Department’s stop-and-frisk program. As early as 1999, New York state’s attorney general criticised the effort as racially skewed. Stop and frisk was the subject of a class action lawsuit, which was settled in 2003. But it wasn’t until the police were required to report on the number of people stopped and their race that both public opinion and the legal landscape shifted. The result was the recent federal court decision in Floyd v. City of New York 813 F.Supp.2d 457, finding that the NYPD’s stop-and-frisk program violated two provisions of the U.S. Constitution: the Fourth Amendment prohibition on unreasonable searches and seizures and the Fourteenth Amendment ban on race-based laws and policies.

She found that on several occasions the police had stopped plaintiffs without the ‘reasonable suspicion’ required under the Fourth Amendment. She also found, based on the testimony of witnesses (including several police officers) that the NYPD intentionally targeted those it considered to be ‘the right people’ – i.e., minorities. And that the police commissioner and the mayor, rather than heeding complaints about biased policing, had not just condoned, but enthusiastically supported, the NYPD’s stop-and-frisk program.

Testimony from those who had been stopped repeatedly clearly moved Judge Scheindlin to recognise the human toll of stop-and-frisk. ‘While it is true that any one stop is a limited intrusion in duration and deprivation of liberty, each stop is also a demeaning and humiliating experience,’ she wrote. Routinely stopping people of colour as they go about their daily lives makes them distrustful of the police. Such suspicion of law enforcement, the judge pointed out, ‘cannot be good for the police, the community, or its leaders.’

Unfortunately, just as it has ignored the voices of minority communities for the last decade, the NYPD’s leadership obstinately refuses to hear the judge. It has already filed a notice of appeal. A better course would be to recognise that maybe, just maybe, there is something wrong with the way the police have conducted stop-and-frisk, and work to reform it. Other cities have achieved safety without ferociously targeting minorities. New York can as well.

Faiza Patel is the Co-Director of the Liberty and National Security Program at the Brennan Center for Justice at NYU School of Law.
Floyd v City of New York: Promise and Challenges in Reforming Stop and Frisk
By Nicole Smith Futrell | 16 August 2013

The New York City Police Department (NYPD)’s controversial stop and frisk program was dealt its most significant legal blow when a federal court judge ruled the practice unconstitutional for its inherent racial profiling of blacks and Latinos. While the Floyd ruling is important for providing court-sanctioned recognition of the racial discrimination long endured by blacks and Latinos in the city, the decision also demonstrates how challenging it will be to eliminate deeply rooted racial bias from the practices and culture of the nation’s largest municipal police force.

Floyd marks a critical turning point for a policing strategy that has been employed at dramatically increasing levels despite overwhelming concern about the marginalization of minority communities. The NYPD’s approach to stop and frisk, which allows officers to stop a person in order to investigate suspected criminal activity and to conduct a frisk if the person is considered dangerous, has been criticized for disproportionately targeting blacks and Latinos without the required level of reasonable suspicion.

Data presented at the Floyd trial suggests that the practice casts an overly broad net, primarily on minorities, and yields little in terms of arrests and weapons recovery. Based on uncontested statistics from the case, of the over 4.4 million stops from 2004 to 2012, 88 percent resulted in no arrest. When a frisk was conducted, weapons were obtained only 1.5 percent of the time. Trial data also revealed that blacks and Hispanics, while comprising a significantly smaller segment of the city’s population than whites, accounted for over 80 percent of the 4.4 million stops.

While the disproportionality exposed by the data is staggering, perhaps even more troubling is the human impact of these interactions. The plaintiffs, representing a class of people of color.

Nevertheless, for all of the concerned individuals who have advocated for the inequities of stop and frisk to be recognized and addressed, the Floyd decision is a victory. Although implementing meaningful changes will be a challenge, the decision creates hope that we are at the beginning of a paradigm shift in which aggressive criminal justice policies that target and criminalize minorities will no longer guide our approach to law enforcement.

Nicole Smith Futrell is a clinical law professor in the Criminal Defense Clinic of Main Street Legal Services at the City University of New York School of Law (CUNY Law).

XYZ or HJ: How do EU and UK Refugee Law Stack Up on Identity Issues?
By Will Tolcher | 11 December 2013

The purpose of refugee law is to give sanctuary to people fleeing persecution. The test that simply asks whether the person is a member of a persecuted group – thinking supported by the ECJ in their rejection of discretion. The Home Office’s argument was that they could both return to their respective countries of origin and conceal their identity to avoid persecution, they would not have a well founded fear of persecution. HJ (Iran) concerned two gay men: “HJ” and “HT” from Cameroon. Two months after HT was seen kissing his partner in their home, he was attacked by a mob of churchgoers, who beat him and attempted to cut off his penis. The police joined in the violence when they arrived. The Home Office’s argument was that they could both return based on the HJ test still has a remnant of discretion involved because it enquires if a person would be discreet, and if not, requires examination of their motives. S Chelvan, the UK’s leading barrister on LGBTI refugee law, has proposed a test that simply asks whether the person is a member of a persecuted group – thinking supported by the ECJ in their rejection of discretion.

Pre-HJ case law in the UK put those seeking refugee status based on their sexual orientation in a catch twenty-two situation, focused around the “well founded fear” element of the definition. This regularly caused refugee claims to fail on the thinking that as a person would conceal their identity to avoid persecution, they would not have a well founded fear of persecution. The HJ case described this logic as being willing to return to a decent: they had no “well founded fear” of Nazis while in the attic (her sad fate is well known – it would be dangerous to assume that concealment works).

HJ (Iran) concerned two gay men: “HJ”, and “HT” from Cameroon. Two months after HT was seen kissing his partner in their home, he was attacked by a mob of churchgoers, who beat him and attempted to cut off his penis. The police joined in the violence when they arrived. The Home Office’s argument was that they could both return based on the HJ test still has a remnant of discretion involved because it enquires if a person would be discreet, and if not, requires examination of their motives. S Chelvan, the UK’s leading barrister on LGBTI refugee law, has proposed a test that simply asks whether the person is a member of a persecuted group – thinking supported by the ECJ in their rejection of discretion.

On the other hand, the most controversial aspect of the decision in XYZ is the issue of what actually is required to constitute “persecution.” The ECJ’s decision was that criminalisation must be practically enforced to become persecutory. The decision that criminalisation – state inflicted stigma on the core practices of a group – is not persecution, comes across as somewhat surprising, and was condemned by Amnesty International. Courts in the UK have not taken a clear position on the persecutory nature of sodomy laws. However, Lord Rodger’s comments in HJ
Access to Justice and Human Rights
Chapter three
Access to Justice and Human Rights

Chapter three

Access to Justice and Human Rights

Chapter three

April Fools: The Quiet Demolition of Legal Aid
By Jo Renshaw | 16 November 2012

Following the celebration of National Pro Bono Week in the UK last week, Jo Renshaw, Partner and Head of the Immigration Team at Turpin & Miller LLP, reflects on the impact of the impending cuts to Legal Aid in the UK and why pro bono work will not be enough to fill the gap.

On 1 April 2013, the Legal Aid Sentencing and Punishment of Offenders Act (‘LASPO’) will come into effect and, to all intents and purposes, the concept of equal access to justice will be dead. In an attempt to save £350 million from the Legal Aid budget, LASPO simply removes whole swathes of law from the scope of public funding including (in the social welfare area) advice on benefits, most debt and housing, education and employment.

Many articles could be (and have been) written about LASPO and its impact on various areas of law. In this short article, I want to look at one of the areas which has received less attention in the media — that of immigration. While asylum work rightly remains publicly funded, all other areas of immigration law will be removed from the scope of Legal Aid, save for cases involving domestic violence and trafficking. In making this proposal, the Government unsurprisingly focused on those who want to ‘visit a family member … or to fulfil their desire to work or study here’ as cases which should not be funded by the tax payer. In times of economic austerity, few would argue with that. However such clients are rarely eligible for Legal Aid anyway and usually have the resources and nous to be able to make applications themselves. As we go forward into the brave new world post April 2013, these are the clients which will keep us awake at night. It is another group entirely — a group for whom there will be no safety net, no redress and for whom the thought of taking on the Home Office themselves is pure fantasy.

These are the clients who turn up in our reception with a shopping bag full of their belongings, two young children and (at best) some indiscernible paperwork from the Home Office or from a person they met at Paddington Station who promised to ‘sort out their status’ for a small fortune. Their children are British, the mother’s case may involve an asylum claim, the other parent, as well as the immigration backgrounds of all involved. They have no idea of the ‘best interests of the child’. Evidence will be both appalled and outraged by what will take place next April. It is a view shared by a number of colleagues. People have no idea of the fee levels earned by junior legal aid barristers, who earn much less than nurses, less than teachers, and much less than GPs. But in the light of that view I just want to make a declaration of a lack of interest. I do not do, and never have done, any criminal legal aid. The proposals for price competitive tendering in criminal legal aid will have precisely no impact on my income whatsoever. I am here because those proposals appall me, because of what they will do for access to justice for those who are most vulnerable, and about the quality of justice which our system provides.

For more information visit the Law Society’s Sound Off for Justice website at http://soundoffjustice.org.

Jo Renshaw is Partner and Head of the Immigration Team at Turpin & Miller LLP.

Legal Aid Cuts are Incongruous and Reckless for a Conservative Government
By Dinah Rose | 12 June 2013

Editor’s note: This is an edited transcript of the address given by Dinah Rose QC on Tuesday 4 June 2013, at the Demonstration to Save Justice outside of the Ministry of Justice.

Anyone who has read the online comments in the Guardian, and even worse, in the Daily Telegraph over the past couple of days, knows that what people say is that we are motivated by self interest. That we are ‘fat cat’ legal aid lawyers alarmed at the brakes being put on the gravy train. That is a version of the truth. People have no idea of the fee levels earned by junior legal aid barristers, who earn much less than nurses, less than teachers, and much less than GPs. But in the light of that view I just want to make a declaration of a lack of interest. I do not do, and never have done, any criminal legal aid. The proposals for price competitive tendering in criminal legal aid will have precisely no impact on my income whatsoever. I am here because those proposals appall me, because of what they will do for access to justice for those who are most vulnerable, and about the quality of justice which our system provides.

Secondly, consider the way that this is being introduced. The government proposes to introduce regulations within three months of today, with no pilot scheme, with no debate in Parliament, and with no evidence as to how or whether it will work.

Anyone may disagree with the government on matters of policy. But there is one thing that we are all surely entitled to expect as a basic minimum, whatever policy is being pursued. That is that there should be a level of competence in the way that government policy is introduced. That it should be evidence-based and that there is some chance that the government knows what the consequences of introducing it will be. The truth is that the government has no idea whether this new system will work or whether it will cause total chaos. It fails the most basic test of good administration.

Dinah Rose QC is a barrister at Blackstone Chambers.

The Beating Heart of the Rule of Law (and not an Avocado)
By Michael Fordham | 11 June 2013

“This organization, the Ministry of so-called Justice, thinks that Legal Aid is an avocado. They think it is soft. They think you can cut it, whenever you want, and keep cutting it, and they think it doesn’t matter. Because, you know, nobody really needs an avocado! And so they can cut it and cut, until you get to the stone, and even then they don’t stop, because then they will chuck it away.

We are here today, representing thousands: prisoners, those whose rights are taken away by public authorities and – get this – foreigners. Yes, foreigners who have legal rights but who aren’t going to get effective legal protection. And the second is the reckless way in which the government is proposing to introduce these proposals.

First, lets look at the nature of this proposal. The government proposes a radical overhaul of the system of legal aid. 1600 providers are to be reduced to a maximum of 400 nationally. The right of the defendant to chose who their solicitor is will come to an end. You will be allocated to your solicitor on the basis of the postcode where you were arrested, or the time of day, or the initial in your surname. And a three-year fixed-term contract will be awarded to the lucky contractor who wins the contract. What on earth is a Conservative government doing introducing a system of localised monopolies, immunised from consumer choice and the pressures of competition? Where the local contractors have no incentive to do anything but farm their captive audience and make the maximum profit on their contract without any concern about quality. That is contrary to the discipline of the free market which has been Conservative party policy since at least the days of Margaret Thatcher.

And what is the government doing at a time of economic discipline of the free market which has been Conservative government. And the second is the reckless way in which this – foreigners. Yes, foreigners who have legal rights but who aren’t going to get effective legal protection. Because, you know, if the State is up against you, they will have the lawyers they choose, every time. But what about you? When you are being prosecuted, or when you are having your rights taken away, or when you are in detention? Legal Aid is the beating heart of the rule of law. It may be soft, yes it may be soft. But we have to defend the beating heart of the rule of law. Because what could matter more than those who are disadvantaged, and those who are marginalized, having effective legal protection? Because, you know, if the State is up against you, they will have the lawyers they choose, every time. But what about you? When you are being prosecuted, or when you are having your rights taken away, or when you are in detention? Legal Aid is the beating heart of the rule of law.

The Treasury may say ‘take out the knife and cut into it’. But this Ministry needs to say: ‘****** off! Put the knife away! Because otherwise we do not deserve to be called: the Ministry of Justice.’ Make some noise!!

Michael Fordham QC is a barrister at Blackstone Chambers.

This organization, the Ministry of so-called Justice, thinks that Legal Aid is an avocado. They think it is soft. They think you can cut it, whenever you want, and keep cutting it, and they think it doesn’t matter. Because, you know, nob...
Civil Legal Aid Reforms in the UK – What will this Mean for You?
By Polly Glynn | 2 June 2013

This is a Government which does not like its decisions being challenged, examined or questioned. This is a Government which likes being able to use its power in whichever way it likes. It is dearly annoyed by challenges to its policies and decisions. Its solution in the proposed Legal Aid reforms is to take away the ability of almost everyone to challenge it, apart from the rich and powerful.

That is why the QCs as well as firms of solicitors are up in arms about the proposals. Not – as some swivel eyed icons state – because they are mired in self interest. To be honest legal aid solicitors could be better paid working as teachers, social workers or nurses. But because this is really important.

Polly Glynn is a Partner at Deighton Pierce Glynn Solicitors.

Legal Aid Cuts: A Student Perspective
By Arthur Chan and Meghan Campbell | 31 May 2013

Oxford Legal Assistance (OLA) is an undergraduate and postgraduate legal aid scheme, run out of the University of Oxford and is partnered with Turpin and Miller LLP, a local legal aid firm. OLA runs a weekly clinic session which provides free preliminary consultation sessions for individuals in need of legal assistance for asylum and immigration claims.

The viability of this important work is now in jeopardy due to the brutal legal aid cuts under the Legal Aid, Sentencing and Punishment of Offender Act, 2012 (LASPO).

Since the legal aid cuts in April, the OLA weekly clinic has seen a drastic decrease in the number of clients. The number of clients seeking help for their immigration claims in the past five weeks has dropped to less than 4 a session, as compared to an average of 6 clients before the cuts came into place. Patrick Jones, an OLA volunteer remarks:

“Everyone knows there is a certain amount of money, as with any form of benefit that ends up where it potentially isn’t needed most. But this does nothing to change the fact that most legal aid goes to people who are desperately in need of it, and it is wrong for the government to axe it to this extent.”

To step into this void, OLA has begun to develop with Turpin and Miller a graduate student special advice scheme. Seven post graduate students are volunteering their time, energy and talents to work on Exceptional Case Funding Applications.

Exceptional Case Funding is a new procedure under the LASPO and allows for “exceptional legal aid to be approved for a case outside the scope of legal aid.” For the funding to be granted, the Act requires that the legal services are necessary to prevent a breach of the individuals’ ECHR rights or rights of the individual to the provision of legal services that are enforceable EU rights.

As Exceptional Case Funding is very new, there is no precedence clarifying when services are necessary to protect ECHR and EU rights. The Lord Chancellor has provided guidance criteria, which indicates that the UK government perceives a successful application to be rare. The Lord Chancellor advises that it would not be “appropriate to fund simply because a risk exists of a breach of the relevant rights.” The case holder reviewing the Exceptional Case Funding Application is to ask themselves: “will withholding legal aid make the assertion of the claim practically impossible or lead to an obvious unfairness in the proceedings?” There must be a substantial risk of breaching the applicants ECHR and EU rights. The guidance criteria indicate that a successful application will be rare and only the minimum services required will be provided.

The OLA Graduate Student Special Advice Scheme has begun working with Turpin and Miller in preparing Exceptional Case Funding Applications for migration cases. Legal Aid is not available to cover the costs of making an Exceptional Case Funding Application, although the process is time consuming and detailed. Graduate students from Oxford are stepping in to help Turpin and Miller fill this gap. While this is a viable short-term option, the number of clients who potentially meet the criteria (on an objective reading of the terms) is high.

These applicants are among the most vulnerable and marginalized in society, often with traumatic histories. While the applicant’s stories and circumstances are all unique and exceptional, their need for guaranteed legal services is not. With limited English language skills, no prior knowledge of legal process and often with past histories of abuse that leads them to be intimidated by figures of authorities, for most, the ‘unfairness’ which would arise should they be denied legal aid is ‘obvious’.

It remains to be seen if the courts will use the Exceptional Care Funding Application as a method to ensure necessary legal services. One thing is certain; time and resources will be spent on making Exceptional Case Funding Applications and on satellite litigation should these applications be refused. With the legal aid cuts still in its initial stage, it remains too early to fully assess the impact to legal aid work at the grass-root level, however the outlook is not good.

Arthur Chan, undergraduate student reading law at the University of Oxford and member of the OLA Executive Committee and Meghan Campbell, DPhil Candidate at the University of Oxford and member of the OLA Executive Committee.
It’s Time to Wake Up – UK Legal Aid Cuts
By Conor Gearty | 30 May 2013

Like many law academics I suppose I had grown tired of well-heeled QC’s claiming that this or that change to legal services spelt doom for their profession when what they really meant (I invariably thought) was slightly less money to spend on a second home. Lawyers have cried wolf so often it’s hard to take their annual protestations against change with any seriousness. So it was with a half-awake mind I listened the other Saturday morning to a presentation from my Matrix chambers colleague Nick Armstrong on what the government now proposes.

I woke up fully, fast.

What has already happened is serious. The Legal Aid, Sentencing and Punishment of Offenders Act 2012 severely limits legal aid for judicial review. It has just kicked in.

And what is coming is different, very different, even from that swingeing intervention:

- changes to criminal legal aid which will deny choice and effective representation to those accused of crimes, leaving them in the hands of the lowest bidder for this service;
- refusing any legal aid to those who do not meet a residence test;
- refusing to pay lawyers in some cases for work reasonably and necessarily carried out;
- removing legal aid for complaints of mistreatment in prison; preventing small specialist public law firms from offering prison law advice;
- removing funding for test cases (whose prospects are by definition uncertain);
- cutting rates for legal advice and representation still further.

This is what no fewer than 90 QCs said about the proposals in a letter published in The Daily Telegraph on Wednesday 29 May:

“... The cumulative effect of these proposals will seriously undermine the rule of law, and Britain’s global reputation for justice. They are likely to drive conscientious and dedicated specialist public law practitioners and firms out of business. They will leave many of society’s most vulnerable people without access to any specialist legal advice and representation. In practice, these changes will immunise Government and other public authorities from effective legal challenge. Abuses by UK agents and officials overseas that need to be structured into the practice of PIL to yield the most effective remedies.

The judges are rightly worried about the latter.

This is what the 90 QCs had to say:

“People whose lives are affected by the unlawful action of public bodies will have no option but to try to represent themselves. Effective representation will be one-sided; the government will continue to pay for, and be represented by specialist lawyers."

Of course the judges will try to help – for a while. As will the government lawyers – for a while.

But times will change.

What was shocking – a claimant in person floundering to explain why what has happened to them is unlawful as well as wrong – will become first normal and then irritating. All that time wasted! Why don’t they just get on with it? Without specialist law firms, younger QCs will emerge, invariably from the world of commercially paid work, with no feel for or memory of the equalities of the past. The public interest bar will be a thing of charity and training, not a core advocacy activity for all.

Can this happen?

Of course. We only have effective legal representation for all because of state support. It is part of the great welfare reforms of the Attlee administration. Before then, the occasional conscience of genuinely poor, the law was for the rich, a playground for the settlement of superfluous disputes rather than a means of improving lives and holding government to account.

Effective impunity within a system of notional accountability – that is what the government is after. Exactly the sort of thing that makes up the sort of neo-democratic state that I have written about in a book I published earlier this year, Liberty and Security.

And what about the law schools?

- no more exciting public law cases
- UK forces acting abroad in the sure knowledge none of their alleged victims will be able to secure justice
- no more housing or welfare cases
- lots of commercial judicial review
- back to being soulless servants of economic power, our students trainee referees for disputes between the rich and poor.

We have until 4 June to stop this juggernaut of radical destructive energy – for this is when the government’s consultation comes to an end.

This time it is serious. And time for us all to wake up.

Conor Gearty is Professor of Human Rights Law at LSE and also Director of its Institute of Public Affairs. He is a practising barrister at Matrix Chambers.

Public Interest Law in South Africa
By Dhaya Pillay | 8 July 2013

I am troubled by the inequality in our society despite our grand Constitution. My concern is that the impact of apartheid plagues black and poor people who seem relunct about challenging their circumstances. Public Interest Law practiced strategically has and could continue to advance our constitutional project.

My definition of Public Interest Law is law that impacts the interests of the public, and particularly, law that advances the rights of the vulnerable, the poor and the disadvantaged. My concern is that the impact of PIL decisions have ripple effects. Whereas in the past our primary target was the state, today any person, corporate or human, can be held to account for violations of constitutional rights.

Unfortunately, one of the greatest obstacles to PIL is “inequality of arms” – meaning that access to the courts is often out of reach. Except for a few NGO’s, public spirited lawyers, Public Interest Law firms and to some extent Legal Aid SA, the road to our courts is closed or at best bumpy and potholed. Could this be a reason for poor communities resorting to marches, violence and demonstrations?

Recent events in two spheres of social services demonstrate the importance of Public Interest Law for the development of sound enduring jurisprudence:

Recent events in two spheres of social services demonstrate the importance of Public Interest Law for the development of sound enduring jurisprudence:

In contrast, the CC created a new socio-economic right to electricity in Leon Joseph v City of Johannesburg [2009] ZACC 28. Alas for these residents’ victory was phyrric. By the time it took for the case to go to the CC, vandals had stripped the building of electrical wiring. But, SERU used this precedent to reconnect electricity for low income residents in Soweto.

Corporations, such as SAx, redistributes wealth by employing a huge work force, reaching out to rural areas of South Africa, paying taxes and paying much needed dividends to pension funds. Regulating alcohol sales could have the unintended consequence of impairing SAx’s capacity to redistribute wealth. At the same time, hardly a serious crime is committed without offenders drinking alcohol. From this single issue of regulating alcohol usage, at least four sectors have an interest in decisions – judges, economists, psychologists, community health practitioners etc. Imagine if any one party was omitted from the debate?

Finding enduring solutions is also a theme in basic education. Recently, SADTU threatened to go slow until the Department of Education re-instates a collective agreement providing a rural allowance. The rights engaged in this dispute include not only the right to fair labour practices and to education, but also the protection that ‘a child’s best interests are of paramount importance in every matter concerning the child’. Education is technically not an essential service in the sense that if interrupted it will not result in a risk to life, health and personal safety. However, education is essential to other important constitutional values and rights. To entrust a court with the task of making a decision in this case without full evidence would be irresponsible.

It may not always be possible to decide between right and wrong, instead striking a balance between competing rights may be the only option.

For that, public participation through non governmental organisations and PIL is indispensable.

PIL practitioners may find that some cases have better prospects of success through mediation than litigation. The CC was recommended mediation in an eviction case in Port Elizabeth Municipality. In the City of Johannesburg the CC recommended settlement of Phi residents to 25 litres of free water per person per day. The High Court upheld the residents’ argument and awarded 50 litres per person per day. The Supreme Court of Appeal concluded that 42 litres of water per person per day was sufficient. In contrast, the Constitutional Court declined to decide the issue preferring to leave the decision to the legislature and the executive to investigate. Would mediation have worked better in this case?

No matter how well a PIL is presented, it counts for nought if implementation is not possible. Organisational capabilities need to be structured into the practice of PIL to yield the most effective remedies.

Justice Dhaya Pillay is judge of the High Court, KZN. This post is based on the 11th Victoria and Griffiths Mxenge Memorial Lecture, which Justice Pillay delivered at UKZN in May 2013.
Access to Justice and Human Rights
Chapter three

Delegates offered various solutions to the monumental challenges facing SRLs which could be introduced before April.

They were concerned to ensure greater co-ordination between the bodies which provide assistance to SRLs and to provide reliable advice as early as possible. Many members of the judiciary aimed to take a leading role in ensuring the accessibility of the court system, while recognising the invaluable work of pro bono units and those who offer affordable legal advice to people with limited resources.

Amidst those present were Lord McNally, Minister of State for Justice, Lord Dyson MR, Chairman of the Civil Justice Council, and Lord Neuberger, incumbent President of the Supreme Court. Each gave a short speech acknowledging the invaluable work of pro bono units and those who offer affordable legal advice to people with limited resources.

Chairman of the CJC Working Group, Robin Knowles CBE QC, who organised the event, summarised the rationale for the forum as the hope that, through co-ordination and leadership, the sum of the efforts made would be greater than their individual parts in promoting access to justice for SRLs. The event felt like an important and insightful step in the endeavours of addressing impending cuts, to safeguard the interests of all litigants, regardless of socio-economic status, within our civil justice system.

Robin Knowles CBE QC is a barrister at South Square Chambers. Natasha Holcroft-Emmess is a BCL candidate at the University of Oxford and a regular contributor to the OxHRH Blog.

Unkind Cuts: UK Refugee Lawyers Cite Grave Concerns over Impending Legal Aid Restrictions
By Stephen Meili | 29 November 2012

Following on from Jo Renshaw’s piece on this blog about the impact of the impending cuts, Stephen Meili presents an insight into lawyer’s perceptions of these cuts on asylum claims.

As part of my current research project on the circumstances under which international human rights treaties help – or hurt – asylum seekers, I have been interviewing U.K. lawyers (26 so far) who represent claimants and/or the government in asylum proceedings. One of the more intriguering sets of responses I’ve received thus far concerns the lawyers’ perceptions of the likely impact of cuts in legal aid funding scheduled for April 2013 (an earlier round of cuts contributed to the closing of Refugee and Migrant Justice and the Immigration Advisory Service, which provided legal assistance to large numbers of refugees and other immigrants).

Even though this next round of cuts largely exempts lawyers representing asylum-seekers, lawyers in my interview sample have described the cuts as “drastic”, “devastating”, and likely to have an “enormous” impact on persons seeking refuge from persecution.

The lawyers, who include solicitors and barristers (including barristers who represent the government in asylum proceedings), cite several reasons for these grim assessments. The most common response has been that the cuts will reduce the number of lawyers representing asylum-seekers because most lawyers currently doing so offer other types of advice to immigrants that will no longer be funded through legal aid. As a result, many of these lawyers are likely to leave the immigration field entirely. Another consistently-cited concern is that people with otherwise valid claims under Article 8 of the European Convention on Human Rights (the right to respect for family and private life) will be returned to their home country. As one lawyer put it “I’m sure that every day dozens of people will be removed from the United Kingdom who, were their [Article 8] case dealt with properly, would have succeeded in demonstrating that it was not disproportionate to remove them.”

In addition to these oft-cited effects, a few lawyers articulated other, less obvious impacts that demonstrate the logical inconsistency of the government’s proposals. For example, at a time when the government is otherwise trying to reduce the number of asylum claims in the U.K., the cuts will likely increase the number of asylum claims because it will be one of the only government-funded ways to seek to remain in the U.K. The consequences of this development are significant, and go beyond the obvious one of an increased judicial caseload. Many litigants in these cases will be unrepresented, which will put even greater pressure on limited judicial resources. Moreover, lawyers interviewed predict that many of these cases are likely to be of questionable merit, which will heighten public hostility toward refugees generally. As one lawyer put it, the “panic” over asylum-seekers will return. Another lawyer indicated that the rise in such cases will impair the reputation of lawyers, who will be viewed as litigating baseless claims. And finally, lawyers anticipate that the increase in less meritorious asylum cases will intensify what they termed the culture of disbelief among asylum adjudicators.

One response that seems counterevintuitive at first blush, but logical upon further reflection, is that the upcoming legal aid cuts will hurt government lawyers, as well as those who represent refugees. Why? Because lack of funding for most immigration-related matters will mean that solicitors who later in their careers represent the government in refugee cases will no longer acquire experience doing a range of immigration work.

It was also intriguering to hear lawyers articulate two silver linings to legal aid cuts.

One is that they will probably weed out some of the lesser-skilled immigration lawyers currently representing refugees. A second is that because of the last round of cuts some of the more skilled lawyers stopped representing refugees and became immigration judges, which has improved the overall quality of the immigration judiciary.

But the following overall assessment reflects the views of most of the lawyers I’ve interviewed: “It will stop people being able to assert their rights. And it will not save money because it will mean that [applicants] lose their cases for the wrong reasons and re-emerge somewhere else in a different context – the criminal justice system, or the immigration detention system or the mental health system, or somewhere else down the line and their problems will not go away; it just means that they will get solved later in a different context. It’s a completely pointless exercise... but there is no debate about it because the government knows it can do what it wants to immigrants because it is not a popular cause.”

In the aggregate, lawyers’ concerns about impending legal aid cuts extend beyond their obvious impact on individual refugees. They suggest that the cuts will damage the reputation of the legal profession, the efficiency of the judiciary, and the efficacy of human rights treaties, such as Article 8 of the ECHR. For without adequate enforcement, such treaties lose their meaning and become mere window dressing that states feel free to ignore.

Stephen Meili is Vaughan G Papeke Clinical Professor in Law at the University of Minnesota Law School. He is currently on leave at the University of Oxford where he is an Academic Visitor at the Faculty of Law and Senior Associate Member of St Antony’s College.
There are, however, two glimmers of light in relation to appeal rights.

First, it appears that human rights appeals permitted under the Bill may still allow the consideration of immigration decisions that are alleged to be not to be in accordance with the law. This is because a decision must be ‘in accordance with the law’ to satisfy Article 8 ECHR. Therefore, provided that private and/or family life is engaged under Article 8(1) (not a high hurdle for anyone who has spent some time in the UK), the Tribunal may be able to find that the decision was not in accordance with the Immigration Rules and dispose of the appeal without needing to consider proportionality. The Secretary of State’s power to remove an in-country appeal right in the case of successful (although immigration judicial review claims are to be transferred to the Upper Tribunal). As material mistake of fact and failure to take a decision in accordance with the law are grounds of judicial review, the challenges which are currently brought as statutory appeals in the First Tier Tribunal will be actionable in the Upper Tribunal as immigration judicial reviews. Although, as noted above, there are clearly problems with judicial review as a remedy (as opposed to residual) avenue of recourse, at least some judicial oversight remains to right the most egregious wrongs.

Secondly, the Bill does not seek to oust judicial review (although immigration judicial review claims are to be transferred to the Upper Tribunal). As material mistake of fact and failure to take a decision in accordance with the law are grounds of judicial review, the challenges which are currently brought as statutory appeals in the First Tier Tribunal will be actionable in the Upper Tribunal as immigration judicial reviews. Although, as noted above, there are clearly problems with judicial review as a remedy (as opposed to residual) avenue of recourse, at least some judicial oversight remains to right the most egregious wrongs.

The jury is out on what will happen to this Bill as it wends its way through Parliament. The political consensus on immigration may suggest not very much, but the fact that some of its provisions sit at the heart of justice and affect a group without any electoral rights mean that – at the very least – it should not go unnoticed.

Rowena Moffatt is a barrister practising in immigration law and a DPhil candidate in Law at the University of Oxford.

The Immigration Bill envisages a sea change.

Clause 11 seeks to repeal the majority of the current rights and grounds of appeal in ss 82 and 84 and replace them with three appeal rights: i) against a refusal of an asylum or humanitarian protection claim; ii) against a refusal of a human rights claim; and iii) against a decision to revoke asylum seeker status. It will be apparent that these new grounds of appeal relate exclusively to the UK’s international or regional obligations (as opposed to residual) access to justice for aliens. The challenging decisions on their immigration status is reduced to a begrudging nod to EU and ECHR rights. Given that the Government’s own statistics show that the Home Office loses half of its entry clearance and managed migration appeals, one could be forgiven for questioning the motives behind the decision to eclipse the majority of appeal rights.

So what remedy can these unfortunate migrants on the receiving end of unlawful decisions on their immigration status seek? The Bill offers administrative review as the alternative to an appeal, but anyone who has conducted an entry clearance appeal (where this system is already in use) will know how ineffective a remedy that is, not to mention the structural deficiency in the lack of independence. As for judicial remedies, judicial review is an obvious alternative for these stripped of statutory appeal rights. However, in addition to the normal hurdles of permission, time limits and standing, the changes to legal aid (including the proposed adoption of a residence test) will leave many of these migrants without recourse in practice.

The result in both cases is disenfranchisement from the rights-bearing community.

The appeals provisions (clauses 11 and 12), which propose a vast reduction in statutory appeals and a ‘deport first, appeal later’ system for so-called ‘foreign criminals’, make clearly clear that the ‘services [and] facilities’ targeted do not exempt justice. Certainly, from a due process perspective, the proposals concerning the immigration appeal system are amongst the most consequential.

Appeal rights were first granted to aliens by the Immigration Act 1971. This put paid to the view expressed by Lord Denning in Schmidt v Secretary of State for Home Affairs that since aliens had no substantive rights to enter or remain in the UK, it followed that they also had no procedural rights.

The current immigration appeals system is governed primarily by the Nationality, Immigration and Asylum Act 2002 (NIAA). Sections 82 and 84 NIAA provide the bases on which appeals may be brought. Importantly, they include the ground of appeal that the decision is not in accordance with law (including the Immigration Rules).

The first immigration bill to be published in four years was introduced in the House of Commons on 10 October 2013. The long title – ‘…to limit…access to services, facilities and employment by reference to immigration status…’ leaves us in no doubt about its intent.
Pro Bono Work in South Africa: From Moral Duties to Legal Duties
By Emma Webber | 14 November 2012

The advent of democracy in South Africa meant that all citizens would in future be treated as equals before the law. However, almost twenty years after the fall of apartheid, the majority of South Africans are still denied access to justice. The primary reasons are the high levels of poverty and marginalisation, a scarcity of affordable legal services in poor communities, and a lack of state resources and capacity to provide such services.

Despite this sad reality, the removal of the stark, explicit discrimination of apartheid seems to have dulled the drive of lawyers to take on public interest work. As Jeremy Sarkin noted in 2002:

“There is a growing perception that in spite of South Africa’s having one of the best Constitutions in the world; its legal practitioners are losing their social consciences. Whereas the Constitution has created many opportunities for the use of law to promote social justice and democracy, there are probably fewer lawyers practising in this area than was the case under apartheid.”

In response, the Bar Councils and Law Societies of South Africa, the bodies that govern legal practitioners, have implemented mandatory requirements for pro bono work as a strategy for expanding access to justice. Their rules require that attorneys (solicitors) and advocates (barriters) do a minimum of 20-24 hours of pro bono work each year.

Controversy has been sparked by the proposed Legal Practice Bill, which aims to restructure the legal profession, the governing bodies, and their rules. In particular, the Bill makes provision for mandatory community service by legal practitioners, but makes no mention of pro bono work.

The two are distinct in that community service would be a component of the practical legal training of candidate legal practitioners and a requirement for their qualification, whereas pro bono services are provided free of charge to indigent clients by qualified practitioners. Pro bono obligations persist throughout a practitioner’s career and refresh each year. Community service requirements would constitute a once-off obligation that would be fulfilled by the time of qualification.

However, the worry is that the requirement of community service will displace that of pro bono work. This would be inadequate because trainee attorneys and advocates do not have the skill to effectively provide equivalent services. Hence, the appropriate solution would be for the Bill to make provision for compulsory pro bono service by practitioners each year, in addition to community service for trainees.

At the very least, the inclusion would signal the official desire for the South African legal community to return to the “ethos that existed at a time when lawyers were resisting and fighting apartheid. There was a sense of mission and of moral duty” (Sarkin).

Emma is a MPhil candidate in Law at St Cross College, University of Oxford and a former clerk to Justice Edwin Cameron at the Constitutional Court of South Africa.

Pro Bono Law in New Zealand: A Work in Progress
By Max Harris | 12 November 2012

New Zealand has a strong history of individual lawyers taking on pro bono cases and doing law in the public interest.

In the 1970s, Sir Edmund Thomas (who went on to become a strong liberal judge on the New Zealand Court of Appeal) led pro bono work to raise awareness of apartheid South Africa and to protest New Zealand’s ties with the country. The current Chief Justice, Sirian Ela, helped to spearhead litigation in the 1980s to protect indigenous rights, working with newly-retired Appeal Judge David Baragwanath (now President of the Special Tribunal for Lebanon). And since the passage of the New Zealand Bill of Rights Act 1990, there has been further pro bono litigation, particularly on issues of free speech (for example, a flag-burning case, Morse, that was driven by pro bono advocacy) and discrimination.

What New Zealand lacks are structured support networks and funding pools for pro bono lawyering. To be sure, New Zealand’s three largest law firms (the commercial firms Russell McVeagh, Bell Gully, and Chapman Tripp) all now have formal pro bono teams, with Chapman Tripp being the first of these firms to found a pro bono team in 2003. Additionally, particular organisations able to source funds (such as the Child Poverty Action Group, the anti-abortion lobby group Right to Life, and Greenpeace) have taken major cases to the Court of Appeal and Supreme Court in the last few years, drawing on pro bono legal work. But the commercial pro bono teams are small by international standards, and the non-governmental organisations taking cases are few in number. There is, importantly, no single clearing house or public interest law centre (outside of small and under-resourced community law centres) that might match up lawyers with pro bono work. As a result, pro bono law in New Zealand is patchy and organized in an ad hoc way.

There are some promising developments, which are worth mentioning. The New Zealand Centre for Human Rights Law, Policy and Practice was set up this year under the auspices of the University of Auckland, with the aim of being ‘a focal point for research, education, community-service, and a range of human rights activities in New Zealand and the wider Asia Pacific region’. The Centre has been mooted as providing a financial and intellectual base for pro bono human rights litigation in New Zealand. The New Zealand Human Rights Lawyers’ Association was also established in 2012, by younger lawyers in Auckland, and has similar aims. These organisations are both in their infancy and focus exclusively on human rights cases. Amongst younger people and in the criminal justice sphere, the organisation JustSpeak (set up in 2011) has sought to build awareness of criminal justice issues and encourage more lawyers to contribute to criminal justice policy, though it too has a confined mandate. Lastly, a group loosely calling itself ‘Pro Bono Law New Zealand’ has recently applied for major grants to set up a nationwide network of pro bono lawyers; though at the time of writing, the group was still awaiting a response from potential donors.

It can only be hoped that these encouraging developments continue. But there is also a need for serious thought to be put into changing the legal framework around pro bono law work in New Zealand. It is not compulsory for practicing lawyers to do pro bono law work at present. The New Zealand Attorney-General also suggested in 2010 introducing a condition in government legal contracts for firms providing government legal services to complete a minimum amount of pro bono work; yet nothing has come of that suggestion.

Without changes to the institutional framework, pro bono law in New Zealand will continue to be sustained by altruistic and well-connected individuals. And that reliance on lawyer-heroes, as opposed to groups of public-spirited lawyers or a properly-established climate of pro bono law, may not prove to be a sustainable way to achieve a pro bono legal culture in New Zealand.

What is needed in New Zealand in the field of pro bono law is leadership from government and the legal community. Without that leadership, the project of building a truly public-spirited community of lawyers remains a work in progress.

Max is a BCL candidate at Balliol College, University of Oxford and is a former co-chair of the JustSpeak Steering Group.
Oxford Pro Bono Experiences: Interning
By Ingrid Cloete | 7 November 2012

Editor’s note: Oxford Pro Bono Publico (OPBP) provides annual grants to allow students to undertake unpaid or poorly paid public interest law work at organisations and law firms across the globe. Ingrid Cloete, one of the successful applicants in the 2012 grants process, writes about her experiences working at the Centre for Child Law in South Africa.

When the OPBP committee put out a call for applications for the OPBP internship grant earlier this year, I jumped at the opportunity. By the end of my first year at Oxford, I was itching for some ‘real’ law – something beyond the textbooks, cases and coffee-fuelled discussions that dominated my BCL. South Africa has an incredible array of diverse public interest legal organisations that do pro bono work to promote human rights. As a South African student planning to return to the country on completion of my MPhil, the opportunity to experience public interest law first-hand was too good to pass up.

The Centre for Child Law at the University of Pretoria was my first choice.

The Centre has used strategic litigation to promote the rights of children in South Africa, using law to effect societal change rather than merely resolving individual disputes. The Centre has been involved in a diverse array of cases, from those relating to children’s rights, to freedom of expression of children. As an aspiring advocate, aiming to specialise in human rights, constitutional and administrative law, interning at the Centre gave me valuable exposure to human rights litigation.

I spent six weeks at the Centre and was involved in researching a number of important legal questions, including:

- To what extent does customary law provide for the protection of children’s best interests, and which aspects of customary law have been accepted, rejected or developed by the South African courts?

I was also very fortunate to be able to accompany the Centre’s attorneys to court. It was an incredible experience to be working in an office surrounded by engaged legal professionals, committed to promoting human rights in South Africa. This allowed me to truly appreciate the value of pro bono legal work, particularly in the area of children’s rights.

For example, in 2012, the Centre obtained an order from the Constitutional Court that children’s interests are to be taken into account in assets forfeiture cases. In that case, a house had been seized under assets forfeiture legislation without taking into account the impact this would have on the children living in the house. This change in the law will have a wide impact for similarly situated children in future – and would not have come about without pro bono assistance. South Africa does not provide legal aid for cases other than criminal cases, which means that, without the assistance of pro bono groups such as the Centre for Child Law, many issues would never be argued. Added to this is the fact that children are particularly vulnerable, and lack access to legal services. Pro bono assistance is thus essential to promoting their interests.

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Oxford Pro Bono Experiences: Volunteering
By Chintan Chandrachud | 6 November 2012

It has been almost a year since I first volunteered to assist Oxford Pro Bono Publico (OPBP) with a report on food marketing and advertising, submitted to the United Nations Special Rapporteur on the Right to Food. Twelve months and several projects later, I continue to remain actively involved with the organisation, finding that every project provides a unique opportunity for learning and a rich set of experiences. OPBP provides a group of postgraduate law students and faculty members at the University of Oxford dedicated to the pro bono practice of public interest law. It typically undertakes pro bono research on a wide variety of cases every year. I had the opportunity to contribute in areas as diverse as hate speech laws, parliamentary privilege and arbitrary executions.

Several factors motivated me to volunteer for OPBP projects on a regular basis. In the academic community at Oxford, I began to wonder whether my research and study had any immediate impact on the practice of law. OPBP bridged this gap between theory and practice. My research and analysis of the law was not only academically rewarding, but also had a visible impact on the development of the law in different jurisdictions. It was very satisfying to research customary inheritance law and to see that research put to use in the High Court of Botswana’s judgment affirming equal inheritance rights for men and women, barely a few weeks later! I also found volunteering for pro bono projects a productive way of giving back to the community through the medium in which I am most comfortable.

There is much to be gained from volunteering for OPBP’s projects. Apart from seeing your research produce results in practice, volunteering makes you stretch the limits of your academic knowledge and think strategically about how the law works in a given situation. You get the privilege of interacting with some of the finest practitioners, jurists and academics from across the world. At the commencement of Pro Bono Week in the UK, I encourage students to contribute to pro bono projects undertaken by OPBP and other organisations.

Chintan is a MPhil Candidate in Law at the University of Oxford. He has been an invaluable member of OPBP, contributing to five research projects in a year.

OPBP wins LawWorks & Attorney General’s Pro Bono Award
By Laura Hilly | 27 March 2013

Oxford Pro Bono Publico (OPBP) was awarded the ‘Best Contribution by a Team of Students’ award in the 2013 LawWorks & Attorney General Student Pro Bono Awards, hosted at the House of Commons on Monday.

Now in its 13th year, OPBP relies upon the dedication and commitment of Oxford law graduate students and Faculty members to provide research and litigation support to NGO’s, legal centres, barristers and solicitors acting on a pro bono basis. The judging panel was extremely impressed with the international reach of OPBP’s work.

OPBP partners with organisations around the world to deliver high quality pro bono assistance. In the past sixteen months, OPBP completed 12 pro bono projects, involving 86 student volunteers (almost one third of graduate students from the Faculty of Law), providing over 960 hours of free legal research.

Sarah Sephton, Director of the Legal Resource Centre in Grahamstown, South Africa, supported OPBP’s nomination. She expressed her thanks for OPBP’s continuing work for LRC, noting that:

‘It has been a very successful collaboration between the LRC and OPBP. By nature and by choice LRC cases are factually and legally complex. We often face opponents who are better resourced. In this climate, having access to the best legal minds in the world through OPBP gives us an invaluable edge when we prepare for our difficult cases.’

In 2011, OPBP launched an Internship Programme to provide funding to graduate students to assist them in undertaking unpaid or poorly paid public interest internships around the world. OPBP has awarded 13 grants to date, supporting internships at organizations such as the Centre for Child Law in Pretoria, South Africa; the Centre for Policy Alternatives in Sri Lanka; the AIRE Centre in London; and Human Rights Watch in Washington DC. The impact of these opportunities on the students and the organisations they support was celebrated at the award ceremony last night.

The annual LawWorks & Attorney General Student Pro Bono Awards recognise and celebrate pro bono contributions made by students and law faculties in the United Kingdom. With devastating cuts to Legal Aid funding about to take effect, there has never been a more important time to reflect upon the importance of pro bono legal work. In his opening remarks, Paul Newdick CBE, Chairman of LawWorks, gave a sage reminder of the need to continue pro bono efforts in the time of austerity. He was clear to point out that pro bono work, while essential, can only supplement government funded legal aid and should not be seen as a replacement: Attorney-General Dominic Grieve QC MP emphasised the defining impact that pro bono work can have upon a law student’s career and emphasised that pro bono work, at all levels, should be encouraged and supported.

This is the second time that OPBP has received this award, having been a recipient in 2007.
The Strasbourg Court, the ‘Exhaustion of Domestic Remedies’ Rule, and the Principle of Subsidiarity: Between a Rock and a Hard Place?
By Natasha Simonsen | 18 March 2013
The recent judgment of the European Court of Human Rights in Er & Ors v Turkey (app. no. 23016/04) illustrates the tension between the principle of subsidiarity and the trend in the Court’s case law towards relaxation of procedural constraints on access to justice.

Legal Aid in India: The Need for Strong Laws and High Minds
By Persis Sidhva | 18 November 2012
The Indian legal system has been ineffective in promoting a pro bono culture. The Legal Services Authorities Act 1987 provides for free legal services to Scheduled Castes, Scheduled Tribes, women and children without any qualification regarding their financial status, persons with disabilities, victims of human trafficking, persons with an annual income less than Rs. 9,000/- (approximately 100 GBP) or such other higher amount as may be prescribed, amongst others. It is well documented that advocates selected to be part of the legal aid panels are paid paltry sums for each case and successive governments have failed to provide the necessary infrastructural facilities and wage, to improve the quality and skills of these advocates. As a result of the apathy towards this vital section of the legal system, these legal aid panels have failed to attract the best talent from the legal profession. This has resulted in inequality of representation in Court between the contesting parties, thereby negating the very purpose of this legislation.

UN Immunity, Access to Justice and the Haitian Cholera Epidemic
By Hannine Drake | 11 November 2012
A few weeks ago a group of Haitian cholera victims took the extraordinary step of filing a class action suit against the United Nations in the Manhattan Federal District Court. The claimants ultimately seek compensation from the United Nations, alleging on the basis of overwhelming scientific evidence that the Haitian cholera outbreak was inadvertently caused by Nepalese peacekeepers employed under a UN peacekeeping mission in Haiti. The University base close to a tributary of the Artibonite river on which Haitians rely for daily use. Evidence shows that poor sanitation at the UN base caused human waste to contaminate the river, thereby triggering the first cholera cases in Haiti in more than a century and to date infecting more than half a million people. This case raises important questions around the extent of UN immunity and access to justice for victims of peacemaker wrongdoing.

The case before the Court concerned a series of claims arising out of his arrest and detention (Article 5), disappearance and presumed loss of life (Article 2), and ill-treatment in custody by Turkish gendarmes (Article 3). The significance of the case lies in the relaxed approach adopted by the ECHR to the ‘exhaustion of domestic remedies’ rule (Article 35(1)) and its implications for the principle of subsidiarity.

The principle of subsidiarity means that the primary responsibility for protecting human rights lies with states: only once all domestic remedies have been exhausted can an application be made to the Court. The application must also be made within six months of the failure of the last domestic remedy. The objectives are to encourage approaches to disputes in domestic courts before coming to the Court, and second, to bring those applications promptly. The Court has, historically, interpreted both principles fairly liberally (Varnava & Ors v Turkey, among many other authorities).

However, the massive increase in the Court’s docket (there are currently more than 128,000 pending cases: see here) has created new pressures. The recent Brighton Declaration proposes to reduce the six-month rule to four months. A reworking of the rule in principle, but is made more difficult by the trend in the Court’s case law, exemplified by Er & Ors v Turkey, towards relaxation of the domestic remedies rule.

In Er, the critical issue for the Court was when the six-month clock should be taken to have started ticking. Turkey submitted that it should be measured from the time that the Hakkari Civil Court certified Ahmet Er’s presumption of death in May 2003 (the applicants didn’t lodge their claim until May 2004). But the Court said that was not a relevant ‘domestic remedy’, because it was obtained for the purposes of property and custody matters, rather than (presumably) for obtaining a remedy for his disappearance and death: [49]. Where the case, as here, concerns a disappearance, there is a state of ignorance and uncertainty and, by definition, a failure to account for what has happened, if not an appearance of deliberate concealment and obstruction on the part of some authorities [56], and so there must be ‘a less rigid approach when examining the issue of compliance with the six-month time-limit’ [57]. Here, it was enough that the applicant had no reason to believe that the accused had failed to report. Judge Sajó, in a separate concurring opinion, cautioned that even this generous ten-year period for lodging applications with the Court should not be interpreted too rigidly.

Given that the existing, literally applied, restrictions on admissibility are nevertheless opposed by some members of the Court as being too narrow, the success of any future attempts to reduce the six-month rule to four months must be cast into doubt. The Court has clearly not been a fair, competitive and transparent selection process, adequate monitoring of the empanelled advocates’ work and an effective complaints mechanism (easily accessible to applicants) are also recommended. Further, law firms must incorporate pro bono work within their current structure. Changes in the law as well as in attitudes within the legal profession are essential to ensure a sustainable system of legal aid and access for justice to all in a country steeped in caste, class, economic and gender inequality.

Persis Sidhva graduated from Government Law College, Mumbai in 2011 and works with Majlis, an organisation committed to the protection and promotion of women’s rights through legal representation, legal aid and training.

Access to Justice and Human Rights
Chapter three

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The Convention on Privileges and Immunities of the United Nations (‘Convention’) protects the UN from legal process but it also requires the UN to provide for ‘appropriate modes of settlement’ of ‘disputes arising out of contracts or other disputes of a private law character to which the United Nations is a party’. Similarly, most status of forces agreements (‘SOFAs’) in terms of which the UN deploys peacekeepers to host states, provide that peacekeepers (who are not agents of the UN but agents of their sending states placed at the disposal of the UN) have almost complete immunity from the local laws and courts of the host state. To compensate for this immunity, the SOFA requires the establishment of a ‘standing claims commission’ to consider ‘private’ claims against the UN or any member state. Yet, again, such a commission has never been established. The Convention and the SOFA thus together create a ‘double immunity’ on the part of the UN and peacekeepers. And, as no alternative forum or commission has been established despite binding obligations to do so, the UN’s inaction has created a ‘double impunity’.

In light of the above, correspondence from the UN to the claimants’ attorneys make for interesting reading. The UN stated, without providing reasons, that victims’ claims for compensation are not admissible because they would ‘necessarily include a review of policy and practical matters’ and are therefore not of a private nature as required by the Convention.

As the claimants have pointed out, there are several problems with this view including the following: first, personal injury claims are textbook private claims. Second, the UN has previously admitted that it has never established a standing claims commission in peacekeeping history despite a clear obligation to do so. There is no basis in law on which not to establish this commission. Third, it is not for the UN to dampen the enthusiasm of peacekeepers whether the claims are receivable, but rather for the claims commission to decide on admissibility once established.

To date there has not been any robust response from the UN regarding its failure to create a claims commission, or its responsibility for the cholera epidemic.

This effective radio silence creates the unfortunate inference that the unexplained UN inaction is motivated by a fear of claim proliferation. Until the UN establishes an alternative forum, claimants in host states will remain precluded from accessing justice.

The detailed history and progress of this case can be followed on the UDHR’s website.

Hannine Drake is a South African lawyer in private practice in Johannesburg. South Africa and an LLM candidate with a focus on human rights at WITS University. South Africa. She writes in her personal capacity.

Access to Justice and Human Rights
Chapter three
Arthur's first career was as a practising advocate at the Johannesburg Bar.

He had a stellar commercial practice — and some very uncommon clients. The Rivonia trial is well known. Arthur took an important position as a leader of the Bar. Much of the legal profession was cowed by those who held power, and was subservient to them. It was, frankly, a degrading spectacle. Much of the profession abandoned those of its members who were harassed, detained, banned or assassinated. Arthur worked to build the institution of an independent and fearless profession, which served the people and which served justice. He saw this as a foundation of the rule of law.

He returned to this theme in his last major public address, just three weeks ago on 9 November. He spoke at the AGM of the Cape Law Society on “The rule of law: the importance of independent courts and legal professions”. He pointed out that the profession is under an obligation to serve the public interest, that it does not do so if it serves only the elite in our society, and that legal services have to be available to all who need them. And he said that an independent legal profession is now an imperative of the Constitution. He quoted the Chief Justice of New Zealand: “Effective judicial process cannot be obtained from independent judges without independent lawyers.”

Another institution to which Arthur devoted much of his life was the Legal Resources Centre. Many people were involved in building it and doing its work. None of them would deny for a moment that Arthur was its inspiration, its leader, and the key to its success. He saw the need for a durable institution committed to ensuring that those who most need it, receive the protection of the law. He built it patiently, skillfully, carefully. The result of that careful work is that the organization stands 33 years later, still committed to the mission for which it started in 1979. It is the same work, for the same people. Only the legal and political context have changed.

Arthur then became involved in institution-building on a grander scale: he started his constitutional work. While we were still in the throes of apartheid, he was an adviser to the Namibian Constitutional Assembly. What was to come next, of course, was his massive work in our own constitutional negotiations and the drafting of the interim Constitution. His hand is clearly visible in the text which was finally approved: his fingerprints are all over the document. You see them in the care, precision, and attention to detail; and you see them in the Constitution’s recognition that we need to go beyond a typical liberal constitution, which aims to limit the power of the state. Arthur understood that we needed a constitution which recognizes the need to empower the state to address and redress the consequences of centuries of dispossession and discrimination. We needed a constitution which would provide a framework for the democratic transformation which was yet to come. The interim Constitution, and its successor the final Constitution, are among Arthur’s most enduring legacies. And then came his masterpiece — the Constitutional Court. The first Constitutional Court consisted of a remarkable group of people. Arthur’s job was to weld them together, to lead and yet again to build institutional structures and procedures which would be durable. And what a success he made of it. It is not just a matter of the penetrating and profound judgments which he wrote. Perhaps even more important, Arthur understood how to build this institution, how to make it work, how to make it durable, and how to lead it.

It is an extraordinary story of achievements. Each one of them, standing on its own, was remarkable. Who in one lifetime could achieve that much? How did Arthur do all of this?

First, there was the transparent integrity in everything he did. You could trust Arthur Chaskalson. He was a person of rock-solid integrity and moral principles. He began last week “Whenever I am not sure, I ask myself what Arthur would say.”

Second, there was the way he engaged with people. It was a respect and concern for people, not theoretical philosophies, that lay at the heart of his life and his work. His core belief was that it is human beings that are really important in life — and therefore also in the law. He put people at the centre of everything which he did. It was by putting people at the centre, that he was effective. It was his respect for people that made him such a brilliant teacher. He wanted to listen to your views; he listened to you carefully and respectfully; and he taught you — not didactically, but by example.

It was also people who caused Arthur the most pain. It caused him deep pain when we failed to live up to the promise we made to each other in our Constitution, that we will build a society in which all can live in freedom with dignity. It caused him pain to see cynical betrayal of the sacrifices which were made in the struggle for democracy. Greed caused him pain, corruption caused him pain, and lies in our public life caused him pain. There was much around us at the moment that caused him pain, as he made clear in his speech to the Cape Law Society. But through that pain, he retained hope and confidence in the people of the country which he loved. He believed that we would yet put this behind us, because he believed in people.

By Geoff Budlender | 7 December 2012

‘He Believed in People’: Remembering Arthur Chaskalson

Geoff Budlender SC is one of South Africa’s leading human rights advocates and a co-founder of the Legal Resources Centre.

Remembering Former Chief Justice of the Constitutional Court of South Africa Pius Langa

By Sasha Stevenson | 19 August 2013

Justice Langa played an important role in the development of South Africa’s constitutional democracy and he touched many people’s lives.

In the last few weeks, much has been said about Justice Langa’s remarkable life. About his having to leave school at age 14 and get a job to pay for his education. About his climb from ship factory worker to court messenger and interpreter, to prosecutor, to advocate, to Constitutional Court Judge, and finally to Chief Justice. Justice Langa has been lauded for representing so-called terrorists during apartheid, for establishing the National Association of Democratic Lawyers and for his role in the drafting of the South African Constitution. As a jurist, Justice Langa wrote important judgments drawing on different aspects of South African law and policy but with the connecting thread of a deep concern for the people at the heart of the cases and awareness that the law is a tool for the improvement of people’s lives.

It was not likely that the relatively new Constitutional Court would escape being at odds with the executive and Justice Langa was at the helm during some of the Court’s most difficult years. He had to deal with increasing criticism of the judiciary by people in high political office. He led the Court through a scandal involving the allegation that a High Court judge attempted to influence sitting Constitutional Court judges in a case involving the country’s president. Justice Langa made it clear that the integrity of the bench is paramount but that judges are not above fair and reasonable criticism saying, with characteristic humour, “I think judges should have a thick skin and, having said that, I’m not encouraging people to call us names.” His quiet but steady leadership no doubt eased the considerable burden on the other judges of the Court.

Apart from his many professional achievements and his astonishing career, Justice Langa was a thoroughly wonderful person. He made those around him feel loved and important. He had a great, wry sense of humour and laughed loudly. He loved sports and would often insist on watching tennis or Formula One with guests in his home.

Justice Langa was a particular good listener. One of those wise old men who you feel should spend all his time imparting his wisdom but instead spends his time listening. This quality alone would have made him a good judge — open to different views but steadfast in his principles. But there was more to him. In a celebrated speech on transformative constitutionalism, Justice Langa acknowledged “we all enter any decision with our own baggage, both on technical legal issues and on broader social issues. While the policy under apartheid legal culture [and, dare I say, many legal cultures] was to deny these influences on decision-making, our constitutional legal culture requires that we expressly accept and embrace the role that our own beliefs, opinions and ideas play in our decisions.”

Justice Langa understood the role of the individual and the role of politics in law. He understood his role in the transformation of South Africa.

Most of all, he played his role at the Constitutional Court not for the intellectual reward of it but because the laws are about people, and for people.

Sasha Stevenson is an attorney at SECTION27, a public interest law centre in South Africa. She worked for former Chief Justice Pius Langa as a Law Researcher at the Constitutional Court in 2009.
Marikana Funding Decision – A Victory for Justice, Fairness and Equality
By Shanelle van der Berg | 28 October 2013

In the wake of the Marikana tragedy, during which 40 striking mineworkers were shot and killed by the South African Police Service ("SAPS"), the Commission of Inquiry subsequently established by the President has been marred with problems.

On 1 October 2012, its very first day of operation, the Inquiry continued with its proceedings despite the fact that the families of those killed were not present – the Commission and the government that had caused their loved-ones' deaths had failed to invite them. Almost a year later, the socio-economic disparity that arguably led to the ill-fated protest in the first place again surfaced when the legal representatives of the injured and arrested miners were forced to withdraw from the proceedings due to a lack of funding. The legal representatives of the family members of the deceased withdrew in solidarity. Meanwhile, SAPS and Lonmin, the mining corporation at which the strike occurred, continued to be represented by adequate legal teams that cumulatively consist of twelve advocates.

To continue with an Inquiry aimed at uncovering the truth behind the largest use of force by South African police against civilians “since the Sharpeville massacre of 1960” in the absence of key participants, smacks of unfairness.

Not only were those injured and arrested directly affected by the incident, but the Inquiry’s findings can have serious repercussions for their future criminal liability or any claims for civil damages they may wish to institute against the SAPS.

The fact that the blatant inequality of such a state of affairs stems directly from their indigence and socio-economic vulnerability renders their exclusion from the Inquiry even more untenable. The recent decision by the Pretoria High Court, ordering Legal Aid SA to fund the legal representation of the injured and arrested miners, is therefore to be wholeheartedly welcomed.

The Court embarked on a thorough examination as to the implications of government’s refusal to fund legal representation for the injured and arrested miners’ rights of access to courts and equality. With regards to the former, the Court held that the surviving miners’ direct and substantial interest in the proceedings, and findings of the Inquiry, their vulnerability as an indigent group facing possible criminal liability, and the complex nature of the proceedings, all pointed to the possible infringement of their right of access. Moreover, the Court acknowledged the doubt cast on the ‘equality of arms’ of the situation when it stated:

“Our society is premised on the constitutional values and principles of social justice, fairness [and] equality … A process which enables only the police, other State organs and a multi-national corporation to be legally represented to the exclusion of the survivors of the police shooting is ‘entirely inconsistent with the principles and values that underlie our Constitution.’

Furthermore, the Court found that Legal Aid SA’s decision to fund legal representation of the families of the deceased, but not if the injured and arrested miners, was irrational and infringed their constitutional right to equality. Significantly, the Court held that the fact that its decision would have budgetary implications could not constitute a bar to an effective remedy where fundamental rights were infringed.

The Court’s judgment is even more commendable in that it follows the Constitutional Court’s earlier dismissal of an application for interim relief in the funding saga. Whereas the Constitutional Court’s previous judgment has been subject to criticism, the High Court’s decision heralds a victory for justice, fairness and equality.

Shanelle van der Berg is a doctoral candidate and member of the Socio Economic Rights and Administrative Justice research group at Faculty of Law, Stellenbosch University, South Africa.
## Conflict, Security and Human Rights

Chapter four

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>Development and Conflict – By Helen Clark, Administrator of the United Nations Development Programme and former Prime Minister of New Zealand</td>
<td>By Helen Clark</td>
</tr>
<tr>
<td>60</td>
<td>Extraterritorial Jurisdiction Under the ECHR – Smith (and Others) v MOD (2013)</td>
<td>By Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>61</td>
<td>A President in the Dock?</td>
<td>By Lionel Nichols</td>
</tr>
<tr>
<td>61</td>
<td>Independent Review of Australian Anti-Terrorism Laws: An Effective Oversight Mechanism?</td>
<td>By Jessie Blackbourn</td>
</tr>
<tr>
<td>61</td>
<td>Justice and Security Act 2013: Impact on Open Justice and Trial Rights</td>
<td>By Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>62</td>
<td>So Near and Yet So Far: The International Arms Trade Treaty and Human Rights</td>
<td>By Gilles Giacca</td>
</tr>
<tr>
<td>63</td>
<td>The Arms Trade Treaty: A Historic Achievement</td>
<td>By Gilles Giacca</td>
</tr>
<tr>
<td>63</td>
<td>UN Arms Trade Treaty Opens for Signature</td>
<td>By Gilles Giacca</td>
</tr>
<tr>
<td>64</td>
<td>Drone Strikes and Domestic Crimes?</td>
<td>By Lord Ken Macdonald</td>
</tr>
<tr>
<td>64</td>
<td>Killer Robots in the Cross-hairs of New NGO Campaign</td>
<td>By Conor Fortune</td>
</tr>
<tr>
<td>65</td>
<td>The 'War Against Terrorism' and the Decade of Exceptionalism</td>
<td>By Luke Rostill</td>
</tr>
<tr>
<td>65</td>
<td>Justice and Security Bill: Report of the Joint Committee on Human Rights</td>
<td>By Hayley Hooper</td>
</tr>
<tr>
<td>66</td>
<td>A Step Closer to Secret Justice?</td>
<td>By Claire Overman and Neil Shah</td>
</tr>
<tr>
<td>66</td>
<td>A Special Relationship? Preserving the Human Rights of Terrorist Suspects in Extradition Cases</td>
<td>By Claire Overman</td>
</tr>
<tr>
<td>67</td>
<td>John Eekelaar on the Response to Abu Qatada's Deportation</td>
<td>By John Eekelaar</td>
</tr>
<tr>
<td>67</td>
<td>The Challenge of Human Security</td>
<td>By John Bond</td>
</tr>
<tr>
<td>67</td>
<td>McCaughey and Others v UK: the Requirement of Prompt Investigation into State Killings</td>
<td>By Claire Overman</td>
</tr>
<tr>
<td>68</td>
<td>UN Resolution on Women’s Involvement in Conflict-Prevention: a Move Towards Participative Equality for Women in Conflict Zones</td>
<td>By Claire Overman</td>
</tr>
<tr>
<td>68</td>
<td>Al-Jedda: Judicial Commitment to the Universal Application of the Right to a Nationality</td>
<td>By Claire Overman</td>
</tr>
<tr>
<td>69</td>
<td>German Federal Constitutional Court Says No Civilian War Damages for NATO Air Strike in Serbia</td>
<td>By Menelaos Markakis</td>
</tr>
<tr>
<td>69</td>
<td>Guantanamo Military Commissions: Reflections from a Legal Observer – Part 1</td>
<td>By Dawinder Sidhu</td>
</tr>
<tr>
<td>69</td>
<td>Guantanamo Military Commissions: Reflections from a Legal Observer – Part 2</td>
<td>By Dawinder Sidhu</td>
</tr>
<tr>
<td>70</td>
<td>Guantanamo Military Commissions: Reflections from a Legal Observer – Part 3</td>
<td>By Dawinder Sidhu</td>
</tr>
<tr>
<td>70</td>
<td>Humanitarian Intervention? – International Law and the Non-Use of Force in Syria</td>
<td>By Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>71</td>
<td>Kadi II: Fundamental Rights and International Terrorism</td>
<td>By Menelaos Markakis</td>
</tr>
<tr>
<td>71</td>
<td>The Santos-FARC Peace Talks: Human Rights Challenges in Colombia</td>
<td>By Andrei Gomez-Suarez</td>
</tr>
</tbody>
</table>
Development and Conflict – By Helen Clark, Administrator of the United Nations Development Programme and former Prime Minister of New Zealand

By Helen Clark | 5 March 2013

One does not need to look for long for examples of conflict impacting on development. Take the case of Mali: a year ago, conflict in the north of the country and a military coup detailed two decades of constitutional government and development work. Election campaigns were scheduled in Mali a month after that coup took place – and the President, adhering to the Constitution, had clearly stated that he would not be a candidate.

Mali’s experience is not atypical or unique – it is an example of the types of conflicts the world is increasingly witnessing. The conflict there is not a war between states, but rather, within a state. It has regional dimensions – in this case the upheaval in Libya had spill-over effect for the north of Mali, and Mali’s regional neighbours have been very engaged in the debate about what to do. The battle lines of the conflict were not clearly drawn, either territorially or in terms of issues, suggesting more complex dynamics at play.

Mali’s road back from this combination of violent conflict and constitutional crisis is not an easy one. It will require international support for some time, including for resuming development progress.

So what form might such support take in countries like Mali which are working their way back from conflict and instability?

Undoubtedly roots of discontent often do lie in poverty; but political and social exclusion and inequality can also be powerful motivators of upheaval leading to conflict as has been seen in a number of countries in recent times. At UNDP, therefore, we do not see reductions in poverty per se as necessarily reducing the chances of violent conflict. Instead, we think conflict and poverty might be better perceived as symptoms of a cluster of problems – including weak governance and institutions and significant levels of inequality related to a combination of economic, political, and social exclusion.

UNDP’s work has long been guided by a belief that transformation of governance systems to ensure that institutions are effective, inclusive, accountable, and responsive, is essential for restoring the trust and confidence needed for peace. More broadly, UNDP’s recent thinking and work is also guided by the following two assumptions:

First, that greater emphasis must be placed on building resilience to shocks and vulnerability – whether economic, political, or environmental, including through more effective and inclusive governance systems.

The risk of conflict or violence can be addressed just as that posed by natural disasters can be. One can strengthen river banks and build levees to protect against a flood. Equally, one can strengthen institutions, equip communities with the skills to prevent conflict and the technology needed to monitor and predict where violence may occur in the hope of minimizing its impact, and develop tools which support the mediation and resolution of conflict where it arises.

Second, the complex causes of violence cannot be addressed with a single approach or a series of interventions. Prevention, as well as early recovery, requires collaborative effort by a range of actors.

The range of potential causes of conflict and armed violence needs to be tackled in integrated ways, and the work of humanitarian, peacekeeping, and development actors should be mutually reinforcing. Comprehensive approaches can include violence prevention and crime control measures to further human security and protect human rights; targeting social cohesion, along with efforts to combat drug trafficking, the proliferation of illegal firearms, and human trafficking; and addressing the particular needs of youth, women, and migrants.

While inter-state wars have declined in number, many states and communities around the world are destabilized by violent conflict and crime, and/or by inter community tensions – including recurring conflicts over land, natural resources, and identity.

UNDP sees the prospect of peace and sustainable development deriving from the same set of variables: the ability of all people to have voice and be able to participate in decisions affecting their lives; the level of effectiveness and inclusiveness of institutions; and the ability to manage emerging risks and crises.

There are no shortcuts to building enduring peace. It requires investment in good governance, improving the conditions in which people live, reducing inequality, and addressing political, social, and economic exclusion.

Article 1 ECHR enshrines an obligation on states to secure to those within their jurisdiction the rights and freedoms set out in the Convention. The claimants in Smith argued that the UK government failed to take reasonable measures to safeguard the lives of soldiers required to patrol in lightly armoured vehicles, which provided no significant protection against improvised explosive devices (IEDs) that caused the deaths in question. In order to make this claim (relating to the substantive aspect of Article 2), the claimants had to show that the UK government had jurisdiction and the Convention applied extraterritorially.

Lord Hope, delivering the leading judgment on this issue, analysed prior UK and European Court of Human Rights (ECHR) jurisprudence. The ECHR held in Bankovic v Belgium that Article 1 of the ECHR establishes an ‘essentially territorial’ notion of jurisdiction to reflect the term’s meaning in public international law (under the ILC Articles on State Responsibility). States could, however, exercise jurisdiction extraterritorially in exceptional circumstances. It was suggested in Bankovic that this would be limited to where states exercised sufficient control to enable them to provide the full package of Convention rights to everyone in the area, generally when they exercised ‘public powers’.

Since Bankovic, however, the ECHR has moved away from this narrow spatial interpretation of jurisdiction, towards acceptance of a personal model based on authority and control. Several cases (such as Issa v Turkey, Ocalan, and Medvedev) focussed the level of state control over the individuals affected, rather than requiring overall control of an area. In Al-Skeini v UK, it was expressly held, in direct contrast with dicta from Bankovic, that obligations under the Convention could be ‘divided and apportioned’ to address to individual situations in which the state exercised authority and control over persons at the time of alleged violations.

Turning to the Smith case itself, at the time when IEDs caused the deaths of soldiers patrolling in lightly armoured vehicles in Iraq (2005/06), the UK no longer exercised ‘public powers’ in the region (as it had in Al-Skeini v UK), the Coalition Provisional Authority had ceased to exist and local administration had passed to the interim Iraqi government. But the Supreme Court held unanimously that the UK exercised extraterritorial jurisdiction over the soldiers at the time of their deaths, based on the authority and control which the UK, through the chain of military command, had over the individuals.

The decision of the Supreme Court is to be praised for a thorough and conscientious appraisal of a complex and contradictory body of prior jurisprudence. It is argued that the court was correct to hold that the UK exercised extraterritorial jurisdiction at the time in question. This conclusion is consistent with the development of the personal model of jurisdiction and the division and tailoring of obligations owed under the Convention. The analysis appears very similar to the ‘functional approach’ to jurisdiction – based on the exercise of authority and control – advocated by Judge Bonello, concurring in Al-Skeini v UK.

The decision is a positive step towards ensuring that the human rights obligations assumed by states, in the words of Judge Bonello (Al-Skeini v UK at [O-II18]), are not made “casual and approximate depending on geographical co-ordinates”.

It advances the supremacy of the rule of human rights law, wherever in the world a state chooses to assert its authority.

Natasha Holcroft-Emmess is a BCL Candidate and frequent contributor to the Oxford Human Rights Hub Blog.
Independent Review of Australian Anti-Terrorism Laws: An Effective Oversight Mechanism?
By Jessie Blackbourn | 6 June 2013

On Tuesday 14 May, the second report of Australia’s Independent National Security Legislation Monitor was tabled in the federal parliament. The report recommended sweeping reforms of a number of Australia’s most contentious anti-terrorism laws, including those providing for control orders, preventative detention orders, and the questioning and detention of non-suspects by the Australian Security Intelligence Organisation (‘ASIO’).

The Independent Monitor has provided detailed, well-reasoned proposals for the reform of a number of Australian anti-terrorism laws which, based on all the available evidence, he considers to be unnecessary, disproportionate and ineffective for the purposes of preventing terrorism. It is to be hoped that the Australian government does not adopt the same tactic as the UK, but instead pays heed to the Independent Reviewer’s proposals, or at least considers them. This has meant that anti-terrorism law reform in the UK has progressed at a slow pace.

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The renewed United Nations Conference on the Arms Trade Treaty opened on 18 March 2013 for a total of nine days. Optimism is running high that despite the very short time frame and the unseemly collapse of negotiations in July 2012, an agreement can be secured this time around. There is currently no international instrument that regulates the conventional arms trade.

The UN Secretary-General delivered his opening address on Monday 18 March, remarking that after a long journey, the final destination is in sight. He said that the absence of international legal rules governing the arms trade “defies any explanation”, noting that even tomatoes, T-shirts, or toys are better regulated. Among the many questions surrounding the problem of irresponsible arms transfers are: where are they produced? How have they been licensed? What standards have been applied to assess the legality of proposed transfers? The biggest question was, though, “we’re all aware about the Secretary-General” and concluded his opening address with the clarion call that the international community owed a treaty “to all the victims and those risking their lives to build peace.”

Over the past decades, a number of regional and international instruments have been adopted to regulate arms transfers.

To date, none has asserted global control over the transfer of all conventional weapons. Thus, a multilateral treaty of global scope could set a clear international standard for responsible transfers and close the gaps and inconsistencies that exist between the current range of domestic and regional arms export control systems.

It is common knowledge that the availability of weapons and ammunition has led to human suffering, political repression, and widespread violations of human rights with a devastating impact on civilians caught in armed conflicts.

Irresponsible transfers of conventional weapons can also destabilise security in a region and contribute to poverty. Indeed, arms spending as well as armed conflict and violence contribute to diverting public resources away from key social services and capital investment. Countries affected by armed conflict or high levels of armed violence are unlikely to attain the Millennium Development Goals.

In the current draft of the Arms Trade Treaty being discussed the following conventional weapons are to be covered by the scope of the treaty: battle tanks, armored combat vehicles, large-caliber artillery systems, combat aircraft, attack helicopters, warships, missiles and missile launchers, as well as small arms and light weapons. However, it remains to be seen whether munitions/amunition will ultimately come within the scope of the treaty.

Several draft provisions relate to human rights, notably the criteria governing denials of proposed arms transfer, an issue which is proving to be one of the most controversial aspects of the negotiations. The draft treaty states that governments must not approve arms sales to states where there is an “overriding risk” that the arms could be used to commit serious violations of human rights law or international humanitarian law. The controversy surrounds the implications of such a criterion for arms-importing States, who fear a political and subjective interpretation of the provision, thereby limiting their possibility to acquire weapons. At the same time, under its current wording (“overriding risk’), the treaty would create a low international standard that in many cases would be weaker than current national legislation. Thus, a large number of states support the proposal to replace the term ‘overriding’ with ‘substantial’ or ‘clear’ risk. In any event, difficult questions of interpretation subsist about which arms may impact human rights?

It would be churlish not to welcome the Arms Trade Treaty. It is the first of its kind in world history: an attempt to establish universal standards governing the sale of conventional weapons, including the small arms and light weapons (SALW) which Kofi Annan, when UN Secretary General, rightly described as ‘the real weapons of mass destruction’ for the devastation they have in conflict zones, particularly in Africa.

Some elements of the Treaty are admirable: the scope is wide, including—after a hard struggle—amunition in most instances. One Article is specifically devoted to diversion. This is a crucial issue because some of the worst perpetrators of atrocities have acquired weapons ostensibly sold to legitimate purchasers through various illicit means. The treaty also addresses brokering and transshipments, also ways that secret or concealed movement of caches of weapons can reach militias or governments subject to sanctions.

An international Secretariat has been created, unfortunately without real power but with useful functions of gathering and circulating information States are required to submit annually; its effectiveness will depend heavily on sustained and adequate finance. Finally, the process of amendment, important in light of doubts about effectiveness of many aspects of the Treaty, is relatively easy. The requirement of 50 ratifications before coming into force should also be easily and quickly satisfied.

However, most transfers are not prohibited, but are subject only to national export ‘assessments’, a framework of regulation that seriously limits the Treaty’s effectiveness. And even with respect to that lesser category of regulation, the final version has in two respects, been weakened compared to the draft put on hold last July. All mention of the arm trade’s adverse impact on development—i.e., arms purchases whose expense drains the wealth of poor nations that could be used on infrastructure, welfare or human capital investment—has been struck out. A number of purchasing States, led by India, hypocritically argued that including a provision on development would be a relic of colonialism, despite the fact that such a provision would inhibit sales, and therefore profits, of Western manufacturers. Mention of corruption—the hallmark of the arms trade—has also gone, though on one interpretation it may have been smugly in by the backdoor.

There is also the problem, noted by Giles Giaccia in his earlier post, that exporters are asked to determine whether there is an ‘overriding risk’ that the weapons ‘could’ be used to commit ‘serious’ violations of, most notably, IHL and IHRL. This is, again, a discouragingly high standard, and all too easily misused to waive through a lucrative order. Attempts to replace ‘overriding” with “significant” were fiercely resisted.

General Assembly passage is only Round 1 of a long, bruising fight. The Treaty is an international law document, but it is much more: a set of standards and principles designed to be implemented in domestic law. The real battleground will be implementation in states like Brazil and South Africa, with growing arms exports and few or no existing restrictions, and in importing countries, especially in Africa, which will need to establish effective administrative machinery to oversee and control exports. NGOs can have a major role to play in this respect — it would be a useful form of aid for EU states to assist with capacity building.

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The Scope of the Treaty is Broad, Covering Most Conventional Arms

The global trade in conventional arms is worth tens of billions of dollars each year, and thousands of weapons are transferred by means of gifts, leases, or loans. Putting the value of the arms trade and broader military expenditure into context, the UN Secretary-General observed during the July 2012 Arms Trade Treaty (ATT) Conference that 60 years of current military spending would be enough to lift one billion people out of poverty. As the Mexican representative, speaking on behalf of Mexico, Colombia, Nicaragua, and El Salvador, said, the General Assembly made ‘a historic achievement’ of a long process. If adhered to and implemented in good faith, the ATT will significantly reduce the humanitarian impact of irresponsible transfer of weapons.

The Treaty Will Open the Door for the Process of Ratification

On Tuesday, 2 April 2013, after many years of discussions and negotiations, the United Nations General Assembly adopted the UN Arms Trade Treaty by an overwhelming margin — the first-ever global agreement governing the conventional arms transfers. A total of 154 States voted in favour of the resolution, three voted against, and 23 abstained. The treaty will now be opened for signature on 3 June 2013.

If adhered to and implemented in good faith, the ATT will significantly reduce the humanitarian impact of the irresponsible transfer of weapons.

This is a very good treaty, a very good treaty indeed. Not perfect assuredly — which treaty ever is? — but a robust text that will genuinely make a difference.

That it is a significant instrument is evidenced by the strong opposition by certain States to its adoption by consensus. In the final hours of the negotiations, the adoption of the text by consensus was blocked under rules of consensus decision-making because of a cynical move by Iran, Syria and DPR Korea, who voted against the General Assembly resolution that adopted the treaty.

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The ATT is now the blueprint for the regulation of international arms trade. It ties any transfer of conventional arms — or their ammunition/munitions, parts or components — to the human rights records of a purchasing country. As noted in earlier posts, several provisions relate to human rights and humanitarian law, notably the criteria governing denials of proposed arms transfers. As the Mexican representative, speaking on behalf of 96 States, said, the General Assembly made a ‘historic achievement’ of a long process. If adhered to and implemented in good faith, the ATT will significantly reduce the humanitarian impact of irresponsible transfer of weapons.

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This signature ceremony opens the door for the process of ratification. Initial estimates suggest that the 50 ratifications could be secured within less than two years. One should remember, however, that under Article 18 of the 1969 Vienna Convention on the Law of Treaties, a state is obliged to refrain from acts that would defeat the object and purpose of a treaty when it has signed the treaty or has expressed its consent to be bound by the treaty, pending the treaty’s entry into force.

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Drone Strikes and Domestic crimes?  
By Ken Macdonald | 8 June 2013

As Kenneth Roth, the Executive Director of Human Rights Watch, has recently pointed out, international human rights and humanitarian law would not necessarily seem to require the wholesale abolition of drone operations such as the ones presently being targeted by the Obama administration in northwest Pakistan.

A proper legal architecture, prompt investigations into catastrophic errors, and a greater degree of congressional oversight could combine to bring drone attacks within a more acceptable framework.

“…drone strikes allow states to carry out targeted killings efficiently, at relatively little cost, and at minimal direct risk to their own security forces.”

A number of domestic legal cases have already been initiated as a result of drone strikes. On 18 July 2012, the American Civil Liberties Union and the Center for Constitutional Rights filed a lawsuit challenging the US Government’s targeted killing of three US citizens in drone strikes far from any armed conflict zone.

The case (Al-Aulaqi v. Panetta) alleges that the US Government’s killings of US citizens Anwar Al-Aulaqi, Samir Khan, and 16-year-old Abdullahurahman Al-Aulaqi in Yemen in 2011 violated the Constitution’s fundamental guarantee against the deprivation of life without due process of law.

In December 2012, the US Government filed a motion to dismiss the case, arguing, in essence, that the courts should not be involved in determining the lawfulness of the targeted killing of US citizens. The ACLU filed a brief in response noting that:

This case concerns the most fundamental right the Constitution guarantees to citizens: the right not to be deprived of life without due process of law. Defendants respond with various arguments for dismissal of the case, but they all boil down to a single assertion: The Executive has the unilateral authority to carry out the targeted killing of Americans it deems terrorism suspects—even if those suspects do not present any truly imminent threat, even if they are located far away from any recognized battlefield, and even if they have never been convicted (or even charged) with a crime.

In the UK, the death in a CIA drone strike of Malik Daud Khan, a Pakistani tribal elder, and dozens of others at a tribal council meeting in North Waziristan in 2011, led to a claim that British officials have become “secondary parties to murder” by passing intelligence to American officials that was later used in drone strikes.

An appeal was lodged in January 2013 against an initial High Court decision not to hear the case, which has been brought by Mr. Khan’s son, Noor Khan, a British citizen. Although this case did not succeed, I very much doubt that we have seen the last of this sort of litigation.

It goes without saying that drone strikes allow States to carry out targeted killings efficiently, at relatively little cost, and at minimal direct risk to their own security forces. But they may also allow States to display traits that are more readily associated with criminal behaviour than with acceptable Government policy.

A study drawn up in 2011 within the UK Ministry of Defence stated that:

“...drone strikes allow states to carry out targeted killings efficiently, at relatively little cost, and at minimal direct risk to their own security forces.”

Chapter four

Conflict, Security and Human Rights

By Conor Fortune | 29 April 2013

It has all the trappings of a sci-fi film.

A life-size, talking robot stands outside Britain’s Houses of Parliament, flanked by a ponytailed professor of robotics, a Nobel Peace Prize winner and human rights activists who are together calling for action to stop the killer robots – before it’s too late.

“Unless we draw a line in the sand now, we may end up sleepwalking into the acceptance of fully autonomous weapons,” says Thomas Nash, director of the British NGO Article 36.

The thought of an arms race to develop and deploy killer robots is “frightening” says Steve Goose, director of the Arms Division at Human Rights Watch.

According to Goose, the goal of the new campaign is to create a new global standard to pre-emptively prohibit a “form of warfare that should never come into existence”.

Jody Williams – awarded the Nobel Peace Prize in 1997 for her work on the International Campaign to Ban Landmines – agrees, and points out that public opinion is already pitched against the use of fully autonomous killer robots in warzones.

But she notes that there will be fierce opposition from weapons producers, who stand to gain the most from developing such weapons.

Perhaps surprisingly, even many military officials have mixed feelings about the use of fully autonomous weapons in warfare, says University of Sheffield Professor of Robotics Dr. Noel Sharkey.

Not only would they diminish from a sense of virtue and valour cultivated by armed forces, but they also raise serious questions about accountability – for example, who in the line of command should be held responsible when an autonomous weapons malfunction?

“Delegating the decision to kill to robots is morally wrong. To not prevent them is morally outrageous,” Sharkey concludes.

This week’s hearings before the Senate Judiciary Subcommittee on the Constitution, Civil Rights and Human Rights have reflected the nuances of this debate. The Subcommittee has received testimony that even current drone use (a separate but related issue to the Campaign to Stop Killer Robots) has an effect on public opinion, allied support, and perceptions of morality, regardless of whether—as Retired Col. Martha McSally suggests—the lawyers are watching. The prospect of fully autonomous weapons threatens to re-shape the IHL landscape and intensify discourse on complex robotic ethics.

Conor Fortune is a London-based human rights activist and freelance journalist.
In the wake of 9/11, the UN Security Council ramped up its counter-terrorism measures.

The core measure, Resolution 1373 (2001) imposed an obligation on Member States to criminalise all forms of terrorism (including the financing of terrorism), to freeze the financing of terrorism, and to impose penalties and sanctions on those involved with terrorist activities and/or the financing of terrorism. And so it was that the notions of ‘terrorism’ and ‘terrorist organisations’ were incorporated into the law. The labelling of a group as a ‘terrorist organisation’ has significant consequences. The complex framework for stopping the financing of terrorism, for instance, has meant that many aid organisations find themselves in breach of international law. This reached its pinnacle with the US Supreme Court decision that to teach a group labelled as ‘terrorist’ how to peacefully resolve conflicts was to provide material support to a terrorist organisation, and so a crime. The definition of ‘terrorist organisation’ is critical.

But it was left to Member States to define what counts as a ‘terrorist organisation’. There has been no international agreement over what organisations are ‘terrorist organisations’. It is easy to see the problem. Consider the African National Congress (‘ANC’): it was labelled as a ‘terrorist organisation’ by the apartheid regime and others; but many states refused to regard the ANC as a ‘terrorist organisation’ because of the justness of its cause. The distinction between internal conflict and terrorism is one that is hard to maintain, a point that is neatly illustrated by the Arab Spring. Leaders across the Western world, including the British Prime Minister, David Cameron, praised those harbingers of democracy, the very same groups who were integral to ‘terrorist organisations’ a few years ago. In Libya, a militarily intervention, described as a ‘regime change’, was effected in support of groups that had previously been labelled as ‘terrorist organisations’.

Justice and Security Bill: Report of the Joint Committee on Human Rights

By Hayley Hooper | 15 November 2012

This week the Joint Committee on Human Rights published its Report on the UK Justice and Security Bill. Hayley Hooper provides an overview of the Bill and the Report’s conclusions.

Jeremy Bentham wrote that ‘publicity is the soul of justice’.

Currently, the British government are of the view that where national security is at stake, publicity must yield. The Justice and Security Bill aims to extend Closed Material Proceedings (CMPs), beyond the certain specialist tribunals and clearly defined statutory procedures into the realm of ordinary civil justice. The next stage of debate is the Report Stage in the House of Lords. In anticipation of this the Joint Committee on Human Rights (JCHR) published a Report on the Bill this week. Its central concern is that the Bill represents an unprecedented departure from the British constitutional tradition of ‘the right to an open and adversarial trial of a civil claim’.

The Government claims the Bill is required to protect the confidentiality of information obtained via international intelligence sharing relationships, known as ‘the control principle’, and to protect national security in general. In Binyam Mohamed the Court of Appeal authorised the publication of seven paragraphs, already in the public domain, relating to the treatment of Mr Mohamed whilst detained during the US ‘War on Terror’. The information had been received by the UK under the ‘control principle’, which the Court of Appeal upheld, despite denying the Foreign Secretary’s application for Public Interest Immunity (PII). The Report reveals that the US Administration reacted unfavourably to the judiciary overruling the Foreign Secretary on a matter of national security.

The Bill responds to this by removing any real judicial discretion in the initiation of a CMP, and by marginalising the role of PII. The JCHR Report criticises this both on human rights (including those rights indigenous to the common law) and rule of law grounds. The concerns of the Independent Reviewer for Terrorism, David Anderson QC, that the provisions of the Bill, if made law, could be used in an anticipated wave of litigation related to British cooperation with US-led drone warfare are also noted. One such case, Noor Khan, is currently undergoing judicial review in the High Court.

The Bill is more moderate than the controversial Green Paper, released in October 2011, which proposed wide-ranging powers to extend the scope of secrecy in civil litigation. Initially, CMPs were proposed in civil cases containing ‘sensitive material’ to protect the ‘public interest’. The Bill restricts the availability of CMPs to cases where disclosure of material may be ‘damaging to the interests of national security.’ The Report welcomes this, but cautions that overly broad definitions remains a risk, recommending a statutory definition of the ‘interests of national security’ be adopted.

Other reservations expressed in the Report include the outer clause related to the Norwich Pharmacal jurisdiction at common law. The Norwich Pharmacal jurisdiction could be used to require government to disclose information related to wrongdoing by a third state. Furthermore, concerns were expressed at the proposed exclusion of the media from court proceedings, and the failure to extend the ‘gisting’ of closed information mandated in control order proceedings by virtue of Home Secretary v AF (No. 3) to civil proceedings involving a CMP. ‘Gisting’ is the practice of providing a summary of closed evidence to the affected person in order to allow him to present an effective challenge to the allegations against him in a manner compatible with Article 6(1) ECHR.

The JCHR remains ‘unsungued that the Government has demonstrated…that there exist[s] a significant and growing number of civil cases in which a CMP is “essential”, in the sense that the issues in the case cannot be determined at all without a CMP’. Their Report urges ‘necessity’ as the appropriate standard the use of a CMP, which must be judicially, not Ministersely, determined.

All of the JCHR’s suggested amendments have now been tabled before parliament. The Justice and Security Bill will be a litmus test for parliamentarians. It will require them to hold government to account in their most controversial and secret of undertakings, while thinking seriously and rationally about the appropriate relationship between human rights and security.

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A Stop Closer to Secret Justice?
By Claire Overman and Neil Shah  |  10 December 2013

The recent case of CF v Security Service (2013) EWHC 3402 provides an early indication of how the courts will treat the newly-implemented Justice and Security Act 2013. The claimants in this case were British citizens of Somali descent, who were detained in Somaliland for two months prior to their removal to the UK. They argued that they were unlawfully detained, tortured and mistreated during this detention.

The court held that a closed material procedure was “in the interests of the fair and effective administration of justice in the proceedings”

During the course of the proceedings, the Act came into force. Broadly speaking, it provides for a court to approve the non-disclosure of a party of sensitive material (meaning material the disclosure of which would be damaging to the interests of national security) yet still rely on that material in reaching its decision. This has been referred to as a Closed Material Procedure (“CMP”).

Under section 6, the court is empowered to make a declaration that a closed material application can be made to it if two conditions are met: first, that sensitive material would be required to be disclosed during the course of proceedings and, second, that to make a declaration would be “in the interests of the fair and effective administration of justice in the proceedings”. Having succinctly held that the first condition was satisfied the crux of the decision turned on whether the second condition was met.

During the passage of the Bill much criticism was levelled at this criterion (see, for example, the second report on legislative scrutiny by the Joint Committee on Human Rights) given its omission of any reference to the public interest in open justice and the concern that, without specifying that the court consider alternative measures, it would in practice enable CMPs to become the default mechanism in any case where national security was raised.

The claimants in the present case argued that to be satisfied that a declaration would be in the fair and effective administration of justice the court must first conduct a public interest immunity (Pii) exercise as this was inherently fairer than a CMP. This, by implication, would involve weighing the interest in public justice against the likely damage that disclosure would cause to national security. The judge rejected this argument noting that such a proposition was the most centrally relevant part of the claimants making the allegations, they had set the agenda for the case, and this would mean that fair and effective justice may more easily be achieved in any case.

With no prior judicial authority on the interpretation of the Act the judge’s reasoning is of particular interest. As no submission was made that the Act was incompatible with the European Convention it is unsurprising that the claimant’s primary submission that CMPs were inherently unfair was rejected. As the judge expressly stated, the court was simply not entitled to reject the clear intention of Parliament – a victory then for the Government’s contention that the principle of open justice was irrelevant in these circumstances. Further, while the judge did seek to decide whether the fairness of a CMP on the specific facts, and in doing so expressly considered other mechanisms, it is hard to avoid the feeling that his ultimate conclusion was inevitable: it is, after all, difficult to answer the question whether it is better to try a claim with a CMP or not at all in one way. These are of course early days and more decisions under the Act will be eagerly, if not cautiously, awaited.

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A Special Relationship? Preserving the Human Rights of Terrorist Suspects in Extradition Cases
By Claire Overman  |  30 September 2012

The recent case of Babar Ahmad and Others v United Kingdom (2013) 56 ECHR 1 represents the final stage in the European appeal process for Abu Hamza and others against their extradition to the USA on terrorism charges. Thus, the ECtHR’s decision of 10 April 2012, in favour of extradition, stands. This initial decision, addressing the issue of whether extradition proceedings enacted between the UK and US would violate the applicants’ rights under article 3 ECHR, therefore merits some scrutiny.

The judgment may be praised insofar as the ECtHR took upon itself the task of scrutinising both the potential conditions which awaited the applicants (at [220]-[224]), and the characteristics of the sentences themselves (at [239]-[242]), before deciding that they did not violate article 3 ECHR. Despite much UK support for speedy extradition without human rights scrutiny, including purported intervention by the monarch, the Court, at paragraph 173, remained committed to its approach, from Chahal v United Kingdom and Saadia v Italy, of not “balancing” the applicants’ rights under article 3 against other factors. It stated that “in the twenty-two years since the Soering judgment, in an Article 3 case the Court has never undertaken an examination of the proportionality of a proposed extradition or other form of removal from a Contracting State.”

However, whilst the Court may be praised for this consistency, despite popular pressure to disregard the human rights of terrorist suspects, one aspect of the judgment appears novel and, if unchecked, could lead a lessening in the level of human rights scrutiny that it might be willing to undertake in future cases. In the present case, unlike in the seminal judgment of Soering v United Kingdom, we find, at paragraph 177, the statement that “the Convention does not purport to be a means of requiring the Contracting States to impose Convention standards on other States.” Whilst this is undoubtedly correct, the novel conclusion which the Court draws from this can be found at paragraph 179: it states that “Save for cases involving the death penalty, the Court has never required States to comply with the Convention standards.”

Two remarks may be made about this pronouncement. First, it appears to envisage a special status for the death penalty, whereby it is exempt from considerations of the characteristics of the receiving state. Why this status is accorded is unclear, especially considering the supposedly absolute nature of the right under article 3. Secondly, it could arguably lead to the introduction of a “privileged” status, or immunity, for some receiving states, as regards the ECtHR’s scrutiny of their treatment of prisoners, according to their track record of conformity with Western political ideals. Care must therefore be taken to ensure that such presumption of a receiving state’s conformity with prisoner rights as envisaged under the ECHR does not preclude independent judicial scrutiny of its practices.

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John Eekelaar on the response to Abu Qatada’s deportation
By John Eekelaar  |  11 July 2013

It is depressing that some politicians are using the Abu Qatada case to denigrate our system for protecting human rights when we should be thankful that it has shown the high value the system places on justice and acceptance that use of evidence procured by torture is a denial of justice.

In forcing a reluctant government to achieve its objective of deportation consistently with upholding this value, the system works exactly as it should. One would have thought that a Secretary of State who holds a brief for Justice ‘would praise and defend it against critics who complain that it makes it more difficult for governments to take executive action that they deem most convenient. Shockingly, he has done the opposite.

John Eekelaar is a Fellow of the British Academy and Co-Director of the Oxford Centre for Family Law and Policy. A copy of this letter appeared in The Independent on 10 July 2013.
**The Challenge of Human Security**

By John Bond | 6 March 2013

In September 2012 the UN General Assembly adopted a resolution on Human Security, which it describes as ‘an approach to assist Member States in addressing widespread challenges to the survival, livelihood and dignity of their people.

The annual Caux Forum for Human Security brings together hundreds of government and civil society representatives to discuss human security issues.

This indicates a growing global recognition that security is not just a matter of armies and alliances. In many countries, these make collaborative approaches possible. It brings together people from a wide range of backgrounds, enabling participants to discover how to work together across cultural, religious, economic and philosophical divides. Forum participants are now working with opposing factions in tense situations. These and many other actions are outlined in the Forum conference reports.

Many NGOs, governments and individuals grapple with these aspects of security. Sadly, all too often their contribution is undervalued in the allocation of resources. Threats to national security tend to make better politics. But this is changing, in part due to the growth of social media. In the Arab Spring countries, through organisations such as Avaaz, citizens are discovering how their collective voice can shape the policies of their country.

Human security is a corollary of this trend. As the General Assembly resolution states: ‘Human security requires greater collaboration and partnership among Governments, international and regional organizations and civil society.

With greater involvement comes greater responsibility. The Caux Forum for Human Security, launched in 2008, has annually brought several hundred government and civil society representatives to Caux in Switzerland, with the aim of building the trust, and developing the skills, which enable Human Security approaches to be implemented successfully.

The Forum was launched by Ambassador Mohamed Sahnoun, formerly Special Advisor to UN Secretary-General Kofi Annan. Sahnoun recognised the need to make Human Security understood, as viable, and as a moral imperative. In this he has won the support of many public figures. As former Australian Prime Minister Kevin Rudd said last year, ‘The Caux Forum unapologetically seeks to inject an ethical dimension into the public policy space.

The Forum explores Human Security through five of its components – just governance, inclusive economics, healing memory, intercultural dialogue and living sustainably. Each of these offers opportunities for creative initiatives at every level from the individual up to government policy.

These initiatives call for many capacities; the Caux Forums focus particularly on the attitudes and relationships that make collaborative approaches possible. It brings together people from a wide range of backgrounds, enabling participants to discover how to work together across cultural, religious, economic and philosophical divides. Forum participants are now working with the South Sudan Government on a five-year programme for national reconciliation, in the Sahel countries on projects for land restoration, in Eastern Europe on dialogue between opposing factions in tense situations. These and many other actions are outlined in the Forum conference reports.

John Bond OAM is the Coordinator of the Caux Forum for Human Security.

**McCaughhey and Others v UK: the Requirement of Prompt Investigation into State Killings**

By Claire Overman | 22 July 2013

Article 2 of the European Convention on Human Rights guarantees, subject to some exceptions, that ‘everyone’s right to life shall be protected by law.’ In its substantive manifestation, this means that States are not to deprive individuals of their right to life, and that they must have adequate judicial protection against violation by other individuals. However, the Court’s case law since McCann v UK has also developed a procedural aspect of this right, holding that the obligation to protect the right to life under Article 2 requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force by agents of the State.

In McCaughey and Others v UK (app. no. 43098/09), decided by the ECtHR Court on July 16, the applicants were relatives of individuals killed by security forces in Northern Ireland in 1990 in operations against IRA suspects. They complained of a violation of Article 2, not only in respect of the killings themselves by state agents, but also in respect of the delay of over 21 years in investigating the deaths. Whilst they referred to other procedural defects in the investigatory proceedings, such as the withholding of certain evidence, the Court repeatedly states in its case law that Convention rights must be practical and effective, rather than theoretical and illusory. As it found in the present judgment, a State’s systemic failure to investigate promptly the killing of individuals by security forces would appear to render the right to life very illusory indeed.

As the Court noted, it was established that Article 2 required investigations to begin promptly and to proceed with reasonable expedition, independently of whether any delay actually impacted on the effectiveness of the investigation.

This was because a prompt investigation of the use of lethal force was essential in maintaining public confidence in the State’s judicial system. In the present case, the Court identified three key phases in the period of delay. The first was marked by “inordinately long periods of inactivity,” during which some disclosure of evidence was made, and the second was characterised by a series of complex and overlapping domestic judicial review applications. The final stage was brought about by the entry into force of the Human Right Act, which made the Convention rights part of domestic law, leading to further questions of its application to investigations into deaths which occurred before the Act’s passing. The Court stated, at paragraph 138, that there’d been a need to postpone the inquest frequently to allow for further judicial actions just to clarify the situation. This demonstrated that the inquest process itself wasn’t structurally capable of providing the applicants with access to an effective investigation. It therefore concluded that
The adoption of this Resolution represents a continuation in the UN’s focus on the role of women in conflict zones, which began with Resolution 1325 on women and peace and security, adopted in 2000. The progression that such Resolutions represent, in terms of women’s role in conflict, is to recognise that women are more than simply victims of human rights abuses. Rather, as the Council acknowledged, they are “pivotal actors,” and as such, should be involved in all conflict-management decisions, from the ground up.

In adopting the Resolution, the Council considered a recent report of the UN Secretary-General on women and peace and security. This report noted that whilst there was pervasive sexual violence against women in conflict zones, greater attention also needed to be paid to the full range of human rights violations experienced by women. These included gender-specific impacts of forced displacement, family separation, withholding of humanitarian assistance and loss of land, property and livelihood. The report also cited the Commission on the Status of Women, which in its 57th session earlier this year, stressed the need to address the root causes of structural violence against women, and all physical, mental and sexual and reproductive health consequences of violence against women. This highlights the danger of focusing too specifically on the individual issue of sexual violence affecting women in conflict zones. The risk is that this issue comes to define the position of such women, and that broader human rights violations committed against them is ignored.

This is not to say that the issue of sexual violence against women during conflict is overlooked by the Resolution. On the contrary, a bold inclusion is its recognition of the need for access to "the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination." By advocating an institutional response to the problem, the Resolution publicises the extent to which it occurs, and therefore seeks to encourage member states to invest in long-term structural solutions.

As well as focusing on the specific issue of gender-based violence against women, Resolution 2122 also has a broad ambit, which allows it to perceive women as more than simply victims of this nature. This resolution and peace-building.

Turning to the individual in this case had Iraqi nationality, and in 2000 he was granted British nationality.

Under Iraqi law, the acquisition of British nationality led to the individual losing his Iraqi nationality. From 2004 to 2007 he was detained by British forces in Iraq, on suspicion of being a member of a terrorist group. As a result, the UK was held, in the case of Al-Jedda v UK, to have violated his right to liberty under Article 5 ECHR. The order by the Secretary of State, depriving the individual of British citizenship, was subsequently made prior to his release from internment.

The Court noted the root of the “evil of statelessness” in the deprivation of nationality of German Jews under the Third Reich. Article 15 of the Universal Declaration of Human Rights provided that everyone had a right to a nationality, and that no one should be arbitrarily deprived of his nationality nor denied the right to change nationality. The Court held that the arbitrary denial of citizenship could also violate the right to respect for private life under Article 8 of the European Convention on Human Rights.

As well as this general law, there also exists specific international law on statelessness: the 1954 Convention Relating to the Status of Stateless Persons, and the 1961 Convention on the Reduction of Statelessness. It was from these international instruments that the prohibition on deprivation of nationality where this would cause the individual to become stateless in some circumstances. As Lord Wilson pointed in paragraph 30, “a requirement that I should be satisfied of a fact does not enlarge or otherwise alter the nature of the fact of which I should be satisfied.” As a result, the Court held that the effect of the legislation was unambiguous: in all cases where an order depriving an individual of his nationality would cause him to become stateless, it would not be allowed.

An alternative argument advanced by the Secretary of State was that the legislation required an “active” or “real” cause of statelessness to be identified. In the present case, she argued, the “real” cause of the individual’s statelessness wasn’t the order, but rather, the individual’s failure to secure immediate restoration of his Iraqi nationality. However, this argument was also rejected. The Court held that the purpose of the legislation was to facilitate a straightforward factual inquiry: did the individual hold another nationality at the date of the order? To adopt the Secretary of State’s interpretation of the legislation would, it held, lead to unnecessary complexity in determining the potency of causes of the individual’s statelessness.

Given the Court’s emphasis on international and domestic efforts to combat the evil of statelessness, it was correct to insist on a straightforward reading of the Act. Where exceptions and discretions are allowed to creep in, the risk is that the Secretary of State is able to manipulate her powers in order to serve political ends. It is no coincidence that the individual in this case was a terrorist suspect. This judgment is therefore to be praised as reflecting judicial commitment to ensure that human rights are available to all individuals, no matter their situation.

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German Federal Constitutional Court Says No Civilian War Damages for NATO Air Strike in Serbia
By Menelaos Markakis | 26 October 2013

The German Federal Constitutional Court has rejected constitutional complaints lodged by Serbian citizens in relation to a NATO air strike in the Serbian city of Varvarin on 30 May 1999. The Court’s judgment could potentially have wider ramifications on the extraterritorial application of the European Convention on Human Rights.

The complaints were Serbian citizens who brought an action against the Federal Republic of Germany seeking pecuniary and non-pecuniary damages for their own injuries and for the deaths of their relatives, caused by the destruction of the bridge on the River Morava in Varvarin, Serbia. The bridge was destroyed by two NATO aircraft which killed ten people and injured thirty, all of whom were civilians. German reconnaissance aircrafts participating in NATO operations in the Federal Republic of Yugoslavia were not directly involved in the air strike. However, the complainants sought to hold Germany legally accountable for not taking action to prevent the bridge being included on NATO’s target list.

The complainants sought to base their claims for compensation on both international law and German tort law, arguing that the lower courts’ interpretation and application of these bodies of law had violated their constitutional rights.

However, as regards international law, the Federal Constitutional Court held that there was no rule of customary international law allowing an individual to bring an action against a State in a court of its alleged breach of international humanitarian law. Such a claim could be brought against a State only by the claimants’ home State (paras. 40-43). Furthermore, the Court held that no such direct individual claim for compensation could be derived from Article 3 of the Hague Convention IV respecting the Laws and Customs of War on Land nor Article 91 of the Additional Protocol I to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (paras. 45-47).

As regards German law, despite ultimately rejecting the applications, the judges criticised the lower court’s recognition of a margin of appreciation allegedly enjoyed by the Federal Government with respect to its power to include targets on strike lists and the use of its veto powers to block NATO’s inclusion of a specific target on the list. According to the judges, in light of the constitutional guarantee of effective judicial protection of individual rights, the question of whether an object constitutes a legitimate military target is not a political one and therefore does not escape judicial control. The interpretation and application of the relevant rules of international law (most notably Article 51 of the above-mentioned Additional Protocol I) are, according to their ruling, a task for the Courts. In exercising this control, the Courts do not trespass the boundaries of what the judiciary is entitled to do (para. 55).

The Court’s judgment could potentially have wider ramifications on the extraterritorial application of the European Convention on Human Rights. Should the complainants lodge an application to the European Court of Human Rights, as hired at by the German media, the European Court will have to revisit the case of Banković and Others v. Belgium and 16 Other Contracting States which concerned a NATO air strike against a public broadcasting building in Serbia. The Grand Chamber had unanimously declared the application inadmissible, holding that the applicants and their deceased relatives were not “within the jurisdiction” of the respondent States within the meaning of Article 1 of the Convention. However, it has been argued that different models of jurisdiction have been employed by the European Court of Human Rights in subsequent cases (see inter alia Issa and Others v. Turkey; Öcalan v. Turkey; A. and Others v. the United Kingdom; Medvedyev and Others v. France; and Al-Skeini and Others v. the United Kingdom). In view of its post-Banković reasoning, the Court’s judgment cannot be seen as a departure from the geographical model of jurisdiction developed in Banković, and towards a functional model of jurisdiction (see Judge Bonello’s concurring opinion in Al-Skeini).

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Guantanamo Military Commissions: Reflections from a Legal Observer – Part 1
By Dawinder Sidhu | 12 September 2013

There is perhaps no more controversial space in the world than the U.S. Naval Station at Guantanamo Bay, Cuba. For many, Guantanamo represents the worst of the American prosecution of its post-9/11 conflict: executive overreach, detainee abuse and neglect, and modest judicial oversight.

In the purported balance between liberty and security, Guantanamo has come to symbolize the triumph of a rule of necessity over the rule of law. Guantanamo’s problematic existence is compounded by its perpetual existence. At present, it indefinitely houses 661 detainees and is the venue for two ongoing military commissions. In a three-part post, I will reflect on my experience as a legal observer of one of these commissions.

Before discussing the commissions, it may be useful to outline the frequency with which I have visited Guantanamo, as well as the motivations of my visits. By the time of this writing, I had visited Guantanamo twice, in July 2005 and March 2007. Some of my visits were formal visits as a legal observer, while other visits were undertaken in my capacity as a legal commentator or as a member of the public.

These themes emerged in the lawyers’ presentations before the commission, and seemed to be the primary messages of their separate, informal meetings with the legal observers.

My observations of the proceedings and conversations with the legal teams support my initial view that Mr. al-Nashiri and the 9/11 defendants should be tried in federal court—a perspective that will be further explored in the following post.

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In my last post, I laid out reasons why Guantanamo detainees currently before military commissions should be tried in federal court. Of course, some counter arguments to this position must be addressed.

First, some may contend that federal prosecutors and judges lack the necessary expertise to appropriately handle terrorism cases. This is simply not true. As Jess Bravin’s compelling book on post-9/11 national security litigation, Terror Courts, notes, federal prosecution teams have secured convictions in civilian court against members of al-Qaeda prior to 9/11, and, armed with their familiarity of the subject matter and relevant players, were eager to take on the post-9/11 terrorism cases as well. In other words, terrorists, including members of the al-Qaeda group responsible for 9/11, have been successfully prosecuted by federal attorneys in federal courts under traditional rules.

Second, the federal system is capable of detaining high-profile individuals. Federal prisons have held many dangerous men, including Timothy McVeigh and Dzhokhar Tsarnaev. Suspected 9/11 terrorists, such as Yaser Hamdi and Jose Padilla, already have been held domestically. The seal, as it were, has been broken, without giving rise to any of the speculative, exaggerated harms.

Third, some claim that trying or holding detainees in the United States would give satisfaction or comfort to our enemy. To this it may be answered that Guantanamo itself likely serves a terrorist recruitment function far more powerful and harmful than any amorphous psychological victory in transferring or trying the detainees stateside. To the extent there is discomfort in having these detainees in Manhattan, they could be tried elsewhere.

Moreover, it is not as though domestic detention facilities would be comfortable for the detainees. In fact, American prisons can be quite harsh for many reasons. Recently, the conditions in the California and New Mexico prison systems, for example, have been found to be unconstitutional, even with the generous deference that is given to prison administrators. This reflects the unfortunate state of confinement for inmates in the American penal system.

Fifth, and finally, the failure to bring detainees from Guantanamo to the territorial United States for trial and detention is not a reflection of the merits of such a move, but is a product of a lack of political will to make it happen. Without public support, our leaders do not have the traditional popular predicate to proceed. But, even if this decision is not politically viable, the issue is of such domestic and international importance that our leaders should take decisive action nonetheless. Doing so would be a principled response to the varied, compounding costs of the current approach.

At the end of the day, my concern about military commissions at Guantanamo is about process, not result. We, Americans, have a better system — the federal system -- available to us that we should use without further delay. Posterty is poised to judge us harshly, yet we can pull ourselves back, at least somewhat, from the dark side of history if we take this better path forward.

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The Court’s judgment in Kadi II throws new light on the level of intensity of judicial review of errors of fact in human rights cases and on the content of the rights of defense of suspected terrorists.

Mr Kadi’s assets and other economic resources had been frozen pursuant to Council Regulation (EC) No 881/2002, an EU legislative measure designed to implement a United Nations Security Council resolution on the freezing of assets of the organisations, entities and persons identified by the United Nations Security Committee as associated with Osama bin Laden, the Al-Qaeda and the Taliban. No evidence justifying the restrictive measures imposed on him had been communicated to Mr Kadi.

Following the European Court of Justice’s judgment in Kadi I concerning which Mr Kadi’s rights of defence, effective judicial protection and property had been infringed, the European Commission communicated to Mr Kadi the summary of reasons provided by the United Nations Security Committee and gave him the opportunity to comment. Neither the Commission nor Mr Kadi was put in possession of evidence other than this summary of reasons. The Commission subsequently adopted Regulation No 1190/2008, which maintained Mr Kadi’s listing as a person whose assets are to be frozen.

In Case T-859/09 Kadi v Commission [2010] ECR II-1577 (Kadi II), the General Court annulled Regulation No 1190/2008. The European Commission, the Council of the European Union and the United Kingdom subsequently appealed to the Court seeking to have the General Court’s judgment set aside.

In Kadi II, the Court held on appeal that if the competent European Union authority finds itself unable to produce before the Courts of the European Union all information and evidence substantiating the reasons relied on against the individual, it is then the duty of the Court to base its decision solely on the material which has been disclosed to it. If that material is insufficient to allow a finding that a reason is well founded, the Court shall disregard that reason as a possible basis for the contested decision (para. 123).

The Court noted that overarching considerations pertaining to the security of the European Union, its Member States or the conduct of its international relations may preclude the disclosure of some information or evidence to the person concerned (para. 125). In such circumstances, it is for the Court to determine whether the reasons relied on by the Union authority as grounds to preclude that disclosure are well founded (para. 126). If those reasons do not preclude disclosure, the Court shall examine the lawfulness of the contested measure solely on the basis of the material that has been disclosed and may accordingly annul the contested decision (para. 127). On the other hand, if those reasons indeed preclude disclosure, it is necessary to strike an appropriate balance between the requirements attached to the right to effective judicial protection, in particular respect for the principle of an adversarial process, and those flowing from security considerations or international relations (para. 128). Accordingly, the Union authority may disclose a summary outlining the information’s content, and the failure to disclose confidential information to the person concerned may affect the probative value of such evidence (para. 129).

The Court further held that the fact that the competent European Union authority had not made accessible to Mr Kadi and to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the country which proposed his listing cannot, as such, justify a finding that Mr Kadi’s fundamental rights had been infringed (para. 137), and that, contrary to the findings of the General Court, not all the reasons stated in the summary provided by the Sanctions Committee were insufficiently detailed and specific (paras. 140-142).

The appeals were eventually dismissed because the Court held that the operative part of the judgment under appeal can be seen to be well founded on legal grounds other than those maintained by the General Court in that information or evidence which might substantiate the reasons for freezing Mr Kadi’s assets was not disclosed. The Court’s judgment in Kadi II throws new light on the level of intensity of judicial review of errors of fact in human rights cases and on the content of the rights of defense of suspected terrorists.

Menelaos Markakis has just completed the MJur at the University of Oxford and will start his DPhil at the same university in October 2013.

The Santos-FARC Peace Talks: Human Rights Challenges in Colombia

By Andrei Gomez-Suarez | 5 December 2013

Colombian political analysts suggest that we do not really know what is happening in the negotiation between the Colombian government of Juan Manuel Santos and the Revolutionary Armed Forces of Colombia (FARC). Yet we do know that, according to United Nations Office for the Co-ordination of Humanitarian Affairs, death threats against civilians have increased 50% in the last year, since the talks started. What does such a worrying increase tell us about the impact of the peace talks in Colombian society and vice versa?

So far the parties have reached an agreement on two points of a six-point negotiation agenda. The partial agreement on the land issue, which most analysts recognise as the cause of the conflict, and the agreement on political participation, which has ignited the ideological struggle and justified the continuation of the armed conflict, show that the peace talks have achieved unprecedented results. However, the parties still need to deal with the victims’ rights, which represent a serious challenge to the transition from war to peace, for it requires dealing with the ongoing damage caused to Colombians’ social fabric by many years of war.

Skepticism remains high in regards to the implementation of a Comprehensive Rural Reform agreed to by the parties. However, scholars argue that recent developments, such as the technical assistance mechanisms suggested by the 2011 Human Development Report and the National Agrarian Pact of August 2013, together with regional programmes, might be a sign that the country is moving towards a new rural Colombia. Moreover, I would argue that the agreement on the land issue shows that Santos and FARC have finally yielded to voices calling for a national peace policy that aligns with the peace talks. This is central for solidifying an ‘imagined’ geography in which previous enemies can coexist and even collaborate within a rural model of development. However, such coexistence can only occur if FARC and Santos recognise each other as part of the same imagined community.

To create an imagined community means to unleash a renewed national identity-building process which can only occur when the wounds of the past are dealt with, thereby enabling the social fabric to start to heal.

Conflict, Security and Human Rights

Chapter four

Kadi II: Fundamental Rights and International Terrorism
By Menelaos Markakis | 23 August 2013

In its judgment in Kadi II (18 July 2013), the Court of Justice of the European Union (Grand Chamber) sought to ascertain the content of procedural rights of suspected terrorists and strike a balance between the imperative need to combat international terrorism and the protection of fundamental rights and freedoms of suspected terrorists.

The Court further held that the fact that the competent European Union authority had not made accessible to Mr Kadi and to the Courts of the European Union information or evidence which is in the sole possession of the Sanctions Committee or the country which proposed his listing cannot, as such, justify a finding that Mr Kadi’s fundamental rights had been infringed (para. 137), and that, contrary to the findings of the General Court, not all the reasons stated in the summary provided by the Sanctions Committee were insufficiently detailed and specific (paras. 140-142).

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Chapter 5
Migration, Asylum, Trafficking and Human Rights
### Alternatives to Detention: Evidence from Canada and Switzerland
By Mary Bosworth

### Hong Kong Court of Final Appeal Ruled on Refugee Law Gateway Issue
By Sebastian Ko

### Contesting Refugee Status Cessation: The Rwandan Case
By Kelly O’Connor

### Hounga v Allen: A Danger for Undocumented Migrant Workers
By Anjoli Maheswaran Foster

### Protecting the Labour Rights and Human Rights of Migrant Domestic Workers – A Labour Regulation Approach
By Judy Fudge

### Trafficking in Human Beings and the European Court of Human Rights – In Dubio pro State?
By Marija Jovanovic

### Stuck in Traffic?
By Bridget Anderson

### Solidarity, Fair Sharing of Responsibility, and Refugee Protection in the EU
By Jaakko Kuosmanen

### The Hidden Face of Forced Labour in Britain
By Mei-Ling McNamara

### Human Trafficking in Scotland
By Mei-Ling McNamara

### New Bill Shifts Focus to Survivors of Human Trafficking
By Mei-Ling McNamara

### The Role of Civil Society in the Execution of ECHR Judgments
By Victoria Prais

### State Sovereignty v Migrants’ Rights: Who Wins before the European and Inter-American Court of Human Rights?
By Laura Hilly

### Trapped Between the Fences
By Reuven (Ruvi) Ziegler

### Getting Real on Children’s Rights: Is Offshore Processing Compatible with Australia’s Legal Obligations to Child Refugee Applicants?
By Katie O’Byrne and Jason Pobjoy

### Australia’s New Offshore Processing Laws for Asylum Seekers Raise Doubt over Australia’s Commitment to Fundamental Human Rights and Beyond
By Elise Klein

### Refugee Rights and the Lucky Country: Does Australia’s Regional Resettlement Plan Violate Human Rights?
By Katie O’Byrne

### Sinking hopes? Climate Change Refugees in New Zealand
By Caroline Sawyer

### The Price of Rights: Regulating International Labor Migration
By Martin Ruhs

### Quashing Legislation Mandating Lengthy Detention of Asylum-seekers: A Resolute yet Cautious Israeli Supreme Court Judgment
By Ruvi Ziegler

### The Prevention of Infiltration (Amendment no. 4) Bill: A malevolent response to the Israeli Supreme Court judgment
By Ruvi Ziegler

### The Québec Charter of Values Project: Republican or Immigrant-phobic?
By Professor Lucie Lamarche

### Indirectly Sending the Citizen Into Exile? The Relevance of British Citizenship to Proportionality Under Article 8 ECHR
By Rowena Moffatt

### A Form of Child Trafficking in Haiti: The Orphanage Business
By Rachel Belt
Alternatives to Detention: Evidence from Canada and Switzerland
By Mary Bosworth | 5 July 2013

A new report in the UNHCR Legal and Protection Police Research Series co-authored by Cathryn Costello and Elsa Kaytaz from the University of Oxford explores the nature and impact of alternatives to detention for refugees, asylum seekers and other migrants in Geneva and Toronto. Based on a combination of documentary analysis and interviews carried out in the two cities, the report recommends greater attention to conditions and treatment at reception. The report also explores the process for securing release from immigration detention centres in the two cities.

The People’s Republic of China has ratified the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, but has not extended the ratification to the HKSAR. Asylum seekers in Hong Kong, who hold no valid visa, are deemed to be ‘illegal immigrants’ with few legal rights. The HKSAR has a policy of refusing acceptance of any refugee (the appeal does not challenge this), and it makes no independent refugee status determination (RSD). Instead, it relies on the UNHCHR to make RSD and resettle refugees under its international refugee protection mandate. If refugee status is denied, the immigration authority steps in to order repatriation.

The RSD process is technically independent from the DOI repatriation process, although the DOI has discretion to consider the RSD decision. The UNHCHR in Hong Kong permits an internal appeal against an adverse finding of its initial RSD decision, but the RSD process lacks many administrative law safeguards. Success rates of both the initial decision and the appeal are low, and the RSD process suffers much delay. Moreover, the UNHCHR cannot be compelled to appear in Hong Kong courts.

The appeal in this case was made on two grounds:
1. treatment of asylum seekers by the HKSAR is subject to the principle of non-refoulement (PNR) as a customary international law obligation and a peremptory norm, it must make its own RSD, even if it does not ultimately accept refugees; and
2. the DOI must exercise its repatriation power with ‘high standards of fairness’, which is subject to judicial review, and, in doing so, has a non-delegable duty to assess an asylum seeker’s circumstances.

The CFA allowed the appeal on ground (2), and decided primarily on judicial review considerations (see [13]-[56] and [81]-[98], namely, whether there was an issue without proper exercise of statutory power by the DOI in respect of a government policy; and the scope of the DOI’s power and the relevant standard of judicial scrutiny. As the court found that the government policy essentially captures the PNR, ground (1) was not considered.

The ruling supports judicial reviews of repatriation orders for asylum seekers, which better aligns the law with the position of judicial power. By drawing on testimonies, this report contributes to the scant literature on first hand accounts of border control. It also addresses the extensive body of criminological and legal work on why people obey the law. Its conclusions, that well-run, effective and fair alternatives to detention work raises important policy questions about criminological and legal work on why people obey the law.

Alternative to detention refers to the conditions and treatment of refugees, asylum seekers and migrants. Those who felt that they had been treated fairly and well were most likely to cooperate with the legal process. The cities were selected based on advice from the UNCHR that recommended them as sites “with significant accessible asylum-seeker populations, with various receptions systems in place that seemed to avoid detention.” (Costello and Kaytaz: 6). In Toronto they included shelter system in their definition of alternatives to detention, while accommodation in Geneva ranged from Federal Centres d’Enregistrement et de Procedure (CEPs) to Foyers run by the Canton of Geneva.

Greater attention needs to paid to the conditions and treatment of refugees, asylum seekers and migrants. The authors interviewed 52 women and men at various stages of the asylum process.

Altogether the authors interviewed 52 women and men at various stages of the asylum process.

Interview material was used to understand the lived experience of alternatives to detention and its relationship to people’s cooperation and compliance with the asylum process. By drawing on testimonies, this report contributes to the scant literature on first hand accounts of border control. It also addresses the extensive body of criminological and legal work on why people obey the law. Its conclusions, that well-run, effective and fair alternatives to detention work raises important policy questions about criminological and legal work on why people obey the law.

Hong Kong Court of Final Appeal ruled on refugee law gateway issue
By Sebastian Ko | 1 April 2013

On 25 March 2013, the Court of Final Appeal (CFA) in Hong Kong unanimously allowed an appeal by three asylum seekers, C, KMF and BF in C and Others v Director of Immigration and Another (2013) HKCA 19. The appeal is based on the repatriation orders of the Director of Immigration (DOI) of the government of the Hong Kong Special Administrative Region (HKSAR), which were made after the UNHCHR denied the appellants ‘refugee status’. The UNHCHR joined the appeal as an intervener.

The People’s Republic of China has ratified the Convention Relating to the Status of Refugees 1951 and its 1967 Protocol, but has not extended the ratification to the HKSAR.

Refugee status ends once an individual re-establishes a protective state-citizen bond through one of the three durable solutions of repatriation, third country resettlement, or local integration. UNHCHR’s strategy for Rwandan refugees includes options for local integration and protection for those still at risk of persecution, but repatriation is favoured.

Repatriation can be voluntary or mandated. Voluntary repatriation is poorly defined, but article 1C(4) of the 1951 Convention Relating to the Status of Refugees allows refugees to re-establish themselves in their country of origin, even if they are still at risk of persecution. Articles 1C(5) and 1C(6) of the 1951 Convention allow host states to declare the cessation of refugees’ status and mandate their deportation. According to UNHCHR, these articles can only be invoked if there have been fundamental, effective, and durable changes in a refugee’s country of origin that result in the re-establishment of protection.

Articles 1C(5) and (6) can be contentious for three reasons. First, exemptions due to the severity of past persecution and family ties to the host country are often not respected. Second, while states are responsible for judging if effective protection exists in refugees’ home countries, refugees may disagree with state conclusions. Finally, articles 1C(5), (6) and (4) can become conflated if host countries make life so unbearable for refugees they are forced to repatriate, resulting in possible repoulement.

Uganda’s treatment of Rwandan refugees illustrates these points. Although Uganda has not formally declared refugee status cessation, it has rejected new Rwandan refugees; applicants and coerced refugees who are afraid to repatriate by cutting food rations and re-allocating their land. Amnesty International argues that conditions in Rwanda are still unsafe, and 300 out of 1,945 refugees Uganda claimed to voluntarily repatriate between 2003-2004 had fled back to Uganda within a year. There are also concerns that planned exemption procedures for when Uganda does formally declare refugee status cessation are insufficient.

The Rwandan case demonstrates that UNHCHR and partner countries must better balance state sovereignty and refugee agency. Without mechanisms to address state interests, countries will not agree to protect refugees. Without refugee participation in significant decisions, however, countries may violate refugee rights. In the context of cessation, three points where refugee views can be better integrated are during the formulation of UNHCHR recommendations, state considerations of cessation, and exemption hearings.

Michael Kagan suggests one approach to achieve this is via a UNHCHR-established independent legal panel that reviews cessation and invites refugees and NGOs to rebut its conclusions. Other models could include refugee surveys. While these options require more investigation, UNHCHR and its partners should consider such refugee perspectives an essential element of protection and cessation.

Kelly O’Connor is currently reading for a Master of Public Policy at the Blavatnik School of Government, Oxford. Last year she read for the MSc in Refugee and Forced Migration Studies.
Hounga v Allen: a danger for undocumented migrant workers
By Anjoli Maheswaran Foster | 11 March 2013

The ruling in Hounga v Allen [2012] EWCA Civ 609 will have a dangerous impact for undocumented migrant workers. The Court of Appeal’s application of the doctrine of illegality means that because these workers have no right to work, and thus their employment contract is illegal, they are deprived of all fundamental labour rights.

Anjoli Maheswaran Foster read for the BA in Jurisprudence separate the right to work from rights at work. Bachelor of Civil Law. Anjoli Maheswaran Foster read for the BA in Jurisprudence

Hounga v Allen demonstrates the need for the right to work to be considered separately from rights at work.

Ms Hounga was a Nigerian national. It was agreed that she would travel to England to work for the Allen family, where she would perform housework and look after the children. Mrs Allen told Ms Hounga that she would be able to live in their house, receive £50 per month for her work and attend school.

In order to obtain her passport and visa, Ms Hounga lied about her age and name. When she arrived in England she also lied to the immigration officers, telling them that she was intending to visit her grandmother. Ms Hounga was assisted by the Allen family throughout this process. Thereafter Ms Hounga worked for the Allen family. During this time she received no pay, and suffered serious physical abuse from Mrs Allen. She was eventually dismissed.

Ms Hounga brought a number of claims before the Employment Tribunal. The Tribunal rejected her claims for unfair dismissal, breach of contract and unlawful deductions from wages and holiday pay. This was because they arose under an illegal employment contract, which Ms Hounga had knowingly entered into. Therefore, due to the doctrine of illegality, the claims were barred on grounds of public policy, because Ms Hounga could not benefit from her illegal conduct. However, the claim for dismissal on racially discriminatory grounds was allowed, because the Tribunal held that Mrs Allen’s conduct in dismissing Ms Hounga was not linked with Ms Hounga’s illegal conduct.

However, the Court of Appeal rejected the distinction made by the Tribunal, and decided that all of Ms Hounga’s claims should be barred. Lord Justice Rimer stated that ‘If this court were to allow her to make that case, and so rely upon her own illegal actions, it would be condoning her illegal employment contract…so [she] could be treated less well because of her inferior situation.’ [61] Therefore, Ms Hounga’s discrimination claim also arose out of her own illegal conduct. Lord Justice Rimer concluded that ‘If this court were to allow her to make that case, and so rely upon her own illegal actions, it would be condoning her illegality. That is something the court will not do.’ [61]

This ruling will have a dangerous impact for undocumented migrant workers. The reality is that many migrant workers enter the UK illegally to work, or originally enter the UK legally but carry on working after their visa expires. This application of the doctrine of illegality means that because these workers have no right to work, and thus their employment contract is illegal, they are deprived of all fundamental labour rights. Undocumented migrant workers are already in a vulnerable situation, and this entrenches the vulnerability. If this case is appealed to the Supreme Court, it is hoped that the Court will reverse this ruling, and will separate the right to work from rights at work.

Anjoli Maheswaran Foster read for the BA in Jurisprudence at Keeble College, Oxford and is currently reading for the Bachelor of Civil Law.

Despite the ILO’s emphasis on a labour regulation approach to dealing with exploitative or abusive practices by employment agencies towards migrant domestic workers, criminal sanctions such as those targeting trafficking and forced labour attract much greater public and official attention.

Protecting the Labour Rights and Human Rights of Migrant Domestic Workers – A Labour Regulation Approach
By Judy Fudge | 26 February 2013

Women who cross national borders in order to work in the households of other peoples’ families are very vulnerable to exploitation. Their precarious work situation is a function of both their precarious migrant status – typically they are admitted to the country in which they work on visas that tie their ‘rights’ to work and to reside in that country to an on-going employment relationship with a specific employer – and their employment within private homes. Employment agencies, which recruit and place domestic workers across national boundaries, are crucial actors in the construction, maintenance and reproduction of global care chains, in which women from the South migrate to the North or to contiguous countries in the South in order to provide domestic work. Employment agencies have long been associated with abusive practices, such as charging fees to workers and fraud, in the recruitment and placement of domestic workers. They also draw upon and contribute to an on-going process of racialising domestic work.

There are cases of extreme abuse that amount to forced labour under Article 4 of the European Convention of Human Rights, as the 2012 European Court of Human Rights decision, CN v. the United Kingdom. [2012] ECHR 1911 demonstrates, this focus on the sharp edge of exploitation diverts attention from much more widespread abusive practices, such as charging fees and misrepresenting terms and conditions of employment to migrant domestic workers. Moreover, even from a labour regulation perspective, too much attention is paid to providing migrant domestic workers with an after-the-fact complaint mechanism. This solution is unlikely to be successful since, owing to their precarious immigration status and their isolation in private homes, domestic workers are too often unable or unwilling to lodge complaints.

Greater attention should be paid to dealing with the root cause of the problem – unscrupulous and unregulated employment agencies that are key actors in global care chains. The recent example of one Canadian jurisdiction, Manitoba, shows how it is possible to design a regulatory regime that is some form of labour regulation approach to dealing with exploitative or abusive practices by employment agencies towards migrant domestic workers. In 2008, Manitoba enacted The Worker Recruitment and Protection Act, which provides a comprehensive foreign worker recruitment regulatory scheme composed of two interrelated parts: employer registration and foreign recruiter licensing. Employers wishing to recruit a foreign worker must apply to register with the employment standards branch, and indicate whether or not they are using a foreign worker recruiter. The Immigration Branch then contacts and informs the employer that it is responsible for reimbursing the worker any recruitment costs that the worker may have paid to anyone during the recruitment process. Not only can employers be held responsible for illegally charged placement fees, these fees can also be treated as wages, and returned to workers via wage collection processes. The employment contract information that the employer provides to immigration officials as part of the visa process is deemed to be the minimum standard enforceable under the province’s Employment Standards Code.

The regulatory structure’s second main piece is the licensing of foreign worker recruiters, which is divided into three parts: employer registration, financial accountability, and criminal sanctions. Foreign worker recruiters are regulated as distinctly defined entities, which are extensively vetted, supervised and bonded. They are prohibited from acting simultaneously as immigration consultants for migrant workers and placement agencies for employers so as to avoid conflicts of interests. This firewall, along with heightened supervision, discourages the blending of legal with illegal fees. The licensing measures also provide a form of quality assurance, and ensure that those employers requiring professional assistance are dealing with reputable and accountable members of the recruitment sector. The substantial bond that is levied as part of the licensing process can be used to reimburse foreign workers for any fees collected from them at any time by any person during the recruitment process. In addition to civil recovery of illegally charged fees, there are significant penalties for contraventions.

Legislation is a necessary but not sufficient condition of adequate regulation. What is distinctive about Manitoba is the extent to which the different levels of government (in Canada immigration is primarily the responsibility of the federal government whereas employment is generally a matter of provincial jurisdiction) and different agencies (involving immigration, border control and employment standards officials) have linked and consolidated their resources to stop abusive recruiters. This regulatory regime has resulted in a shift towards direct employer recruitment and away from the use of recruiters. The few agencies that continue to recruit migrant workers to Manitoba are highly regulated and well capitalised.

Eradicating irresponsible brokers who operate as ‘flesh peddlers’ at the bottom of the labour market will not guarantee that migrant domestic workers who work and live in private homes will be treated with dignity and in accordance with international norms. Nevertheless, as the example of Manitoba demonstrates, it could put an end to some of the most prevalent abusive practices. Effective regulation of transnational labour brokers would also ensure that the costs of the care deficit in the global North are not borne by the women of the global South who cross borders to perform this essential work.

Judy Fudge is the Leverhulme Visiting Professor, Kent Law School and Lansdowne Chair in Law, University of Victoria.
**Migration, Asylum, Trafficking and Human Rights**

**Chapter five**

**Trafficking in Human Beings and the European Court of Human Rights – In Dubio pro State?**

By Manja Jovanovic | 27 April 2013

The ECtHR in M. and Others v. Italy and Bulgaria (app. no. 40020/03) departs from a low-threshold approach for triggering Article 4 in potential trafficking situations previously established in Rantsev v. Cyprus and Russia (app. no. 25695/04). This regrettable turn creates ambiguity around required state action in potential trafficking cases and allows governments to continue to downplay their responsibility for the flourishing of this monstrous practice.

**States have positive obligations under international law towards victims of THB that are triggered when the state has ‘reasonable grounds to believe’ that an individual might be a victim of THB. The ECtHR in Rantsev endorses this approach. However, the lesser known case of M. requires a much higher standard of proof to trigger Article 4 protection.**

Asking potential trafficking victims to prove their allegations rather than to raise a credible suspicion makes the Convention virtually inapplicable in most trafficking situations.

**The factual circumstances of M. case were in dispute. The applicants, a Roma family from Bulgaria, came to Italy on the promise of work from another Roma family of Serbian origin. The applicants complained that their daughter had suffered ill-treatment, sexual abuse and forced labour at hands of the Serbian family in Italy. They alleged that the Italian authorities failed to protect her or punish the perpetrators, and instead of investigating the circumstances complained of, the police instituted criminal proceedings against the girl and her mother for perjury and false accusations. The government counter claimed that the situation amounted to a typical marriage according to the Roma tradition.**

**The Court found a violation of the procedural limb of Article 3 on account of an ineffective investigation into the first applicant’s alleged ill-treatment by the Serbian family.**

However, the Court declared the Article 4 complaint inadmissible. Instead of asking whether the trafficking allegations raised a ‘credible suspicion’ of M’s victim status, the Court noted that:

“...from the evidence submitted there is not sufficient ground to establish the veracity of the applicants’ version of events (…) It follows that the applicants’ allegation that there had been an instance of actual human trafficking has not been proved (…)”

This finding is problematic on several grounds. First, given the similar nature of rights protected under Articles 3 and 4, it is not obvious why the applicants’ allegations of the circumstances, which gave rise to both complaints, were sufficient to engage Article 3, but had to be proved for Article 4. Moreover, by placing the burden of proof on the applicants, the Court makes it virtually impossible for future trafficking victims to rely on Article 4 in seeking to establish a state’s responsibility for failing to take appropriate action. That is because allegations against the state will usually be made when it has not done enough to investigate the events, leading to little evidence being available. Requiring applicants to prove these factual circumstances render the Convention inapplicable to most trafficking situations. Furthermore, it is not clear why this case is any less one of trafficking than Rantsev, given the similar failure of the authorities to establish the factual circumstances of the case.

By finding Article 4 inadmissible because the applicants failed to reach the beyond a reasonable doubt standard of proof, the Court in M creates a dangerous precedent. Instead of clarifying its scarce Article 4 jurisprudence, the Court has muddied the waters on how human trafficking engages the Convention’s protective mechanism.

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**Stuck in Traffic?**

By Bridget Anderson | 26 February 2013

‘Traffic[ing]’ seems to extend the audience of those engaged with the human rights of migrants. Even those who are not usually sympathetic to the plight of undocumented migrants can engage with the plight of ‘victims of trafficking’ and respond to calls for their protection. Trafficking also seems to offer a rare patch of common ground between migrant advocates and state actors, both concerned to stop exploitation and abuse. However in practice, anti-trafficking approaches have proved deeply problematic. How helpful is the trafficking framework?

To ask this question is not to put into question the undoubted abuse, injustice, extortion, rape, violence and murder experienced by migrants, particularly undocumented migrants. There is also no question that this happens, and that the vulnerable are exploited (a tricky term though) in myriad horrendous ways. However, whatever one means by grouping such heterogeneous phenomena as child labour in Benin, tobacco farming in Kazakhstan and under age prostitution in Oxford, ‘anti-trafficking’ is not the answer. It mystifies labour and labour relations, it mystifies immigration and immigration controls, it essentialises gender and childhood, it confuses and obfuscates, and importantly it also acts against the interests of many that it purports to serve.

In recent years there has been an attempt to rehabilitate human rights to some extent in this discourse, as the expression of hope and indeed of some possibility of universalism and this has drawn explicitly on migrants and the undocumented, most obviously the work of Ranciere, that has emphasised the importance of rights claims, the power of rights when they are invoked by ‘the part of no part’.

**Whatever one thinks of these arguments trafficking obstructs them.**

It is not only that the authority of the state has to be invoked in order to protect the rights of the Victim of Trafficking, but that the state is directly and inescapably the source of vulnerability and that the absence of protection for VoT, border controls, directly and inescapably heighten that vulnerability. While undocumented migrants can challenge the source of their differentiation from citizens and assert ‘I’m illegal. So what? VoT who cannot claim, ‘I’m a VoT. So what?’. The VoT in claiming human rights has no right to resist the author of the source of her vulnerability. She is caught in an iron cage of logic, a state created subject with no room for manoeuvre. The granting of human rights to VoT makes the possibility for human rights as dissensus invoked by illegal migrants more difficult. The most object of those formally excluded are given rights, and they are rights that are premised on the right NOT to enter, to be protected from movement. The VoT, once she has testified and her abuser is imprisoned, is supposed to return home. Indeed the narrative is that she wants to return home, and part of her innocence and victimhood is that she never wanted to move in the first place. In this way immigration controls are claimed to be a mechanism of protection for migrants, rather than a mechanism of oppression. Immigration enforcement does not ignore liberal values but directly invokes them.

The language of trafficking marks the United Kingdom as a site of free labour and equality. It draws attention to the backward employment and social relations of the migrant, in contrast to those of the citizen, yet it also overlooks the key point of difference between the migrant and the citizen, which is that the migrant is subject to immigration controls. Trafficking enables ‘us’ to congratulate ourselves on the freedom and rights within the British economy, and to respond morally and emotionally to the gap between us and them, between privilege and suffering. The commitment to combat trafficking demonstrates that non-citizens are not regarded purely as commodities, moved about for maximum profit. Through anti-trafficking it is apparent that the State, and importantly the nation, acknowledges that they are human beings who cannot be simply traded as factors of production. In this sense it rescues the national labour market by connecting it to the moral economy. It flags the social norms and obligations and the extent of tolerable inequalities: ‘we’re not saying that migrant workers should be given cushy jobs, but they are entitled to the minimum’, as a prosecutor on one UK Trafficking court case put it. Concern with trafficking focuses on borders and immigration controls while missing the crucial point that immigration controls produce relations of domination and subordination, thereby leading state responsibility for the consequences of this completely out of the picture.

Professor Bridget Anderson, Professor of Migration and Citizenship at the University of Oxford and Deputy Director of COMPAS. Her book Us and Them? The dangerous politics of immigration control will be published in March 2013 by OUP.

This blog post is an extract from a longer piece ‘Trafficking and the protection of human rights. Full of sound and fury, but what does it signify?’ presented on 24 January 2013 in Oxford as part of the COMPAS International Migration and Human Rights Seminar Series.
Solidarity, Fair Sharing of Responsibility, and Refugee Protection in the EU
By Jaako Kuosmanen | 19 February 2013

Article 80 of the Treaty on the Functioning of the European Union (TFEU) requires that asylum policies of the Union and their implementation be governed by the principle of solidarity and fair sharing of responsibility among the Member States. The EU is currently in the process of finalising its legislative package for the Common European Asylum System (CEAS). The European Council set in the Stockholm Programme the goal of establishing CEAS by the end of 2012.

There is some evidence of progress with regard to intra-EU solidarity in refugee protection – the establishment of the European Asylum Support Office (EASO) being an example of this. However, much more needs to be done before CEAS can genuinely be argued to realise the principle of solidarity and fair sharing of responsibility.

One important barrier is the Dublin Regulation, which establishes the criteria for identifying the EU state responsible for the examination of asylum claims. The Dublin Regulation remains integral part of CEAS.

A majority of Member States remain strongly supportive of the fundamental idea behind the Dublin Regulation, although in the aftermath of the ECtHR case M.S.S. v. Belgium and Greece (app. no. 30896/08) there has been a broad consensus that the Regulation needs recasting.

The recast discussions have focused on the issue of an emergency mechanism that could suspend Dublin transfers to a Member State, subject to particular pressures, under certain circumstances. In the Commission’s view, the mechanism should serve the purpose of effectively and modern-day slavery in Britain. In one of the most recent examples of this, the Transparency in UK Supply Chains Bill (Eradication of Slavery) 2012–2013 – which would have made companies trading in Britain more accountable in the prevention of forced labour, human trafficking and the worst forms of child labour in their supply chains – was talked out in its second reading in Parliament on 19 October, again on 18 January, and is scheduled again for another reading on 1 March.

This Bill came at a time when one of the most shocking examples of forced labour was occurring at a gangmaster supplier working for Noble Foods, a UK company with contracts for eggs to companies such as Tesco, Sainsbury’s, Asda, McDonald’s and Marks & Spencer’s, and where the mistreatment of a large number of Lithuanians internally trafficked across and the country was roundly condemned. Though there are mixed opinions on the current Supply Chains Bill, there is no denying that greater political will is needed if large UK businesses are going to rout out exploitation in the country’s labour market.

As the recession cuts deeper into Britain and work is becoming scarcer, the desperation and vulnerability of workers has become more acute. This year, Britain will for the first time ever set direction on human trafficking, and all eyes will be on how the government sets out to define what they claim is a growing immigration problem, and what they concede is an urgent human rights issue.

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The Hidden Face of Forced Labour in Britain
By Mei-Ling McNamara | 1 February 2013

As previous posts on the OxHRH Blog have highlighted, trafficking for forced labour remains a hot-button issue in the UK. A new report by the Office of International Migration (OIM), released in January 2013, looked at trends in trafficking from over 150 missions since 2010. The report revealed that labour exploitation is now surpassing sexual slavery as the main cause of human trafficking across the globe. It has also led to an increase in the number of male victims of trafficking. While female victims still remain the largest exploited group, primarily for the sex trade, the report found that the number of males who received IOM assistance rose by 27% from 2010 to 2011, with greater focus on trafficking for industries including construction, fishing and mining.

Last year, the UK saw the number of trafficking victims being referred rise substantially from 700 to nearly 1,000, where labour exploitation now makes up a quarter of all documented cases. The illegal nature of the job remains another tether that keeps trafficked victims criminalised and more fearful of seeking help from the authorities. Lacking documentation and crossing borders illegally only stack the case against trafficked victims who are now found to be breaking the law. Cannabis factories, illegal goods selling and benefit fraud are just some of the growing industries that place victims firmly in the crossfire between protection and prosecution.

For years, the UK has had to contend with the shadow spectre of sex trafficking, and has created some robust legislation to counter it. Human Trafficking Centre, ACPO (Association of Chief Police Officers) and Crimestoppers launched a public service campaign to make citizens more aware of forced labour in this video, and Wales has assigned the UK’s first-ever anti-human trafficking coordinator to tackle the growing incidence through its ports, hidden residences and industrial estates. Yet contradictions and inconsistencies remain rife in the UK government’s message to eradicate the scourge of trafficking and modern-day slavery in Britain. In one of the most recent examples of this, the Transparency in UK Supply Chains Bill (Eradication of Slavery) 2012–2013 – which would have made companies trading in Britain more accountable in the prevention of forced labour, human trafficking and the worst forms of child labour in their supply chains – was talked out in its second reading in Parliament on 19 October, again on 18 January, and is scheduled again for another reading on 1 March.

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As the recession cuts deeper into Britain and work is becoming scarcer, the desperation and vulnerability of workers has become more acute. This year, Britain will for the first time ever set direction on human trafficking, and all eyes will be on how the government sets out to define what they claim is a growing immigration problem, and what they concede is an urgent human rights issue.

Mei-Ling McNamara is a journalist and documentary filmmaker, working in both print and broadcast media. She is currently pursuing her PhD in Trans-Disciplinary Documentary Filmmaking at the University of Edinburgh where her work is focused on forced labour on the black market in Britain. Her documentary Children of the Cannabis Trade, broadcast on Al Jazeera English, won the 2011 Human Trafficking Foundation Media Award for Best TV Documentary, presented at the House of Lords. She is currently based in Edinburgh.

Human Trafficking in Scotland
By Mei-Ling McNamara | 7 February 2013

Scotland is a unique case on the issue of trafficking in Britain. Its woefully low record of attaining prosecutions has been attributed by some to the legal hurdles in Scots law pertaining to collaboration. Its legislation relating to trafficking is complex – spread across a number of different statutes including: Proceeds of Crime Act 2002; Criminal Justice (Scotland) Act 2005; Asylum and Immigration Act 2004; Gangmasters (Licensing) Act 2004; Immigration, Asylum and Nationality Act 2006; Sexual Offences (Scotland) Act 2009 and Criminal Justice and Licensing Act (Scotland) 2010.

Following an investigation by the Equality and Human Rights Commission led by Baroness Kennedy QC in 2010, responses to human trafficking in Scotland have been criticised as lacking a coherent approach. In the report, Baroness Kennedy stated:

“Police who had investigated trafficking cases spoke about the near impossibility of securing courtroom testimony from witnesses, especially when their immigration status was uncertain, and they were threatened by traffickers to their countries of origin at the end of the process.

Scottish prosecutors also face an additional hurdle as there is a requirement in Scots law for corroborating in criminal cases; this raises the evidential bar for a successful prosecution even higher than in other parts of the UK or abroad.”

In response to this, moves have been made to reform legislation in order to improve the number of prosecutions, including dissolving the collaboration rule, creating a Scotland Office for Human Trafficking and launching a reassessment of the National Referral Mechanism, which many say in its current state is merely an immigration tool rather than a sympathetic assessment of a potential trafficking victim.

Yet with over 150 prosecutions secured in England and Wales for trafficking, Scotland has only secured two successful prosecutions for trafficking to date. The first, HMA v Craig and Beukan in 2011 was the first case of individuals to be charged under section 22 of the Criminal Justice (Scotland) Act 2003. The second and most recent case was in January this year, involving the issue of trafficking for forced marriage.

However, it is important to note that labour trafficking has yet to see any prosecutions in the Scottish courts, though there is growing evidence that this issue is beginning to receive greater attention. In a recent roundtable meeting at the Scottish Parliament of a cross-party group on human trafficking, Assistant Chief Constable Stephen Whitelock said: ‘The growing problem of forced labour in Scotland now exceeds cases of sexual exploitation in the country.’

ACC Whitelock also said that police are now being trained to assess trafficking victims better where there may be a greater question of their status, such as the growing incidence of cannabis factories found across the country.

There seems to be a growing acknowledgement in Scotland that a robust response will have to occur if the country is going to make a dent into this intransigent problem. Many feel that a proposed statutory aggravation should not take the place of a much-needed standalone piece of legislation on human trafficking in Scotland. Yet what is certain is that while greater debate is being had on the subject, what actions emerge will be highly anticipated. As the Scottish referendum approaches in 2014, more attention will be drawn to Scotland and the efforts it makes to confidently tackle issues such as trafficking and forced labour, and to ensure victims are not inadvertently prosecuted as criminals.

Mei-Ling McNamara is a journalist and documentary filmmaker, working in both print and broadcast media. She is currently pursuing her PhD in Trans-Disciplinary Documentary Filmmaking at the University of Edinburgh where her work is focused on forced labour on the black market in Britain. Her documentary Children of the Cannabis Trade, broadcast on Al Jazeera English, won the 2011 Human Trafficking Foundation Media Award for Best TV Documentary, presented at the House of Lords. She is currently based in Edinburgh.
New Bill Shifts Focus to Survivors of Human Trafficking
By Mei-Ling McNamara | 22 October 2013

Earlier this year, I interviewed a group of young Bangladeshi men who had been trafficked into Scotland to work in the hotel services industry. They had been deceived, abused, exploited and threatened into working under forced labour conditions, some of them for months, others for years. As they revealed the harrowing circumstances of their stories, equally as shocking was the way in which they had been treated after they had finally escaped their situation.

Throughout their ordeal – from victim identification, psycho-social support, legal representation and financial redress to their subsequent felt protected by a system aimed at prosecuting their perpetrator and providing them with support. Yet at every turn, when they could have received significant help by an organisation or authority, they were turned away or ignored. Without proper criminal immigration, and employment law joined up to protect victims of trafficking, these men have been forced to leap over the massive gaps in a system that lacks adequate human rights-centred legislation to address this growing problem.

In Edinburgh this September I was invited to attend the consultation launch of a new, comprehensive piece of legislation to address human trafficking in Scotland, the new Human Trafficking (Scotland) Bill.

As mentioned in my last blog piece, Scotland, and the wider UK, trails woefully behind many countries in its identification and prosecution of traffickers. Though a victim of human trafficking is identified every four days in Scotland, the prosecutions of traffickers may be counted on one hand. It is therefore heartening to see this Bill – a bold step towards addressing this issue. Last week the MSP heading up this Bill, Jenny Marra MSP Dundee, and its co-writer, Graham O’Neill, put out articles outlining some of major points of the Bill here and here. In brief, this Bill unifies disparate legislation used to prosecute human trafficking, bringing it under one roof and codifying its legal definitions to make for a more streamlined process, aiming to tackle the problem more aggressively. The Bill calls for greater leadership in improving victim identification while also enshrining into Scots law the EU directive for the non-criminalisation of victims. And finally, the Bill calls for an impetus for multi-agency approach to deliver a supportive survivor service. This is both unique and incredibly crucial, as it provides a greater degree of onus on agencies, to ensure that no one slips through the cracks. Dr Anne T. Gallagher, a leading expert on human trafficking policy and a former special adviser to the UN High Commissioner for Human Rights on human trafficking said that if passed, the new Bill would be “the most innovative and comprehensive piece of anti-trafficking legislation in the world.” This issue has been building momentum north of the border since the Equality and Human Rights Commission published their Inquiry into Human Trafficking in Scotland in 2011, with an update published in February this year. It calls for a more encompassing piece of legislation such as this one currently in consultation.

While the Scottish government is considering introducing a statutory anti-trafficking Bill, the Scottish Criminal Justice (Scotland) Bill, aimed at dissolving the issue of corroboration in criminal trials, and the Home Secretary has announced a new Modern Slavery Bill which promises to deliver a strong criminal justice approach, the Survivors Service offered in Scotland’s proposed Human Trafficking Bill offers the most comprehensive service to address the vital needs of its victims. Placing the needs of the victim first, the Bill addresses problems such as identification, support services and referral, while acknowledging their vulnerable status – most importantly prioritising these issues over immigration. The UKBA is placed outside the decision-making process and minimum standards have been put in place to provide victims with 46 days’ accommodation, in counselling, health care and information on their legal rights. The Human Trafficking (Scotland) Bill is still in its consultation phase, but it already shows an awareness, not only of the criminal justice issues required to root out traffickers, but of the urgent needs of survivors who are easily lost in the bureaucratic maze of British laws and legality.

Only through the help of a few empathetic individuals have the four Bangladeshi men been able to pursue their cases pro-bono and temporarily find work to support their families back home. They continue to live a precarious existence, remaining in legal limbo where they live a day-to-day existence faced with traumatic memories and financial insecurity. The UK and Scottish government have publicly denounced slavery on their shores and are promising to end the scourge of human trafficking they say is rife in their cities and towns. Now is the time to have political courage to go beyond the rhetoric to see how legislation can reach the lives of the people that need it most – the survivors.

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. Her documentary Children of the Cannabis Trade, broadcast on Al-Jazeera English, won the 2011 Human Trafficking Foundation Media Award for Best TV Documentary. She is currently based in Edinburgh.

The Role of Civil Society in the Execution of ECtHR Judgments
By Victoria Prais | 13 May 2013

European Court of Human Rights (ECtHR) judgments can have a huge impact in Member States by highlighting systemic and serious problems in human rights protection. But what happens once an ECtHR judgment dies down? The implementation process is critical to the success of the ECtHR system.

The Committee of Ministers (CM) of the Council of Europe is charged with supervising the implementation of ECtHR judgments. In Papamichalopoulos v Greece (app. no. 14556/89) ([34]) the ECtHR expanded the obligation, maintaining that while Member States have a positive obligation to ensure the protection of human rights and the ECtHR should only intervene if a Member State fails in that regard.

Moreover, rule 9 of the rules of the CM allows for civil society engagement in the implementation of ECtHR judgments, particularly in respect to ‘general measures’ that seek to redress systematic reasons for the Member State’s breach. Civil society is becoming more involved in the scrutiny of ECtHR judgments. The Department for the Execution of Judgments of the ECtHR has received a steady stream of rule 9 submissions from NGO’s, National Ombudsmen and other national human rights organisations. Civil society organizations (CSOs) have also provided critical “shadow” reports to the CM about the situation on the ground in various countries.

However, as a lawyer at the Department managing cases from the UK, Ireland & Cyprus, I saw mixed levels of civil society engagement. In Hirst v United Kingdom (app. no. 74025/01) (prisoner voting) and in McKena v United Kingdom (app. no. 28883/05) CSOs have been actively engaged and have filed Rule 9 submissions.

The case of A, B & C v Ireland (app. no. 25576/05) offers another positive example of CSO engagement. The campaigners, all of whom had crisis pregnancies, and challenged Ireland’s restrictive abortion regulations. In December 2010, the Grand Chamber of the Court unanimously held that Ireland’s failure to implement abortion legislation in spite of existing case law constituted an Article 8 violation. The Court highlighted particular issues that needed to be addressed.

In this case, CSOs have acted as a ‘critical friend’ throughout the implementation process and have, on occasion, been strident in their criticism of the government’s proposed measures. They critiqued the government’s initial Action Plan. They criticized the lack of interim measures to give effect to the judgment, and the general delay in implementation of the judgment. In one submission, an NGO provided detailed recommendations for legislation and guidelines to meet the terms of the judgment.

However, the case of Rantsev v Cyprus/Russia (app. no. 29605/04) provides a stark contrast to these examples of positive CSO engagement. The case concerned the trafficking of the applicant’s daughter, a young woman who arrived in the UK on an “artifact visa from Russia to Cyprus where she then died. The Court found Cypriot authorities failed to conduct an effective investigation into the death, that Cypriot authorities had failed in their positive obligation to create an appropriate framework to combat trafficking and also that police failed to protect the young woman. The Court found that Russian authorities failed to effectively investigate the recruitment of the applicant’s daughter in Russia.

The paucity of civil society engagement on the case is noteworthy; there were no Rule 9 submissions on general measures. CSOs could have provided “shadow” reports with relevant statistics or analysed the effectiveness of the current legislative framework on trafficking. There was no independent analysis of how authorities dealt with trafficking victims in Cyprus and whether operational staff were suitably trained.

It is difficult to explain civil society’s silence in some cases and active engagement in others. There may be a lack of CSO knowledge on how they can be practically involved in the execution of ECtHR judgments. Civil society may also be more developed and confident in certain countries than in others. Alternatively, some CSOs may see little value in engaging in repetitive cases whereas they could actually play a vital role.

That said, progress has been made in making civil society a partner in the execution process, and the relationship continues to grow and flourish... It may take time to get “buy in” from civil society quarters, but there is certainly CSO will to be involved in the process.

Victoria Prais is a Legal Officer – Human Rights Based Approach at the Scottish Human Rights Commission. She is a former lawyer at the Department for the Execution of Judgments of the European Court of Human Rights, Council of Europe.

State Sovereignty v Migrants’ Rights: Who Wins before the European and Inter-American Court of Human Rights?

By Laura Hilly | 8 November 2012

On Tuesday 6 November 2012, the Oxford Human Rights Hub (OxHRH) in conjunction with the Oxford Migration Law Discussion Group (OxMLDG) welcomed Professor Marie-Benedicte Dembour, Professor of Law and Anthropology at the University of Sussex.

Professor Dembour gave an engaging presentation entitled ‘State Sovereignty v Migrants’ Rights: Who wins before the European and Inter-American Court of Human Rights? This presentation drew upon her work on her upcoming monograph, provisionally titled ‘Migrant First, Human Second? Comparing the Approaches of the European and Inter-American Courts of Human Rights to Migrant Cases’.

Professor Dembour juxtaposed case law demonstrating the Inter-American Court of Human Rights’ comparatively ‘human-centric’, or ‘human-rights-first’ approach to cases involving migrants’ rights with what she identified as a ‘State-centric’ or ‘State-first’ approach taken by the European Court of Human Rights. She pointed to possible causes for these divergent approaches: the textual differences between the European and American Conventions on Human Rights; the social make-up of the European and Latin-American continents which reverberates with the distinctive political history and migration patterns characteristic of the two continents; and the orientations of the judges sitting on the respective benches, resulting in a particular judicial ‘habitus’ where precedents are established which set the parameters of future judicial reasoning and activity.

Trapped Between the Fences

By Reuven (Ruvi) Ziegler | 10 September 2012

Events on Israel’s border with Egypt shed light yet again on the Israeli government’s mishandling of (primarily Eritrean and Sudanese) asylum seekers. For a week, a group of about 20 Eritreans fleeing Egypt have been trapped, after they crossed the rather flimsy Egyptian fence into Israeli territory, only to be confronted by a recently constructed fence that Israel has been erecting precisely to stop such asylum seekers from entering Israel—this in addition to halting drug trafficking, arms smuggling and terrorism.

Notably, the fence’s route lies inside Israeli territory. The Israeli daily Haaretz reported that Israeli soldiers have been ordered to prevent the asylum seekers from crossing the Israeli fence. They have given them no food, only limited amounts of water, and some fabric to protect them from the sun, with the explicit purpose of making the asylum seekers turn around. One of the asylum seekers was pregnant; she has had a miscarriage.

On 5 September, ‘We Refugees’, an Israeli NGO, petitioned the Supreme Court demanding that the asylum seekers be admitted to Israel immediately and have their asylum applications assessed according to Israel’s international law commitments. On 6 September, a hearing was held before a three-judge panel chaired by the Court’s president, Asher Grunis. The state submitted a written response arguing that it is its sovereign right to prevent entry. The Court has scheduled another hearing for 9 September, noting that it has heard evidence presented by the state ex parte. Later that afternoon, the state arranged with Egypt that the two women and the boy will be allowed to enter Israel on ‘humanitarian grounds’ (only to be immediately detained at the ‘Saharonim’ detention centre) while the 18 men had to return to Egypt.

In previous judgements, the Israeli Supreme Court has emphasised that the state is bound by the principle of non-refoulement. Like the European Court of Human Rights in Hirsi Jamaa and Others v. Italy (app. no. 27765/09) (concerning the Italian transfer of Somalian and Eritrean nationals to Libyan authorities), the Israeli Supreme Court ruled in HCJ 7032/07 (Hebrew) that an individual cannot be sent back to a place where his freedom or life would be threatened. Justice Aharon Barak, then the President of the Israeli Supreme Court, established that the principle of non-refoulement can be derived not only from Article 33 of the U.N. Refugee Convention, but also from Article 1 of the Israeli Basic Law: Human Dignity and Liberty. Chief Justice Barak held that the principle ‘applies in Israel to any governmental authority relating to the expulsion of a person from Israel.”

A more recent and highly pertinent case, HCJ 7032/07 (Hebrew), involved the ‘hot return’ procedure, whereby Israel would return border-crossers to Egypt in coordination with the Egyptian authorities, without assessing the claims of potential asylum seekers. The court dismissed the petition in view of the Israeli government’s announcement that the practice has ceased (primarily due to the political developments in Egypt). However, the court held that “if and when the policy is renewed, it will follow accepted standards of international law and include proper guarantees that will assure the safety of returnees to a high degree of certainty” [par. 12, author’s translation].

Notably, the construction of the (expensive and sophisticated) fence and the refusal to admit those approaching it as asylum seekers while concomitantly refusing to set up a procedure for making asylum applications at the border crossings is part of a comprehensive government policy to deter future asylum seekers from arriving, and to encourage asylum seekers currently in Israel to leave ‘voluntarily’. The majority of asylum seekers in Israel come from Eritrea, and the State offers them (as well as Sudanese nationals) temporary collective protection from deportation without conducting individual refugee status determination procedures and without allowing them to work.

In a previous paper, I have discussed some conceptual and practical difficulties arising from the Israeli position. Moreover, these developments come against the background of legislation passed earlier this year that sanctions detention of ‘infiltrators’ crossing the Israeli Southern border for a period of up to three years in a new detention centre that has recently been completed in the Israeli Negev desert (see my discussion here). One can only hope that the moral outrage that the scenes at the border has caused, and the realisation that repatriation of Eritreans and Sudanese asylum seekers is unlikely in the foreseeable future, will lead the Israel government to adopt a Convention-compatible asylum policy towards the Eritreans and Sudanese who currently reside in Israel, and to set up a procedure for making asylum applications at its border crossings. Otherwise similar incidents are likely to occur.

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Gettine Real on Children’s Rights: Is Offshore Processing Compatible with Australia's Legal Obligations to Child Refugee Applicants?
By Katie O’Byrne and Jason Pobjoy | 8 September 2012

Amidst the fierce debate surrounding the report of the Expert Panel on Asylum Seekers (Houston Report) and the subsequent enactment of the Legislation Amendment (Regional Processing and Other Measures) Act 2012 (Cth) (‘Regional Processing Act’), children’s rights have been kicked further under the carpet as the Australian Government persists in its crusade for legal exceptionalism. This note focuses on implications of the legislative changes for child refugee applicants arriving by boat, and in particular, unaccompanied minors.

Australia owes every child within its jurisdiction—including non-citizen children—the corpus of rights set out in Convention on the Rights of the Child (‘CRC’). At the heart of the CRC is the requirement that ‘[i]n all matters concerning children, the best interests of the child shall be a primary consideration’. The CRC goes on to require special protections for children deprived of a family environment (art. 20) and refugee children (art. 22), and provides that children have the right to education (arts. 28-29), the highest attainable standard of health (art. 24) and freedom from arbitrary detention (art. 37). Critically, Australia is not absolved of these responsibilities by transferring children to an offshore processing facility. Apart from limited engagement with the best interests principle, the Houston Report did not mention these responsibilities, despite having been commissioned to advise on ‘relevant international obligations’.

The ‘best interests’ principle requires that the best interests of each individual child must be the subject of active consideration of all administrative authorities, legislative bodies and courts of law, and taken into account as a primary consideration. The UN Committee on the Rights of the Child (‘UNCRC’) has interpreted the principle to require a comprehensive assessment of the best interests of a displaced child prior to any decision fundamentally impacting that child, conducted in a friendly and safe atmosphere by qualified professionals.

The Regional Processing Act does not contain any requirement that a best interests assessment be conducted in relation to children who are transferred to another country to be processed. The majority of the High Court in Plaintiff M70 v Minister for Immigration and Citizenship noted that in the context of the (failed) Malaysia Solution the intention was to conduct the assessment after a child had reached Malaysia. Conducting a best-interests assessment after the decision to transfer is made radically misses the point of the obligation. Under the Regional Processing Act, it is not clear when—or if at all—this assessment will take place.

For the past several decades, when an unaccompanied child arrived in Australian territory the Minister for Immigration and Citizenship was appointed the child’s guardian under the Immigration (Guardianship of Children) Act 1946 (Cth) (‘Guardianship Act’), and the child became a ward of state. Before the child left Australia the Minister would have to give consent in writing, having regard to the child’s interests. The High Court in Plaintiff M70 confirmed that this consent would be reviewable under Australian administrative law. Such a regime would constitute a violation of the rights under the CRC, including the ‘best interests’ principle.

In order to circumvent the High Court ruling, the Houston Report recommended that the requirement to consent be repealed. But Parliament sunk the boot even harder into children’s rights. The Regional Processing Act has amended the Guardianship Act to remove in their entirety the Minister’s guardianship responsibilities for any unaccompanied child who is taken to be processed in an offshore facility. No provision is made for any person to replace the Minister as legal guardian. This is directly contrary to guidance provided by the UNHCR, which emphasises that a child’s best interests require the expeditious appointment of a ‘competent guardian … as a key procedural safeguard’ to be consulted about all actions taken in relation to the child. In one ferocious legislative swop, unaccompanied children have been cast adrift.

It’s time to get real on what the new offshore processing regime means for children seeking international protection. The current regime is plainly incompatible with Australia’s international legal obligations, and is yet another blot on Australia’s increasingly tarnished human rights record. In circumstances where the Government has demonstrated an obstinate, if misconceived, intention to process refugee applicants offshore, it is crucial that these arrangements are compatible with the near-universally agreed set of rights that states owe to all children.

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Australia’s New Offshore Processing Laws for Asylum Seekers Raise Doubt over Australia’s Commitment to Fundamental Human Rights and Beyond
By Elise Klein | September 2012

On 16 August 2012, the Migration Legislation (Regional Processing and Other Measures) Bill 2012 was passed in the Australian Parliament. In broad terms, the laws were introduced as a measure to reduce the number of asylum seekers who attempt to reach Australia by boat. There are several aspects of this new law that, from a human rights perspective, are very troubling. Through a political economy lens, the new laws show how the Australian government has failed to respond of the actual reality of forced migration.

There are three human rights law concerns worth highlighting.

First, the Act gives the Government power to transfer people who arrive by boat to a ‘regional processing country’ (likely to be Nauru and Papua New Guinea) to have their asylum claims processed. The determination of a country as a ‘regional processing country’ need not be limited by reference to international obligations or domestic laws of that country. Not only does this circumvent the decision reached by the High Court of Australia in late 2011 (which held that regional processing must meet international human rights standards), it also may violate Australia’s non-refoulement obligations under the Refugee Convention.

Secondly, the Act expressly excludes the application of natural justice to a variety of Ministerial decisions, including which regional processingcentrethe asylum seeker should be sent to, and which countries should be identified as regional processing centres. According to the explanatory memorandum, allowing natural justice (such as the ability to appeal the Minister’s determination) would ‘negate the policy objective to arrange for persons to be taken quickly for processing offshore’. Denying individuals their right to natural justice in the name of expediency raises serious concerns about Australia’s respect for fundamental human rights, particularly the right to a fair hearing enshrined in Article 14 of the ICCPR.

Finally, when the legislation was introduced it was not accompanied by a Statement of Compatibility with Human Rights, contrary to the Human Rights (Parliamentary Scrutiny) Act 2011. The reason for this omission is said to be based on a very narrow view that the 2012 Bill was one amending an earlier 2011 Bill, so the requirement to introduce a Statement (which is mandatory for all laws introduced to Parliament since January 2012) was not enlivened. The failure to produce such a Statement on this narrow view and in circumstances where the law clearly raises human rights issues calls into question the legitimacy of Australia’s recent National Framework for Human Rights, which seeks to promote greater scrutiny of legislation for compliance with international human rights obligations.

Legal issues aside, the new offshore processing regime is also central to a wider discussion about the nature of the global political economy and how forced migration is endemic to globalising neoliberal economic systems. A re-framing of the whole debate centralising this would not be only helpful, but necessary in any attempt to move forward.

Forced migration is a global issue that reflects the structural inequality of the world we live in. When our world is moulded by war, harsh borders, trade liberalisation and climate change, the instances of people being displaced are going to continually increase. Australia, like all industrial countries, has a hand in this.

Today, more people migrate than any point in history, and this is increasing. In 2000, the UN estimated 185 million people migrating, rising to 214 million people in 2005. In the past, we saw migration predominately originating in Europe. Today, due to the myriad of push factors borne by the Global South, we see a pattern where people are trying to cross the South-North divide.

Continuing to support the populist notion of ‘stopping the boats’ through policies such as offshore processing shows a fundamental failure to conceptualise global neoliberal economic structures that contribute to pushing people to migrate.

The politics of deterrence that characterise this new policy misses the point and the laws that underpin that policy circumvent fundamental human rights protections. People will continue to seek refugee status, not only because it is their fundamental human right to do so, but more importantly because they rarely have any other choice.

Dr. Elise Klein has a DPhil in Development Studies from the University of Oxford. She currently holds a post doctoral fellowship at the Center for Aboriginal Economic Policy Research at the Australian National University.
Refugee Rights and the Lucky Country: Does Australia’s Regional Resettlement Plan Violate Human Rights?

By Katie O’Byrne | 7 August 2013

Australian Prime Minister Kevin Rudd has announced that people who come by boat to Australia and claim asylum will be transferred to detention facilities at Manus Island in Papua New Guinea (PNG) for processing and be permanently resettled in that country. PNG signed up to Australia’s “Regional Resetlement Arrangement” (RRA) in exchange for hundreds of millions of dollars redirected from Australia’s existing aid commitments. A similar deal has been struck with Nauru.

Third, the obligation of non-refoulement requires more than a commitment to not send refugees back to the countries they have fled: Australia cannot lawfully send a person to any country where he or she would face persecution. Particular concerns have been raised about high levels of violence against women in PNG and its continued criminalization of homosexuality. The Australian government has also confirmed that children and pregnant women may be sent to Manus Island despite risks to these groups of taking anti-malarial medication. Several pregnant women have already miscarried.

While PNG is a signatory to the Refugee Convention, it refuses to recognise the rights of refugees to work, housing, education and protection against expulsion. PNG has promised Australia that it will not apply these reservations in relation to persons transferred under the RRA, nonetheless, the UNHCR is concerned about the formidable challenges of integrating the resettled refugee population.

A nation of “boat people”, Australia now responds to a human rights challenge by flagrantly violating human rights. It is not beyond reach to achieve a genuine regional solution that engages other countries, strengthens protection, shares the burden of resettlement and complies with international law by protecting human rights. In the meantime, Australia currently resettles less than 1% of the world’s refugees. On the international stage, the “lucky country” could do a lot better.

Katie O’Byrne graduated from the LL.M. at the University of Cambridge in 2012.

Sinking hopes? Climate Change Refugees in New Zealand

By Caroline Sawyer | 10 November 2013

New Zealand’s Immigration and Protection Tribunal recently considered a “climate change refugee” case under its relatively new jurisdiction, which includes protection under the ICCPR as well as the Refugee Convention.

The appellant in AF (Kiribati) [2013] NZIPT 800413 hoped to stay in New Zealand with his family, citing the deteriorating conditions in his home island of Kiribati. This Pacific island has a long history of habitation and also invasion from other islands such as Tonga or Fiji, but from the 18th century onwards was under British and imperial influence, as a result of which – as much as of its geography – it has connections to New Zealand. New Zealand’s refugee and protection regime is relatively generous in operation, but it can generally afford to be so. New Zealand is more distant from everywhere than is usually appreciated – three or four hours from Australia by aeroplane – and, with its Advance Passenger Screening, it rarely sees any arrivals without a visa or visa waiver. Nevertheless, it does accept visitors and workers from New Zealand

The government maintains that the RRA is legal under both domestic and international law. However, while the potential for domestic legal challenge is unclear, the plan violates international law on at least three bases:

First, under Article 31 of the Refugee Convention, Australia must not penalize refugees entering its territory without authorization. The new policy punishes those who come by boat, while thousands of asylum seekers who arrive by plane each year are processed and resettled in Australia. Yet despite this tiered system, unlike any other country Australia counts all refugees in the same pool for the purposes of its overall intake, perpetuating demonizing rhetoric that every “boat person” is “taking a spot” from a refugee in an overseas camp. This confuses Australia’s Convention obligations with its voluntary sharing of refugees entered in January and the UNHCR has found significant shortcomings in its legal framework.

Second, under Article 33 of the Convention, Australia must not expel or return a refugee to territories where he or she would face threats to life or freedom on a prohibited ground (the obligation of non-refoulement). Compliance with this obligation requires an adequate system of refugee status determination. According to the RRA, PNG will undertake refugee status determination under local law. PNG has no track record in refugee status determination. Indeed, its refugee legislation was only enacted in January and the UNHCR has found significant shortcomings in its legal framework.

These announcements were prompted by a recent increase in the number of asylum seekers coming to Australia by boat, with travel generally arranged by people-smuggling networks in south-east Asia. Treacherous waters and insecure vessels led to numerous capsizes and deaths by drowning. It is unsurprising that over 90% of people coming by boat have been assessed as genuine refugees. Most would not risk such a journey unless escaping worse elsewhere.

Australia faces a human rights problem created by external forces, but the government is not speaking the language of human rights. Rather, its more pressing priority is to neutralise the “asylum seeker issue” before the upcoming federal election. Ostentatious full-page advertisements now bear down from Australia’s most popular newspapers stating: “If you come here by boat without a visa, you won’t be settled in Australia”. The Opposition Leader Tony Abbott promises an even harsher military-led response.

Seven grouped appeals from Tuvalu brought largely the same result. The appellants had nothing left in their country, which was sinking. Nevertheless, held Mr Joe of the Refugee Status Appeals Authority, they were not within the Refugee Convention but were “unfortunate victims ... of the forces of nature”. Mr Burson’s later, closer discussion did not dispel that.

Mr Burson first reviewed copious country information, establishing that employment, housing, health and even the supply of fresh drinking water in Kiribati are deteriorating as the sea gradually encroaches further on an already-overcrowded island. But the Kiribatians’ misery does not bring them within the parameters of New Zealand’s international obligations. The submission that the prosecution necessary for a successful refugee claim does not require human agency, whether from the state or tolerated by it, was rejected as brought from a non-legal source and not applying in the IPT. Mr Burson did discuss the potential overlap between environmental degradation and persecution, as for example obtained with the Marsh Arabs of Iraq, but AU’s situation fell short of denial of his core human rights and did not bring him protection as a refugee or under the ICCPR’s guarantees against “arbitrary deprivation of life”. Kiribati had taken no steps to deny the conditions of life to AF or his family, and moreover the risk to them was not “imminent”. The IPT left AF with only the hope – but it is a hope – that if given notice of liability for deportation, he might succeed in an alternative line of argument, under New Zealand’s humanitarian rules, which prevent deportation if it is “unjust or unduly harsh” (s 207 Immigration Act 2009).

Refugee Convention jurisprudence has broadened to include women and gay people as identifiable refugee categories, but “persecution” remains central. The potential of other treaties to assist the wider range of climate change “refugees” remains to be seen – for example whether and how the Convention on the Reduction of Statelessness will be invoked for the benefit of inhabitants and when these islands finally disappear.

Dr Caroline Sawyer is a Senior Lecturer at the Faculty of Law, Victoria University of Wellington.
There are trade-offs in the labour immigration policies of high-income countries between openness to admitting migrant workers and some of the rights granted to migrants after admission. This is a key finding arising out of new research examining labour immigration policies in over 45 high-income countries, as well as policy drivers in major migrant-receiving and migrant-sending states.

Greater equality of rights for new migrant workers tends to be associated with more restrictive admission policies, especially for admitting lower-skilled workers from poorer countries. The tension between “access to rights” applies to race a few specific rights that are perceived to create net-costs for the receiving countries, especially the right of lower-skilled migrants to access certain welfare services and benefits.

The trade-off raises a dilemma.

From a global justice point of view, both “more migration” and “more rights” for migrant workers are “good things”. The World Bank believes that more international labor migration, especially low-skill migration which is currently most restricted, is one of the most effective ways of raising the incomes of workers and their families in low-income countries. At the same time, rights-based organisations such as the ILO and many activists campaign for greater equality of rights for migrant workers. The trade-off between access to rights and means that we cannot always have both—more migration and more rights—so a difficult choice needs to be made.

Most low-income countries around the world are acutely aware of the trade-off between access to labour markets in high-income countries and some migrant rights. Few migrant-sending countries are willing to insist on full and equal rights for fear of reduced access to the labour markets of higher-income countries. As I discuss in my new book, The Price of Rights, some migrant-sending countries have explicitly rejected equality of rights for their nationals working abroad on the grounds that it constitutes a restrictive way of immigration policy measure.

How to respond to the trade-off between openness and rights is an inherently normative question with no one right answer. I believe that there is a strong case for advocating the liberalization of international migration, especially of lower-skilled workers, through temporary migration programs that protect the trade-offs between access and rights means that we cannot always have both—more migration and more rights—so a difficult choice needs to be made.

We should start discussing the creation of a list of universal ‘core rights’ for migrant workers that would include fewer rights than the 1990 UN Convention of the Rights on Migrant Workers. The ILO and some migrant-sending countries have explicitly rejected equality of rights for their nationals working abroad on the grounds that it constitutes a restrictive way of immigration policy measure.

Quashing Legislation Mandating Lengthy Detention of Asylum-seekers: A Resolution yet Cautious Israeli Supreme Court Judgment

By Reuven (Ruvi) Ziegler | 3 October 2013

The Israeli Supreme Court, sitting as a High Court of Justice, handed down a unanimous judgment quashing the 2012 Law for the Prevention of Infiltration (amendment no. 3 and temporary order) which mandated near-automatic 3 year detention for “infiltrators” (the judgment is presently available only in Hebrew).

The Price of Rights: Regulating International Labor Migration

By Martin Ruhs | 6 October 2013

regulating International Labor Migration (Princeton University Press). He is the author of The Price of Rights: Senior Researcher at the Centre on Migration, Policy and Asylum, Trafficking and Human Rights

Chapter five

As I have argued elsewhere, this legislation is incompatible with Israeli constitutional law and international refugee law. 1,750 persons are currently detained pursuant to the Act, out of the 54,201 persons present in Israel who have crossed its southern border with Egypt without authorisation. These individuals qualify as ‘infiltrators’ according to the impugned legislation.

In the present ruling, a nine-judge panel held the legislation to be in violation of Article 5 of the Basic Law: Human Dignity and Liberty which forms part of Israel’s constitutional arrangement, and pronounces that “[t]here shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise”. The court refrained from concluding whether the legislation also violates the right to freedom of movement.

In Israel, the right to liberty is subject to a general limitation clause under the basic law (similar to, inter alia, section 36 of the South African Constitution and section 1 of the Canadian Charter of Rights and Freedoms). Article 8 stipulates that ‘there shall be no violation of rights under this Basic Law except by a law defining the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required’.

Applying the limitation clause, the court held that the first legislative purpose, the prevention of long-term settlement of ‘infiltrators’ in Israel, is proper. Conversely citing an earlier judgment, it held that the second legislative purpose, preventing further ‘infiltration’, is improper, as detainees used merely as a means to an end, which violates their human dignity. The court refrained from determining whether the legislation also violates the human dignity of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required’.

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The main opinion, written by Justice Arbel, reluctantly held that the legislation passes the first sub-test (rational connection), but fails the second sub-test (least rights-restricting means) since, in her view, it is the completion of the fence which prevents further infiltration and there are various alternatives to detention (AiD) which include introducing a reporting requirement, or employing asylum seekers in agriculture where their residence will be employer-based. Conversely, the court’s President, Justice Grunis, asserted that these alternatives should not necessarily be considered legislative alternatives as they are executive rather than legislative acts. All judges agreed that, in the current circumstances, the legislation fails the second sub-test (narrow proportionality).

Space does not permit full appraisal of the court’s landmark judgment. I would like to offer six general observations:

First, numbers matter: the massive reduction in new entrants since the construction of a fence along the Israeli-Egyptian border has affected border-crossings continued at their previous pace, it is reasonable to assume that the legislation would have been upheld at least by some of the justices. The main judgment does not rule out reconsideration in light of changing factual circumstances.

Second, and relatedly, individualised determinations are not divorced from general perceptions: the separate opinions in the judgment diverge as to whether the state’s claim that most of the ‘infiltrators’ are genuine refugees but, rather, work migrants should be accorded (equal) weight and, consequently, as to the prospects for modified legislation withstand constitutional scrutiny.

Third, the potential harms of an effectiveness test: the court’s analysis can be read to suggest that, had initial plans for building a massive detention facility materialised, the legislation would have been more likely to pass at least the second proportionality sub-test.

Fourth, the power of language: the judgment is replete with references to the ‘infiltrators’ phenomenon. Notably, however, Justice Danziger and Fogelman note that they use the term ‘infiltrator’ only hesitantly.

Fifth, the limited role of refugee law: while the judgment pays occasional tribute to international refugee law, its ratio is at best supported by rather than relied on such interpretation. Article 31 of the Refugee Convention, entitled ‘Refugees Unlawfully in the Country of Refuge’, which deals with their non-penalisation, was not even mentioned once. This is hardly surprising as Israel has ratified the 1951 Convention and its 1967 Protocol but has not incorporated them into its domestic law, nor has it adopted legislation regulating asylum and refugee status.

Sixth, the unequal resort to extrajudicial empathy: the justices repeatedly called against the (negative) social and national implications of the ‘infiltration phenomenon’. Only Justice Hayut’s separate opinion pleads that the state dissolve the legal ‘fog’ surrounding the precarious status of Eritrean and Sudanese nationals who make up over 90 per cent of African asylum seekers in Israel.

This landmark judgment presents an opportunity for Israel to adopt a sensible and humane policy towards its asylum seekers. One can only hope that, rather than attempt to modify the quashed legislation, this opportunity will be seized.

Dr. Reuven Ziegler is a Lecturer at the University of Reading School of Law. This is a version of a post previously published on the European Society of International Law Interest Group on Migration and Refugee Law.
The Prevention of Infiltration (Amendment no. 4) Bill: A malevolent response to the Israeli Supreme Court judgment

By Reuven (Rovi) Ziegler | 5 December 2013

On 16 September, the Israeli Supreme Court, sitting as a High Court of Justice (HCJ), handed down a unanimous judgment quashing the 2012 Prevention of Infiltration (Amendment no. 3) Act mandating lengthy detention of asylum seekers. The HCJ set a 90-day period during which the State had to release 1,811 asylum seekers detained under the quashed amendment. The State publishes weekly updates regarding the release rate: according to the latest figures, only 538 detainees have been released to-date.

Detainees will be prohibited from working, and will be required to assemble three times a day in order to be counted. The facility will be closed at night, and leaving the facility for more than 48 hours requires a permit. The facility’s location in the desert, far from any civilian settlement, means that there is nowhere for the detainees to go.

Section 32T of the proposed amendment authorises the ‘board of supervisors’ – an appointee, without having to justify it and without clear criteria. Accordingly, the proposed Bill purports to move a detainee from the ‘open’ to the ‘closed’ facility for periods ranging up to a year as a sanction for certain transgressions. Those decisions will not be subject to judicial oversight; indeed, nor is the initial decision which persons to detain in the ‘open’ facility.

The HCJ judgment presented the State with an opportunity to reconsider its approach and devise a policy that meets the needs of the 54,000 asylum seekers currently living in Israel who cannot be deported, and addresses the hardships of the residents of south Tel Aviv (where many asylum seekers currently reside). Instead, the proposed Bill purports to tackle the non-existent problem of future asylum seekers entering Israel, using present asylum seekers as a means to that end.

Dr. Reuven Ziegler is a Lecturer at the University of Reading School of Law. This is a version of a post previously published on the European Society of International Law Interests Group on Migration and Refugee Law.

The Québec Charter of Values Project: Republican or immigrant-phobic?

By Lucie Lamarche | 17 September 2013

On Tuesday, September 10, 2013, the Government of Québec released its Strategy aimed at protecting the Values of the nation. It is important to say that this document is neither a bill nor a policy paper, yet. A strategy, in the brave new world of political communication, is a prompt aimed at assessing voters' reaction and opinion, the Strategy affirms that three values distinguish and define Québec: a common language, a secular-neutral state.

But a lot of people, especially Montrealers and human rights activists, including some feminists, do not wish to promote a hierarchy of human rights that would in a Charter put gender equality above other rights and women’s rights, including their right to work and other social rights. Values are not magical! And if anything, they are black magic when used in the framework of a political agenda. Such calculation, as many of us believe, include the factoring in of the political impact of a predictable judicial debate where Québec would lose against the Canadian Charter of Rights. Let’s just say that the Supreme Court decisions are not popular in Québec when they interpret the meaning of a distinct society. The confusion between values and human rights as nurtured by the Strategy would make it worse.

Québec is anything but a conservative society. And we deplore the fact that the rest of Canada cannot resist another round of ‘Québec bashing’. But we are used to it. What seems to us more dramatic is not only the potential for human rights violations carried by the Strategy, but also, the risk of an unnecessary political division inside Québec. This would not serve the immigrants nor any modern nation.

Professor Lucie Lamarche is the Gordon F. Henderson Chair at the University of Ottawa, Canada

Nobody in Québec, is against the basic values of the nation: French as a common language, a neutral and secular state and gender equality.

Chapter five

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Indirectly Sending the Citizen Into Exile? The Relevance of British Citizenship to Proportionality Under Article 8 ECHR

By Rowena Moffatt [13 August 2013]

Judgment in R (oao MM & Ors) v Secretary of State for the Home Department [2011] UKSC 4, the Supreme Court found that the British citizens had a constitutional right to residence in the country of nationality without let or hindrance. This finding placed weight on the significance of British citizenship in proportionality under Article 8 ECHR.

Blake J’s conclusion is clear: in the absence of compelling justification, refusing entry clearance in circumstances where the British citizen partner would have to relocate outside the UK to continue family life is a disproportionate interference with Article 8 ECHR rights.

The judgment also makes an important pronouncement on the constitutional importance of British citizenship in the context of the proportionality of interferences with family life under Article 8 ECHR.

The changes of 9 July 2012 inserted new provisions into the Immigration Rules requiring UK sponsors to demonstrate earnings of at least £18,600 (or more where there are children) in order to bring a spouse to the UK. While Blake J did not strike down the new maintenance requirements, in relation to sponsors who are British citizens or refugees he found the requirements to be ‘unjustified and disproportionate’.

This has had an immediate effect on decision making in the Home Office as applications which do not satisfy the maintenance requirements but do not otherwise fail to be refused have been put on hold.

The issue of child recruitment into orphanages for the purpose of exploitation (the “orphanage as a business” model) reflects a newly observed development in the realm of child trafficking and one that is currently unchecked by many international and national child protection agencies. Volunteers, church groups and smaller agencies donate into what can be a corrupt and dangerous enterprise for children, potential adoptive parents and the children’s biological parents. Children may be actively recruited from poor families or parents may willingly send them to “orphanages” during hard times, with the hope of bringing them back home when the family’s financial situation improves. Over half of the 30,000 children living in or orphanages or residential care centers in Haiti have at least one living biological parent and 80% have a close relative.

To control this illicit enterprise, the definition of child trafficking needs to be interpreted in a non-conventional sense. Although there are still many children used for domestic labour in Haiti, which is considered the textbook example, many more may be separated from parents, adopted illegally or paraded in front of potential donors to put funds into the hands of businessmen posing as benevolent orphanage owners.

Children are used to unlawfully obtain funds or money collected via their illegal adoption at some orphanages. I have met mothers who had sent children to orphanages temporarily, only to hear later that, unknown to them, their children had been adopted in a faraway country. Hopefully, recent improvements in the adoption law, which include a full search for any living relatives by the IBESR, will prevent further separations. However, adoption payments made directly to orphanages remain unregulated and the IBESR lacks the means needed to check.

Any intervention to control orphanages needs to be balanced with the recognition that Haiti and countries of similar socio-economic standing have many genuine orphans that need to be protected and cared for in residential care centers. The regulation of these centers needs to be transparent to donors and volunteers, not just to local government officials, who may be seduced by the potentially “big business” of orphanages.

Rachel Belt is currently based in Port-au-Prince, Haiti, working for the Office of the Prime Minister of Haiti. In 2013, she completed her Masters in Humanitarian Management at the Liverpool School of Tropical Medicine and she has a certificate in Forced Migration from Oxford and a degree from Columbia University in Political Science. Her work focuses in child protection and humanitarian management. She has previously worked for Doctors Without Borders, Project Medishare for Haiti, the International AIDS Vaccine Initiative and the World Health Organization in New York, Haiti, Geneva and Uganda.

The Haitian government, with the assistance of UNICEF, expanded the IBESR’s presence into all ten regions of Haiti and prepared a report recommended to cross borders with children and bulked up the Brigade for the Protection of Minors, a special force within the National Police that handles child-specific issues. The government and partner agencies were making to combat the exploitation of children in the context of a very poor country recovering from a major disaster.

The project, “A Child Haiti: The Orphanage Business” by Rachel Belt [17 December 2013] seeks to understand the significance of British citizenship is timely and welcome.

The research identified four main types of child trafficking in Haiti: ракля, illegal adoption or domestic labour. The children may be actively recruited from poor families or parents may willingly send them to “orphanages” during hard times, with the hope of bringing them back home when the family’s financial situation improves. Over half of the 30,000 children living in or orphanages or residential care centers in Haiti have at least one living biological parent and 80% have a close relative.

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Chapter 6
Constitutions, Institutions, Nation Building and Human Rights
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author</th>
</tr>
</thead>
<tbody>
<tr>
<td>87</td>
<td>One Step Forward, Two Steps Back: Constitution-Making and Voter Education in Zimbabwe</td>
<td>Obert Hodzi</td>
</tr>
<tr>
<td>87</td>
<td>Zimbabwe’s New Constitution: The Interplay between Election Reform and Constitutional Reform</td>
<td>Obert Hodzi</td>
</tr>
<tr>
<td>88</td>
<td>Think This Way: How Zimbabweans Adopt, Hold and Express Their Political Ideologies</td>
<td>Duncan Okubasu Munabi</td>
</tr>
<tr>
<td>88</td>
<td>Shelby County v Holder: Disconcerting Aspects of the US Supreme Court’s Decision and its impact</td>
<td>Alecia Johns</td>
</tr>
<tr>
<td>89</td>
<td>A Human Rights Act for Australia: A Transfer of Power to the High Court, or a More Democratic Form</td>
<td>Emma Hoberg</td>
</tr>
<tr>
<td>89</td>
<td>of Judicial Decision-Making?</td>
<td></td>
</tr>
<tr>
<td>89</td>
<td>The Tasmanian Dams Case, 30 Years On – Unfulfilled Promises</td>
<td>Neshevida Balasubramaniam</td>
</tr>
<tr>
<td>90</td>
<td>Australian judge lays down gauntlet for Proponents of Human Rights Instruments</td>
<td>Emma Hoberg</td>
</tr>
<tr>
<td>90</td>
<td>True Reconciliation Requires a Treaty</td>
<td>George Williams</td>
</tr>
<tr>
<td>91</td>
<td>The South African Constitutional Court: Is There a Threat From Populism?</td>
<td>Hugh Corder</td>
</tr>
<tr>
<td>91</td>
<td>Jurisdiction over Police Failures in Khayelitsha, South Africa: The Inter-Governmental Dispute</td>
<td>Sanja Bornman</td>
</tr>
<tr>
<td>92</td>
<td>The Future of Human Rights on These Islands</td>
<td>Colin Harvey</td>
</tr>
<tr>
<td>92</td>
<td>An Initial Reaction to the Commission on a Bill of Rights Final Report</td>
<td>David Feldman</td>
</tr>
<tr>
<td>92</td>
<td>The Universality of Human Rights Norms: Why the UK Should Stay with Strasbourg</td>
<td>John Eskeleizer</td>
</tr>
<tr>
<td>92</td>
<td>The UK’s Human Rights ‘Report Card’</td>
<td>Hayley Richardson</td>
</tr>
<tr>
<td>93</td>
<td>When is a UK Bill of Rights not a UK Bill of Rights?</td>
<td>Francesca Klug, Amy Ruth Williams</td>
</tr>
<tr>
<td>93</td>
<td>Human Rights and the UK Constitution</td>
<td>Colm O’Conneide</td>
</tr>
<tr>
<td>94</td>
<td>The Choice Before Us? The Report of the Commission on a Bill of Rights</td>
<td>Amy Williams</td>
</tr>
<tr>
<td>94</td>
<td>Lord Sumption on ‘The Limits of Law’</td>
<td>Thomas Raine</td>
</tr>
<tr>
<td>95</td>
<td>If the Human Rights Act were Repealed, Could the Common Law Fill the Void?</td>
<td>Brice Dickson</td>
</tr>
<tr>
<td>95</td>
<td>When does the EU Charter of Fundamental Rights apply?</td>
<td>Dimitrios Kyriazis</td>
</tr>
<tr>
<td>96</td>
<td>Bridging The Divide? Integrating the Functions of National Equality Bodies and National Human Rights Institutions in the EU</td>
<td>Neil Cowdher, Colm O’Conneide</td>
</tr>
<tr>
<td>96</td>
<td>The Iran Tribunal: The Case of the Court with Neither Power nor Jurisdiction</td>
<td>Olinga Tahzib</td>
</tr>
<tr>
<td>96</td>
<td>Fundamental Human Rights and the Community Law of CARICOM</td>
<td>Derek O’Brien</td>
</tr>
<tr>
<td>97</td>
<td>Same Script, Different Cast: A Tale of Zambia’s Constitutional Making Process</td>
<td>Tabeth Masengu</td>
</tr>
<tr>
<td>97</td>
<td>A New Role for Businesses in Safeguarding Human Rights</td>
<td>Claire Overman</td>
</tr>
<tr>
<td>98</td>
<td>The Human Rights Restoration-Revolution</td>
<td>Dr Marco Duranti</td>
</tr>
<tr>
<td>98</td>
<td>Cambodia Elections 2013: Is a Cambodian Spring Blossoming?</td>
<td>Rodolphe Prom</td>
</tr>
<tr>
<td>99</td>
<td>Human Rights and Community Justice: A View from Red Hook, Brooklyn</td>
<td>Julia Spelman</td>
</tr>
<tr>
<td>99</td>
<td>Indian Supreme Court Upholds the Right to Negative Voting</td>
<td>Gautam Bhatia</td>
</tr>
</tbody>
</table>
One Step Forward, Two Steps Back: Constitution-Making and Voter Education in Zimbabwe

By Obert Hodzi | 24 May 2013

Over the past decade, Zimbabwe has been characterised by political turmoil and economic malaise that resulted in dollarisation and abandonment of the country’s currency in 2008. After the disputed and violent elections of March and June 2008, political parties in Zimbabwe entered into a Global Political Agreement (GPA) to address the challenges facing the country. Article VI of the GPA provided that the government of national unity, comprising the Zimbabwe African National Union–Patriotic Front (ZANU-PF) and Movement for Democratic Change (MDC), would set up a Parliamentary Constitution Select Committee (COPAC) to facilitate the drafting of a new constitution. The constitution drafting process that ensued for the next four years was dominated by inter-party political bickering. In January 2013, after spending at least $50 million, COPAC produced the final draft of the constitution, leading to a constitutional referendum held on 16 March 2013.

Despite the fact that the draft constitution represents a compromise between the major political parties, more than 95% of voters approved it. Over the first two weeks of May 2013, the House of Assembly and the Senate unanimously approved the draft constitution with minor amendments. The Constitution of Zimbabwe Amendment (No. 20) Bill was signed into law by the President on 22 May 2013.

However, if the new constitution represents a small step forward for Zimbabwe, the voter registration process for the constitutional referendum was fraught with problems.

As the draft constitution was approved, civil society activists played running battles with police due to allegations that they had engaged in illegal voter education. Meanwhile, the Zimbabwe Electoral Commission (ZEC) struggled to implement their mobile voter registration campaign due to poor publicity, lack of voter education, meagre financial resources and logistics and personnel problems. Hundreds of potential voters were turned away for not possessing relevant documents, in particular proof of residence which is required to register as a voter. In addition, aliens were denied registration even though they possessed Zimbabwean identity documents. Meanwhile, human rights activists and other political parties such as MDC-T complained that the Registrar General neglected areas known to be non-ZANU-PF strongholds in an effort to systematically disenfranchise its potential supporters from registering as voters.

Before the election, as ZANU-PF launched and implemented its door-to-door voter mobilisation campaign, the Officer Commanding Harare Sub-Urban Region also banned all other political parties from conducting door-to-door voter mobilisation campaigns arguing this measure was necessary to curb political violence. Weeks before this pronouncement, MDC-T officials and Election Resource Centre voter education volunteers had been arrested for impersonating government officials and providing voter education without the approval of ZEC.

The new Constitution provides for a further 30-day voter registration exercise, which according to the cabinet will be undertaken before the next elections are held. Yet, regardless of the legal provisions of the constitution, the politics surrounding the constitutional approval process are not encouraging. For example, the ban of door-to-door voter mobilisation was not based on any legislation but was a police decree. In the past, ZANU-PF has used police decrees to apply the law selectively and persecute non-ZANU-PF supporters. In addition, the leadership of state security institutions have already declared their support to ZANU-PF contrary to the non-partisan constitutional mandate. Constitutionalism therefore remains a critical challenge to Zimbabwe.

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Zimbabwe’s New Constitution: The Interplay between Election Reform and Constitutional Reform

By Obert Hodzi | 9 July 2013

The new Constitution of Zimbabwe was signed into law on 22 May 2013. It contains several provisions that are encouraging; a wider bill of rights including socio-economic rights, the requirement that executive powers be shared between the cabinet and the president, provisions ensuring access to the media to all political parties, and guidelines on the conduct of security services. However, several provisions of the constitution will only go into effect when presidential, parliamentary and local government elections are held on 31 July 2013, which means that in practice electoral reforms have taken precedence over more comprehensive and holistic constitutional reforms. The implementation of these electoral reforms has not been without problems, and has set an uneasy precedent for constitutional reform in Zimbabwe more generally.

In Zimbabwe, electoral reforms have taken precedence over more comprehensive and holistic constitutional reforms. According to Schedule 6, Part 2 Section 3 provisions relating to: (1) Citizenship, (2) Declaration of Rights, (3) Elections, particularly those relating to the election and assumption of office of the new president, the election and summoning of parliament and the functions and powers of the Zimbabwe Electoral Commission (ZEC), (4) Public administration and leadership as well as the conduct of members of the security services, and (5) Provisions relating to local and provincial government were supposed to come into effect on promulgation into law of the new Constitution; while the rest of the constitution will be effective on the assumption into office of the new President of Zimbabwe.

The probable reason for the staggered implementation is to fit reforms within the election timeframe. However, even provisions that were supposed to be immediately implemented, such as guidelines on the ‘conduct of members of the security sector,’ remain politically contested. Section 208 of the new constitution prohibits members of the security services from being partisan or meddling in civilian affairs. Section 11.6 requires the president to inform parliament whenever members of the defence forces are to be deployed in Zimbabwe. However, ZANU-PF has resisted attempts to regulate the conduct of the security services during the electoral period. A number of prominent and high level police officers, military officers and intelligence officers have indicated their interests to campaign and contest as ZANU-PF candidates – an additional cause of concern.

Furthermore, the constitutionally mandated 30-day voter registration process has been marred by logistical problems. One challenge relates to Zimbabweans of foreign descent: they were formerly disenfranchised, but according to provisions in the constitution they are now allowed to register as voters. However, they now face significant challenges in acquiring the national identity cards required to vote.

The timeline for elections has drawn in both the Constitutional Court and regional bodies. On 31 May, 2013, the Constitutional Court ruled that general elections should be held by 31 July 2013. However, the Southern Africa Development Community (SADC) Extraordinary Summit held on 15 June 2013 urged the government of Zimbabwe to seek a 14-day postponement of the election date to ensure necessary electoral reforms would be implemented. The government complied with the SADC resolution, by lodging an application for the postponement of elections, which will be heard by the Constitutional Court on Wednesday, 26 June 2013. This has raised concerns over the separation of powers between the judiciary and the executive as well as the role of SADC in national courts’ decisions. To avoid the potential conflict between regional bodies and national courts, SADC and the African Union acknowledged the Zimbabwe’s Constitutional Court earlier ruling that elections be held on 31 June 2013 and committed to respect the court’s decision on the appeal seeking postponement of the elections.

Other thorny issues in Zimbabwe’s constitutional reform process are electoral management and the accreditation of local and foreign election observers including the composition of the electoral management body, the Zimbabwe Electoral Commission. Prior to the adoption of the new constitution, the Registrar–General managed the voter registration process and the Ministry of Foreign Affairs accredited election observers. The new Constitution grants the Zimbabwe Electoral Commission sole mandate for election management, including registration of voters, management of the voters’ roll and accreditation of election observers. It further provides for an electoral court to expeditiously resolve electoral disputes. Previously, electoral disputes were adjudicated by regular courts which took years to decide the cases, rendering them mere academic exercises. We can only hope new court reviews will be more encouraging.

Thus, while the new constitution provides several promising provisions on paper, in practice, if the current hitches in the implementation of the electoral reforms are indicative of a larger trend, Zimbabwe remains far from embracing the principle of constitutionalism.

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When American jurist Ben Cardozo said that the freedom of thought is “the matrix, the indispensable condition, of nearly every other form of freedom,” it was no idle talk. His words were wise and are still true.

Political rights are largely under siege in Zimbabwe because of the curtailment of this freedom. The existence of repressive laws scare and prevent citizens from holding certain ideologies.  Imagine for instance that the dictates of the political elites. Poverty then seals this risk of discrimination. Some are denied food while others gamble of holding anti-ruling party ideologies stand the challenge of the political environment does not permit them to freely think and express themselves, nec vi, nec clam, nec precario. State sanctioned violence has caused many to think the way the ruling party wants them to, rather than adopt opposing ideologies. Political violence, propagated by state security forces, seems to have been greatly curtailed by patriarchy. They are not promoted at work. Women’s freedom of thought is “the matrix, the indispensable condition, of nearly every other form of freedom,” it was no idle talk. His words were wise and are still true. When asked to report to the police because of the fear of being accused of holding certain ideologies, many people have found themselves to let go of the right to adopt, hold and express their political ideologies. That aspiration remains wishful thinking. Zimbabweans have no option but to let go of the mother of their classical freedoms, the freedom of thought. This begs the question, why has the freedom of thought been held hostage in Zimbabwe?

I conducted a study in Harare in April 2013 to see whether the anticipated gravity of the VRA, the Voting Rights Act, the political environment does not permit them to freely think and express themselves, nec vi, nec clam, nec precario. The VRA was enacted in 1965 to address pervasive racial discrimination in voting. The VRA made substantial inroads, partly due to its pre-clearance requirement, which mandates certain States to seek approval from federal authorities before changing their voting laws. In 2006, Congress reauthorized the Act, but without changing the original formula for deciding which States required pre-clearance (section 4). By a 5-4 majority, the Court held that the coverage formula in section 4 was unconstitutional on the basis that it violated the principle of equal sovereignty of States. The formula was held to be outdated for failing to respond to ‘current needs’, given the fact that the ‘flagrant’ discrimination, which distinguished covered jurisdictions in 1965, no longer existed.

The Court’s decision invalidates crucial legislation designed to safeguard the right to vote: the single most fundamental democratic right, which is itself ‘preservative of all rights’ (Yick Wo v Hopkins). Yet, the majority opinion invites doubt as to whether the degree of care exercised in formulating its decision was commensurate with the anticipated gravity of its impact. Key areas of concern are outlined below.

1. Court’s failure to explicitly outline its standard of review

The Fifteenth Amendment grants Congress the power to enforce ‘appropriate legislation’ to combat racial discrimination in voting. In assessing whether Congress is operating within this power, the Court has previously established that Congress may utilize any ‘rational means’ to effectuate this aim (South Carolina v Katzenbach 383 U.S. 301 (1966)). Yet, in Northwest Austin v Holder 557 U.S. 193 (2009), the Court left open the question of whether this standard still applied or whether a higher standard of ‘congruence and proportionality’ was necessary. The Court had the luxury of leaving the question open in Northwest
Constitutions, Institutions, Nation Building and Human Rights
Chapter six

A Human Rights Act for Australia: A Transfer of Power to the High Court, or a More Democratic Form of Judicial Decision-Making?
By Emma Hoiberg | 17 July 2013

Australia is the only Western country without some form of a national Bill of Rights. In 2008, the National Human Rights Consultation Committee, established by the federal government, recommended that Australia introduce a Human Rights Act based on the UK Human Rights Act 1998. Interestingly, the arguments raised in opposition to an Australian Human Rights Act were largely the same as those raised before the UK parliamentary inquiry held last year. Much was made of the power given to the courts under the UK model to issue a declaration of incompatibility. At the forefront of the opposition in Australia was the argument that the introduction of a Human Rights Act would result in a transfer of power from a democratically elected legislature to an unelected judiciary.

However, what is often overlooked in this debate is that the High Court of Australia already possesses a significant power under the Australian Constitution to strike down legislation which is constitutionally incompatible.

It has used this power to invalidate legislation in areas which traditionally fall within the criminal sphere – laws restricting communication on political matters, detention of prisoners beyond the expiration of their sentences, and laws which have restricted the voting rights of certain sectors of the community. Some of these decisions have been based directly on provisions contained in the Constitution, but many are “implied” limitations derived from a combination of Constitutional provisions.

The argument that an Australian Human Rights Act would result in a “transfer” of power to the judiciary understimates the extent to which the High Court can, and already does, use the Constitution to strike down legislation which is incompatible with fundamental human rights. Ironically, this is a much stronger power than the ability to issue a non-binding declaration of incompatibility under the Human Rights Act 1998 (UK).

Accordingly, the debate in Australia must shift from whether the High Court should have the power to make decisions on human rights issues, to why it would be better for this to occur under a Human Rights Act.

I argue that there are two additional benefits to having a Human Rights Act in Australia. The first is that it would give greater democratic legitimacy to the High Court’s decision-making. It allows the people, through their democratically elected legislature, to say which human rights should be protected by the High Court and in what way. Currently the High Court’s primary mechanism to protect human rights derives from its own interpretation of the Constitution – a mechanism which, while it has been effective, is hardly democratic.

Secondly, having a national Human Rights Act would assist in creating a “culture of justification”. Human rights litigation requires the government to come to court and provide persuasive, coherent reasons for its alleged infringement of human rights. The role of the judiciary is to examine that justification. Even if that is the sole purpose of a Human Rights Act – to hold the government to account – it will direct greater focus towards human rights in the decision-making process and bring human rights to the forefront of public and political consciousness. In Australia, that would be a much-needed improvement.

Emma Hoiberg is an Australian lawyer who completed the BCL in 2012. This post is drawn from a dissertation prepared for that course.

The Tasmanian Dams Case, 30 Years On – Unfulfilled Promises
By Neshevida Balasubramanian | 20 October 2013

The landmark Australian Tasmanian Dams case celebrated its 30th anniversary in August 2013. This case was a turning point for Australia. It had significant implications both for the interpretation of federal constitutional powers as well as the political relationship between the Commonwealth and the States.

In a 4:3 decision, the High Court of Australia held that the external affairs in the constitutional power gave the Federal Government full authority to implement any international treaty that it signed on any subject matter. In this case, an Act implementing the World Heritage Convention, and thus preventing the Franklin Dam being built on a World Heritage listed area, was held to be valid.

This was a powerful decision.

It meant that Australia could fully implement international human rights treaties with no impediments from the States – the case was thought to be a triumph for human rights. International human rights can now fully be implemented in Australia, they said. Australia will soon have a bill of rights, they said. So, 30 years on, has the Tasmanian Dams case really fulfilled its promise of improving Australia’s human rights protections?

Having signed several human rights treaties, Australia has the power to establish a Bill of Rights, either in legislation, or within our Constitution. 30 years on from the Tasmanian Dams case, Australia has neither. We are one of the only advanced democracies in the world that do not protect fundamental human rights explicitly in our national Constitution.

This has meant for example, that although Australia signed the International Convention on the Elimination of All Forms of Racial Discrimination and implemented this domestically at the federal level through the Racial Discrimination Act, it doesn’t provide any real guarantee that citizens in Australia will be treated equally and will not be subject to discrimination on the basis of race.

Why is this?

The Federal Parliament has the power to suspend any legislation including the Racial Discrimination Act wherever it likes. In fact, it has done so three times already, in order to pass legislation that is discriminatory against our Indigenous population. This has severely reduced Australia’s credibility and moral standing internationally.

The right to equality and non-discrimination is a core right in any liberal democracy. So how can Australians stop the Federal Government overriding human rights protections at political whim? There is only one way, and that is through entrenched Constitutional protection. The Australian people have the power to vote through amendments to change the Constitution so that it includes fundamental human rights.

Shockingly, Australia’s constitution still contains relics of its racist colonial history. The ‘Races Power’ in s 51(xvi) still allows ‘special laws’ to be passed to the detriment of a particular race. Modern High Court interpretation of this power has not changed this.

This demonstrates that so long as anything in our Constitution can be interpreted to the detriment of our own people, there is a real risk that it can be used in this way.

There is a way to change this situation. And the first step is close. All major political parties in Australia have agreed to have a referendum that recognises our Indigenous people in the Constitution. This would guarantee equality and non-discrimination and would also pave the way for other human rights protections to be written into our Constitution.

It is an important moment because it will mean that our Constitution will finally say that Australia is a country built on fundamental respect for human dignity, respect and equality for all.

Australians can finally pick up from the historic triumph that the Tasmanian Dams case represented and move forward as a country to say loudly and clearly that fundamental human rights are too important to be left out of our national constitution.

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Constitutions, Institutions, Nation Building and Human Rights
Chapter six

Australian Judge Lays Down Gauntlet for Proponents of Human Rights Instruments
By Emma Hoiberg | 2 December 2013

Dyson Heydon’s lecture earlier this year, “Are Bills of Rights Necessary in Common Law Systems?”, used the HRA to identify four “central functions”, two “key characteristics” and seven “problems” with Bills of Rights. However, many of the problems Heydon identifies may not assume the same significance if a Bill of Rights similar to the HRA existed in Australia. Some problems, like loss of national sovereignty, are peculiar to the UK’s relationship with the European Court of Human Rights. Other problems, such as Heydon’s concern that giving judges a human rights jurisdiction causes them to stray into other areas that courts have traditionally abstained from, cannot be predicted with much certainty.

Heydon’s problem with the advisory nature of declarations of incompatibility would be unlikely to arise at a federal level in Australia, due to the separation of powers in the Australian Constitution which requires the HCA to only exercise judicial power. Advisory declarations have been held to be non-judicial. A declaration of incompatibility would at the very least need to be binding on the parties to the dispute in order to be constitutionally valid in Australia (see Monomovic v R at [587] (Crennan & Kiefel JJ) and also the Report of National Human Rights Consultation Committee, Appendix E).

Heydon also takes issue with the interpretative power in s 3(1) of the HRA, which he describes as giving courts the power to remodel legislation in a way which does not reflect the legislative will. However, the HCA has expressed reluctance to use an interpretative power like s 3(1) of the HRA to change the meaning of legislation. In Monomovic v The Queen (2011) HCA 34, the High Court interpreted a similar (but differently worded) provision in the Victorian Charter of Human Rights and Responsibilities Act 2006 as simply a legislative expression of the principle of legality. Only Heydon, in dissent, found that the Victorian provision was drafted with the HRA in mind and should be interpreted broadly.

Heydon’s primary argument centres around the familiar debate of whether the judiciary is a competent or legitimate branch of government to make decisions about human rights. This is probably the most compelling of Heydon’s arguments, and not one to which there can be a simple response. It should be pointed out, as I have previously argued on this Blog, that the HCA is regularly called upon to apply and interpret constitutional provisions involving questions of social or political policy, such as voting rights, preventative detention schemes and the upcoming hearing on the 1967 referendum. The High Court has proved capable of managing equality laws. It is accepted without question that the High Court is both a competent and legitimate body to be resolving these controversies.

Heydon concludes by identifying three alternative techniques to protecting human rights that do not require a Bill of Rights: the separation of powers; the principle of legality; and the specific rules of the general law. The HCA has used the first two techniques to protect rights, although with differing results. Ironically, the HCA has considerably expanded the reach of the separation of powers contained in the Australian Constitution, by imposing into the Constitution a requirement that the separation of judicial power applies at not only the federal level but also the state level. This implied constitutional protection has been used in a number of cases to invalidate excessive or indiscriminate legislative restrictions, but it arguably goes beyond the intention of the drafters of the Constitution. At the same time but at the opposite end of the spectrum, the High Court has maintained that the principle of legality applies only insofar as the wording of the legislation is ambiguous. It cannot assist with legislation which clearly intends to infringe human rights.

When Heydon’s critique of Bills of Rights is applied to the Australian context, two things can be seen. First, the difference in Australia’s constitutional structure and the reticence of the HCA to interpret Bills of Rights liberally means that a Bill of Rights like the HRA may not have many of the problems that Heydon identifies. Secondly, Heydon’s alternatives to a Bill of Rights have in fact been used by the High Court with varying efficacy. Perhaps, then, a Bill of Rights should not be too lightly dismissed in the Australian context.

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True Reconciliation Requires a Treaty
By George Williams | 20 November 2013

Treaties are accepted around the world as the means of reaching a settlement between Indigenous peoples and those who have settled their lands. Australia is the only Commonwealth nation that does not have a treaty with its Indigenous peoples. We have never entered into negotiations with them about the taking of their lands or their place in this nation. Rather than building our country on the idea of a partnership with Aboriginal people, our laws have sought to exclude and discriminate against them.

A negotiated treaty with Aboriginal people would mark an important break from a system that has disregarded the views of Aboriginal people, and reinforced their feelings of powerlessness.

This is reflected in the text of our Constitution. Aboriginal people were not represented, nor were they consulted in its drafting. Indeed, they were viewed by the White drafters as a dying race, and the Australian legal system was premised on the idea that they had no long-term future in the Australian nation. Until Mabo in 1992 [1992] HCA 23, this was reflected in the idea that Australia was terra nullius, or no man’s land, when white settlers arrived in 1788. For the purposes of our laws, it was as if Aboriginal people simply did not exist.

It is no surprise then that the Australian Constitution was drafted to deny Aboriginal people their rights and their voice, even in their own affairs. The preamble to the Constitution makes no mention of the prior occupation of Australia by its Indigenous peoples. Section 25 recognised that the States could disqualify people from voting in the elections on account of their race. Section 51(xxxi) provided that the Commonwealth Parliament could legislate with respect to ‘the people of any race, other than the Aboriginal race in any State, for whom it is deemed necessary to make special laws’. This was the so-called, ‘races power’, and was inserted to allow the Commonwealth to ‘regulate the affairs of the people of coloured or inferior races who are not Citizens of the Commonwealth’. Section 127 provided: ‘In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, all aboriginal natives shall not be counted’. Some of these things were fixed with the 1967 referendum. On the other hand, the referendum did not change the preamble or section 25. Today, we have a Constitution that ignores the existence of Aboriginal people and recognises that people can be denied the vote and other important rights and freedoms simply because they are deemed to discriminate against people for the same reason.

The question today is how we can end this pattern of exclusion and discrimination. Constitutional change is certainly part of the answer, but so is a treaty.

The idea of a treaty goes back many years. In 1832 the Governor of Van Diemen’s Land, George Arthur remarked that it was ‘a fatal error… that a treaty was not entered into with the Aboriginal people of that island. In more recent times, a call for a treaty was made at the Corroboree 2000 convention, and the Council for Aboriginal Reconciliation identified a treaty as an aspect of the unfinished business of the reconciliation process.

By a treaty, I mean nothing more than an agreement between governments and Aboriginal peoples. Such an agreement could involve three things: a starting point of acknowledgment, a process of recognition, and outcomes in the form of rights, obligations and opportunities.

A treaty could recognise the history and prior occupation of Aboriginal peoples of this continent, as well as their long-standing grievances. It could be a means of negotiating redress and of helping to establish a path forward based upon mutual goals, rather than ones imposed upon Aboriginal people. At its heart is the notion that a place in the Australian nation cannot be forced upon Aboriginal people. It needs to be discussed and negotiated through a process based upon mutual respect that recognises the sovereignty of Aboriginal peoples.

By contrast, what we tend to see today, at best, is only consultation with Aboriginal people. The international evidence is compelling in showing that listening to Indigenous peoples is by itself insufficient to bring about real change. Change must be built on the genuine partnership between Indigenous peoples and governments. This is the most important finding of the Harvard Project on American Indian Economic Development: that sovereignty matters. The evidence shows time and time again that redressing disadvantage over the longer term depends upon Indigenous people having the power to make decisions that affect them. They must be responsible for the programs designed to meet their needs, and must be accountable for the successes and failures that follow.

The problem in Australia is that we lack the laws and institutions necessary for Aboriginal peoples to make such decisions. A negotiated treaty with Aboriginal people would mark an important break from a system that has disregarded the views of Aboriginal people, and reinforced their feelings of powerlessness. A treaty could give rise to stronger, and more capable, institutions of Aboriginal governance. This is not to suggest there is any quick and easy fix: a treaty is one piece of the puzzle. It is something that needs to be done both to achieve reconciliation and underpin long-term Aboriginal prosperity.

Prime Minister Tony Abbott spoke about such matters in Parliament last year in a speech in support of an Act of Recognition for Aboriginal peoples. He has not positively supported the idea of a treaty, but has spoken in a way that recognises the need to change, including power of a treaty in facilitating two peoples to ‘become one nation’. Tony Abbott got it right. Now is the time to take the steps that would finally unite us as one people. True reconciliation requires a treaty.

Professor George Williams, Anthony Mason Professor, Faculty of Law, University of New South Wales. This is an edited version of a speech given at the Intelligence Squared Debate, Wheeler Centre, 12 November 2013.
The South African Constitutional Court: Is There a Threat From Populism?

By Hugh Corder | 13 June 2013

The overwhelming body of opinion seems to be that the South African Constitutional Court (CC) has done quite well in its first 17 years. From the first slew of “easy” cases, (reversing the onus, outlawing of sodomy, etc), to the landmark stamping of its authority in Makwanyane [1995] ZACC 3, Fedure, [1998] ZACC 17 Pharmaceutical Manufacturers Association [2000] ZACC 1, the Court has spoken directly, with clarity and vigour, seemingly confident about its role in the democracy demanded of it by the Constitution.

With this rather exemplary judicial record, why the focus on a ‘populist’ threat?

Perhaps this is triggered by the fear of a retreat from this brave beginning, of an undermining of judicial impartiality and independence. But the term first needs to be defined. ‘Populism’ is taken to be some form of unmediated, simple majoritarian approach to the notion of democracy, seeing the wishes of 50% plus 1 should prevail, as expressed through mob action, beyond the confines of the rule of law, as the last five months of 2012 and the events at Marikana and de Doorns so vividly demonstrated. It seems to be a topic worthy of consideration, for the reasons set out below, in brief:

- The fate of the judiciary in Zimbabwe from 1999 and in Kenya, and elsewhere in Commonwealth Africa at present, such as Malawi and Swaziland.
- The series of attacks on the courts generally, the CC in particular.
- The unwillingness of the majority on the Judicial Service Commission (JSC) to tackle allegations against Judge President Hoopho until recently.
- A clear bloc voting by ANC and ANC-aligned members emerging in the JSC appointments process post-2009. One must ask what multiple effects this is having on judicial capacity, especially where it appears that this is undermining the State court structure in at least three ways: competent and hardworking judges are doing more than their fair share of the work; private arbitration is growing; and there is increasingly intemperate public criticism of the administration of justice, which again in turn reduces the courts’ most precious popular democratic support base, their legitimacy, and may put off many leading lawyers, both black and white, from becoming candidates for judicial office.
- The issue of ‘transformation’ being constantly and generally unhelpfully seen as a single-aspect process, only in terms of demography, of achieving race and gender resemblance as proportionately close to the broader population as possible. This fails to take account of the much more fundamentally transformative goals of the Constitution.

If one weighs up these real and perceived populist threats to the constitutional project as it manifests through the judiciary, and sets them against the strong foundations set by the CC over the past seven years or so, what does the balance sheet look like?

In my view, there are a number of surprisingly encouraging recent judgments [e.g. FULL [2011] ZACC 23, Ambrosini 2012] ZACC 27, Glenister III 2011] ZACC 6, Apri SA [2013] ZACC 9]. However, set against positive signs, the grand process through which mediocrity and even ideology begin to affect both the form and substance of jurisprudence is a relevant threat.

In the inevitable waxing and waning of the scope of public authority between the judiciary and the other two branches of government, there are going to be times when the judiciary pulls in its horns a little, the better (one always hopes optimistically) to fight another day. We have seen this before.

Are we about to see this happen to the CC, effectively in response to the ascendant power threat of the current populist faction within the ANC and more broadly, as people tire of flawed service delivery, and grow impatient with increasing disparities of wealth? I do not think so, but the OUTA CC [2012] ZACC 18 judgment certainly counts as a warning shot across the bow of any court that could take itself too great a power to intervene in the financial and economic processes of the country.

Perhaps the future management system of the courts is a space to be most closely watched. The appointments of Chief Justice, SCA President and their deputies, are all in the gift of the political majority or a faction thereof, for the time being. If one has a flawed person in any of those positions, and the Constitution and the law give their office great power, unexpected threats could ensue.

There are many ways to break a valuable object, and precious little chance of putting it together again. We need to remain vigilant in defence of the constitutional democratic model which was brokered with such hope, ingenuity, energy, and effort some thirty years ago. The judiciary, led by the CC, is the key to the strengthening of the values of the Constitution, and it deserves our critical support.

Hugh Corder is the Professor of Public Law, University of Cape Town. This post is an amended version of a lecture given to the Oxford Human Rights Hub on 15 May 2013.

Jurisdiction over Police Failures in Khayelitsha, South Africa: The Inter-Governmental Dispute

By Sanja Borman | 5 February 2013

In this post, Sanja Borman, an Attorney at the Women’s Legal Centre in Cape Town, has researched and presented the current legal dispute surrounding the independent commission of inquiry set up to investigate police failures in the South African township of Khayelitsha.

On 29 November 2011 a group of civil society organisations, represented by the Women’s Legal Centre, lodged a complaint with the Premier of the Western Cape, South Africa. The complaint detailed the organisations’ concerns regarding the systemic, on-going failures and inefficiencies of the policing system in Khayelitsha, a township approximately seven kilometres outside of Cape Town, and home to some of Cape Town’s poorest and most marginalised residents. The complaint outlined the manner in which the relationship between the police and the Khayelitsha community has broken down. As part of the complaint, the Social Justice Coalition, Ndifuna Ukwazi, Equal Education, the Triangle Project and the Treatment Action Campaign requested the Premier to set up an independent commission of inquiry (CoI) in terms of Section 206(5) of the South African Constitution.

Upon receipt, the Premier made the Provincial Commissioner of Police, the National Commissioner of Police, and the National Minister of Police aware of the complaint and request for an independent CoI, and requested their input. In the course of the following nine months, the Premier received no such input. During this time, the complainant organisations continued to put pressure on the Premier to act, and Khayelitsha continued to experience vigilante attacks and killings – a phenomenon the complainant organisations considered to be symptomatic of the breakdown of the policing system. In July 2012 the newly appointed National Police Commissioner sent a task team to Khayelitsha to investigate the complaint. The organisations were hopeful that the task team’s report would vindicate their complaint, but the Commissioner failed to meet the deadline for this report, and the organisations were again determined to see a commission established. Finally, on 24 August 2012 the Premier established the CoI by gazetting its terms of reference in the provincial government gazette. The Col comprised former Constitutional Court judge Catherine O’Regan, as Chairperson, and Adv Vusumzi Pikoli. According to the terms of reference, the Col was limited to investigating the complaint, and compiling a written report including recommendations. In order to discharge its mandate the Col was to hold public hearings, allowing the Khayelitsha community to recount their experiences of the South African Police Service (SAPS) in an open forum. The Col also issued and served several subpoenas duces tecum on members of the SAPS, but stated clearly in its first public notice that it would not be ‘determining whether anyone should face criminal prosecution, nor whether anyone is civilly liable for any breach of the law.’

Shortly before the first hearing in November 2012 the Minister of Police met with the Premier and proposed an alternative to the Col, but failed to satisfy the Premier and complainant organisations regarding the alternative’s independence, and the extent to which it would be open to public participation. Then, on 6 November 2012 the Minister filed papers at the Cape High Court for an urgent interdict to prevent the Col from continuing its public hearings, and enforcing its subpoenas, pending the outcome of a full review of the constitutionality of the Col. The Minister contended that the Premier, in establishing the Col in the manner that she did, had failed to comply with the legal provisions relating to inter-governmental cooperation; had misconstrued her powers in terms of section 206(5) of the Constitution in an unlawful, irrational manner; and had purported to usurp the statutory and constitutional powers of the National Commissioner, Provincial Commissioner, and the Minister of Police.

The interdict application was opposed by all relevant parties, and heard before a full bench of the Cape High Court on 13 December 2012. The court handed down judgment on 14 January 2013, and the majority ruled that the Minister had failed to demonstrate a prima facie right to the interim interdictory relief sought, as he had failed to demonstrate that the Premier acted beyond or in violation of her constitutional powers and duties in establishing the Col.

On 1 February 2012 the Minister appealed and sought direct access to the Constitutional Court for the same urgent interdictory relief, and hearing of the constitutional review application. The complainant organisations are hopeful that the Col will, in the interim, continue its investigation and public hearings.

Sanja Borman is an Attorney at the Women’s Legal Centre in Cape Town.

Constitutions, Institutions, Nation Building and Human Rights
Chapter six
Constitutions, Institutions, Nation Building and Human Rights
Chapter six

The Future of Human Rights on these Islands
By Colin Harvey | 28 January 2013

Now that the idea of a new UK Bill of Rights appears to be buried, choices re-emerge. The predicted outcome of the London-based Commission’s work was finally confirmed in December 2011. Where now for human rights? Thinking beyond the European Convention on Human Rights was never confined to this generation or any one process. The limitations of the Convention are well known, and critical material is not lacking. Talk of next steps circles around ‘going beyond’ and ‘building on’ existing achievements in several senses. The feeling is that it is possible to improve; that the world of human rights captures more than the HRA or the ECHR. The more ill-defined talk of ‘ownership’ that resembles constitutional patriotism in desperate defence of a union in transition, and the disguised nationalist/unionist positions that occasionally surface.

The fierce debate on the HRA or the Strasbourg Court will certainly pass, leaving us less sure of the shape and style of the new one. But surely the primary long-term challenge will still remain to globalise the debate on the secure promotion of human rights. We cannot afford to forget the brutal lessons of history, but if taken to extremes this might mean not viewing life exclusively from Dublin, or London, or Edinburgh – though, perhaps, unique time, don’t like the terms of reference’ and makes it sound authoritative. It will be fascinating to see what the Government makes of it. At least it cannot be said to have made the Government’s task easier.

The Universality of Human Rights Norms: Why the UK should stay with Strasbourg
By John Eekelaar | 28 November 2012

The view is often heard in discussions in anticipation of the report of the Commission on a British Bill of Rights that, while people can see the value of a human rights regime, they object to the present structure because the Convention, and the Court, are ‘European’. In this short memo, I leave aside the many practical difficulties inherent in unravelling the present structure (set out in Colm O’Cinneide, Human Rights and the UK Constitution, published by the British Academy Policy Centre, 2012) because I want to make one simple point. It is that, while many jurisdictions root their human rights regimes more completely in national institutions, the involvement of a court with international jurisdiction in the UK’s regime has the considerable advantage of responding better to the characteristics that inform human rights norms.

The reason is that inherent in the idea of human rights is the implication that they should be available to everyone in comparable circumstances. It is antithetical to the core idea of human rights that they should be particular to any specific jurisdiction or particular group of people, or that they should be unavailable to any jurisdiction or group of people. That is why they are usually located in international instruments. The supra-national character of human rights is reflected in regional mechanisms for their recognition and application such as the Inter-American Commission and Court of Human Rights, and, of course, the European Convention and Court of Human Rights. Even jurisdictions that do not participate in such mechanisms are affected by international human rights instruments.

Naturally, these mechanisms can be complex and do not always work well. Yet the aspiration should be to make them work better, not to reject them in principle. One of the main values of the European system lies in the principle that when a human right is recognised as being held by someone in one European country, say in Belgium, it is considered good practice in other European countries will be considered as enjoying the same right. This should not be seen as a manifestation of foreign (i.e. European) power over national interests, but as an appreciation of the implicit commitment to universality in all human rights norms. Obviously, the complexity of the world means that universality can probably ever only be partially achieved. But participation in a regional system goes some way towards it. Withdrawing from such a system would therefore not only raise major practical problems. It would also be deeply antagonistic to the values at the heart of human rights.

John Eekelaar is a Fellow of the British Academy and Co-Director of the Oxford Centre for Family Law and Policy.

An Initial Reaction to the Commission on a Bill of Rights Final Report
By David Feldman | 23 December 2012

David Feldman, Rouse Ball Professor of English Law at the University of Cambridge and former Legal Adviser to the Parliamentary Joint Select Committee on Human Rights pens his preliminary thoughts on the final report released by the Commission on a Bill of Rights:

Having skimmed superficially over the report of the Commission, I am encouraged to find that it says nothing, and does so at great length. This is the best for which we could have hoped. The separate papers published by several members show how much worse the outcome could have been. Perhaps the most remarkable aspect of the report is that it was possible to produce the advantage of having an experienced, senior civil servant at the helm: evidence on every page. Only such a person could have overseen the drafting of a report that gives so much useful and accurate information, one that seems to have understood the potential for ‘ownership’ that resembles constitutional patriotism in desperate defence of a union in transition, and the disguised nationalist/unionist positions that occasionally surface.

So, let’s keep talking to each other about human rights across these islands.

Colin Harvey is Professor of Human Rights Law at the School of Law, Queen’s University Belfast.

The UK’s Human Rights ‘Report Card’
By Hayley Richardson | 12 October 2012

The Universal Periodic Review (UPR) at the UN Human Rights Council (HRC) – the review of each UN member state’s human rights record – is a comparatively new process that has recently embarked upon its second cycle. With 100% participation of member states in its first cycle, expectations for the second cycle are justifiedly high.

As one of the first countries to face the UPR, the UK has been eager to present itself as a model student at the HRC.

At its second review in May this year, Lord McNally, Minister of State at the Ministry of Justice and head of the UK delegation, presented a comprehensive account of the current state of human rights in the UK. The national report also provides a context to the issues, highlighting what it considers to be important constraints.

The process resulted in a total of 132 recommendations, a significant increase on the 28 submitted in 2008 and a sign that states are indeed eager to strengthen this fledgling UN mechanism. While some member states took the opportunity to push particular agendas, many of the recommendations were substantive and thoughtful enquiries on issues ranging from stop and search policing powers to the extent of the jurisdiction of the UK’s human rights obligations.

Overall the UK’s human rights ‘report card’ paints a largely positive picture. The compilation of UN information provided by the Office of the High Commissioner for Human Rights, which forms part of the review, showed that the UK has: ratified the majority of the core human rights treaties, holds ‘A’ status for all three national human rights institutions and broadly cooperated with reporting and other requests. The UK’s ‘score card’ at the European Court of Human Rights is similar: during 2011-2012 the UK lost just nine out of the 31 cases it was involved in.

However, there is always room for improvement and the UK section of the report is no exception. As one of the first countries to face the UPR, the UK has recently embarked upon its second cycle. With 100% participation of member states in its first cycle, expectations for the second cycle are justifiedly high.

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So, let’s keep talking to each other about human rights across these islands.

Colin Harvey is Professor of Human Rights Law at the School of Law, Queen’s University Belfast.
When is a UK Bill of Rights not a UK Bill of Rights?
By Francesca Klug and Amy Ruth Williams | 3 October 2012

The recently published Human Rights and the UK Constitution by Colm O’Cinneide is essential reading for anyone who wants to understand what’s at stake in the current UK Bill of Rights debate. Such scholarship is especially important given the confusion surrounding the work of the government-appointed Commission on a Bill of Rights. As stressed in our response to the Commission’s second consultation, whilst the questions being asked are wholly legitimate, failure to place them in their legal and political context can result in misleading conclusions.

The Commission was established by the current government in the light of sharp disagreements between the coalition partners as to whether to repeal the Human Rights Act or defend it.

In addition, although both parties remain formally committed to the European Convention on Human Rights (ECHR), the Liberal Democrats have generally been much less likely to question the legitimacy of the European Court of Human Rights than have their Conservative colleagues. Against the background, any proposals for a UK or British Bill of Rights must confront three issues in particular head-on.

1. The Human Rights Act

The Commission’s terms of reference do not mention the Human Rights Act (HRA). This is misleading for two reasons. First, many academic commentators, respondents to the Commission’s first consultation paper and drafters of the HRA consider it to be a UK Bill of Rights in all but name; just as the Canadian Charter of Rights is recognised as Canada’s Bill of Rights. Secondly, as has a different title. The Commission’s consultation could therefore more appropriately have asked whether we need a new or modified UK Bill of Rights, rather than whether we need one at all. Second, since opposition to the HRA from some quarters – including the Prime Minister and the Home Secretary – caused this review to be instigated in the first place in the context of such widely-shared criticisms of the HRA that proposals for a UK Bill of Rights can be transparently assessed.

2. The rights of unpopular groups

One of the most commonly expressed grievances about the HRA is that decisions under it favours ‘unpopular’ or ‘marginal groups’ in certain circumstances, like asylum seekers, terror suspects or Gypsies and Travellers. Given that the very essence of human rights protection is its universality, a Bill of Rights could ‘solve’ these perceived problems; at least for as long as the UK is bound by the ECHR. There are clear arguments for a Bill of Rights which builds on the HRA or is more widely consulted on and ‘owned’ by the people of this country. A Commission which seeks to support the establishment of this commission or repeal of the HRA. It is therefore incumbent on the Commission on a Bill of Rights to tell the Government when its plans for a UK Bill of Rights can no longer reasonably be labelled as such. Should it do so, the Commission would provide a service to us all by illuminating the currently opaque and ill-informed debate about judicial rights protection of universal human rights.

The Commission on a Bill of Rights is due to report by the end of 2012.

Professor Francesca Klug is a Professorial Research Fellow at the LSE and Director of the Human Rights Future Project in the Centre for the Study of Human Rights (@LSEHumanRights).

Amy Ruth Williams is the research assistant on the Human Rights Future Project.

Human Rights and the UK Constitution
By Colm O’Cinneide | 28 September 2012

UK human rights law has been the subject of considerable controversy over the past few years. A new report that I have written for the British Academy Policy Centre, Human Rights and the UK Constitution, aims to clarify the central issues at stake in this debate. Completion of the report was overseen by a steering group comprised of five British Academy Fellows – Professors Vernon Bogdanor, John Eekelaar, David Feldman, Sandra Fredman and Conor Gearty – and also Francesca Klug (LSE). The report has also been rigorously peer-reviewed. Readers are invited to draw out the report’s own conclusions. However, its central arguments are summarised in what follows.

The existing state of UK human rights law has in general received favourable reviews from legal academics and the judiciary. However, it has also been subject to strong criticism from certain quarters. In particular, calls have been made for a fundamental re-think of the UK’s relationship with the Strasbourg Court, and for the HRA to be replaced by a new Bill of Rights. However, many of these criticisms appear to be lacking in substance when subject to close scrutiny. For example, some critics have argued that the ECHR is irrelevant or that the Human Rights Act is incompatible with the ECHR. However, this is misleading. The Human Rights Act incorporates Convention rights, allowing the Court to play a leading role in protecting the human rights of LGBT persons across Europe.

Some have also argued that the条例 Court of Strasbourg. The条例 Court is not only the forum for reviewing the Human Rights Act of a well-established democracy like the UK (See e.g. the arguments made by M. Pinto-Duschinsky, Bringing Rights Back Home: Making human rights compatible with parliamentary democracy in the UK (London: Policy Exchange, 2011).

However, the structural relationship between the UK and the EU is not identical: the EU is a supranational entity, whilst the UK is a member of the Council of Europe and an ECHR State Party. Moreover, the UK is a separated state with its own government and legal system. As a result, the EU and the UK have different legal traditions and a different approach to human rights protection.

Criticism has also been directed at the Human Rights Act 1998 and how it has been interpreted by UK judges, partially on the basis that it has linked UK law too closely to the Strasbourg case-law and stunted the development of a ‘home-grown’ domestic rights jurisprudence. As a result, many critics of the HRA see its replacement as an opportunity to portray the Human Rights Act as anachronistic and out of date.

However, any attempt to de-incorporate the Convention rights from UK law will give rise to serious legal complications. To start with, the Human Rights Act 1998 and the Government of Wales Act 1998 all require the devolved legislatures to comply with Convention rights. In addition, even if the HRA was repealed or amended so as to de-incorporate Convention rights, they would still be potentially applicable by UK courts whenever EU law was in play (see Articles 52(3) and 53 of the EU Charter of Fundamental Rights). Furthermore, any moves in the UK to unplug the Convention rights would limit the ability of the UK government to object if countries such as Russia, Turkey or Serbia did the same. In general, it would be difficult and arguably undesirable for a new Bill of Rights to cut UK law from the influence of Strasbourg, or to de-incorporate Convention rights.

None of the above discussion precludes the introduction of a Bill of Rights plus, which would add a new layer of rights protection to UK law that would complement the protection afforded by Convention rights, as for example the Basic Law does in Germany. However, such an extended Bill of Rights would obviously extend the judicial role in protecting individual rights, rather than reining it in as many critics of the HRA would like.

It would also be possible for a Bill of Rights to ‘repackaged’ the provisions of the HRA and re-incorporate Convention rights within a different legislative framework, or to introduce a purely declaratory (i.e. not legally binding) Bill of Rights and Responsibilities, as proposed by the last Labour administration. However, it is unclear how such proposals would alter the status quo in any meaningful way.

In general, it is difficult to identify reforms which would clearly improve the existing state of UK human rights law. In light of this analysis, and given the relatively smooth functioning of the Human Rights Act thus far, it remains open to question whether replacing the HRA with a Bill of Rights would improve UK law for the better. The current state of human rights law in the UK appears to strike a reasonable balance between the Strasbourg Convention and the need to protect individual rights. Attempting to recalibrate that balance may prove to be a difficult and thankless task.

Colm O’Cinneide is a Reader in Law at the Faculty of Laws, University College of London.
In an article recently published in Public Law, Prof. Francesca Klug and I set out an analysis of the ill-fated report of the Commission on a Bill of Rights. Given that the government provided no formal response when the report was published in December of last year and it has been written off as a ‘damp squib’ by most commentators, you might ask why did we bother?

The simple answer is that the Bill of Rights debate is not going away.

Senior members of the Conservative Party have made it clear that scrapping the Human Rights Act (HRA) will form part of the 2015 agenda. In December of last year and it has been written off as a ‘damp squib’ by most commentators, you might ask why did we bother?

Alive to the fact that the proposed UK Bill of Rights “would bring into sharp focus the nature of the UK Bill of Rights”, according to nationality, rights conditional on fulfilment of obligations they have not signed up to. The second perspective, like its counterparts, does not address the question of whether the HRA is in fact a UK Bill of Rights. Nevertheless, Kennedy and Sands provide an invaluable service in exposing what is presented as a united ‘majority’ proposal for a UK Bill of Rights as a coalition of viewpoints agreed on little other than the title to be given to their proposed instrument.

Three months after the publication of the Commission’s report, the Human Rights Act 1998 (Repeal and Substitution) Bill received its second reading in the Commons. This exceptionally detailed Private Members’ Bill provides further indication of proposals emanating from the Conservative party in this area. It provides for consideration of responsibilities in rights adjudication and features a number of ECtHR de-coupling provisions, along the lines of the change the standards and mechanisms perspective.

Perspective one: change the language and label.

The majority of the Commissioners, seven of the nine, propose a UK Bill of Rights “written in language which reflects the distinctive history and heritage of the countries within the United Kingdom”. But this recommendation belies two further views about the nature of said Bill of Rights.

The first notion provides a purely cosmetic rebrand of the HRA; it is a proposal to change the language and label of our human rights law. The new Bill of Rights would provide the same level of rights protection but it would be better owned by the British public, so the argument goes, since the rights would be written in a more indigenous language, which would differ in unspecified ways from the European Convention Articles that form the basis of most of the rights in the HRA.

But this ‘change the language and label’ perspective is based on the premise that hostility to the HRA stems largely from its “European” origins, rather than its universal application. It implies, for example, that should terrorist suspects be protected from “cruel or unusual punishment” (1689 Bill of Rights), rather than “torure inhuman or degrading treatment” (Article 3 ECHR), the rights protection measure responsible would command widespread support. Is this argument really sustainable?

Perspective two: change the standards and mechanisms.

A different view is aired by a number of the ‘majority’ Commissioners. The change the standards and mechanisms perspective, espoused by the Conservative nominees on the Commission, sees a UK Bill of Rights as a vehicle for significantly altering current rights protection rather than as a cosmetic rebrand. Categories of rights-holder which courts are on occasion required to give are bound to be deeply unpopular—prisoners, asylum seekers, immigrants and so forth—and we must not outlaw even the wicked.”

Replacement of the HRA with a Bill of Rights that did not provide for such protection would not be a Bill of Rights worth its name. Amy Williams is a Research Assistant to the Human Rights Futures Project at the Centre for the Study of Human Rights at LSE. She conducted research for the Commission on a Bill of Rights.

Lord Sumption on ‘The Limits of Law’
By Thomas Raine | 20 December 2013

In the 27th Sultan Azlan Shah Lecture, given in Kuala Lumpur on 20th November, Lord Sumption, Justice of the UK Supreme Court, again stepped into the debate over the appropriate role of courts in human rights adjudication. The lecture expressed concern over the judicial role and sought to defend legislative decision making about rights.

Sumption critised the ECtHR for treating the Convention as a “living instrument”. First, Sumption launched an attack on the European Court of Human Rights (ECtHR). He criticised the Strasbourg court for regarding the European Convention on Human Rights (ECtHR) as a “living instrument”. The problem, he argued, is not the text of the Convention. The problem is the way in which the ECtHR interprets those rights. By interpreting the Convention in light of evolving social conceptions across Europe, the Court develops Convention rights “reflected of its own view of what rights are required in a modern democracy.” This has “transformed” the Convention from a safeguard against tyranny into a “template for many aspects of the domestic legal order.” It has led to the recognition of new rights which are not expressly provided for in the language of the Convention. This extension of rights rests on the “sole authority” of the judges of the ECtHR.

Sumption identified three problems with such ‘judicial law making’. The first is that, in adapting a “living instrument” approach, the ECtHR’s recognising rights that states do not appear to have granted or may have positively excluded this problem is particularly acute in the context of an international treaty which “records not just an agreement between states but the limits of that agreement.” The second problem is that the expansion of the Convention is difficult to reconcile with the rule of law. Such expansion is “potentially subjective, unpredictable and unclear” and raises questions about the certainty of law. Thirdly, the Strasbourg court’s approach suffers from a “significant democratic deficit.” The questions that the court is often called upon to decide are of an “inherently political character.” As the Court, through expansive interpretation, has moved away from truly fundamental rights it has left the realm of consensus and entered the sphere of legitimate political debate.

Sumption’s second theme was more general. He noted the “much wider phenomenon” of resorting to judicially declared fundamental rights as a “prime instrument of social control and entitlement.” He claimed that the “main casualty” of this trend is the political process. Many commentators, Sumption claimed, regard the political process as exhibiting “illogically, intellectual dishonesty and the irrational prejudice characteristic of party politics.” He defended the political process against such criticism on two grounds. First, decisions made through the ordinary democratic process are more likely to command public acceptance. Sumption argued that politics allows us to make compromises on issues (such as rights) that give rise to deep disagreements. We can all participate, albeit indirectly, in this process of compromise and are therefore more likely to recognise the outcome as legitimate. Second, Sumption stated that legislative decisions about rights may be more likely to be correct than judicial ones. He stressed the narrow focus of courts who are heavily reliant upon the material put before them by litigants. This narrow focus makes courts ill-equipped to deal with the polycentric problems that rights cases often throw up.

Sumption makes an important contribution to this debate. In particular, his defence of the political process is welcome. However, I would make two concluding remarks. First, it is not clear what approach to interpretation Sumption would like the ECtHR to adopt. He suggests that the court should restrict itself to keeping states to the basic obligations that they have signed up to. But what exactly are those obligations? The Convention itself, which expresses many rights in vague or abstract language, does little to answer that question. It is also important not to exaggerate the virtues of legislative decision making. Whilst Sumption is right to stress the value of participatory processes as a means of ensuring that they are not guilty of exaggerating the extent to which we can all meaningfully participate in the political process.

Thomas Raine is a PhD student in Public Law at the University of Glasgow.
If the Human Rights Act were Repealed, Could the Common Law Fill the Void?
By Brice Dickson | 27 November 2013

It now looks pretty certain that, if Justice Secretary Chris Grayling has his way, the Conservative Party manifesto for the election in 2015 will promise to repeal the Human Rights Act 1998 and to enact some alternative legislation. Earlier this year a retired judge of the High Court of Australia, Dyson Heydon, also suggested that the UK would be better off without a statutory Bill of Rights. Such a position begs the question whether, in the absence of the 1998 Act, UK courts could instead rely upon the common law to protect human rights to the same standard as under the Act.

Out would go the judicial duty under section 2 of the Act to ‘take account’ of Strasbourg jurisprudence, but the right of lawyers to make reference to that case law in their arguments and of judges to refer to it in their reasoning would continue. The absence of section 2 would make a difference only if it were replaced by a statutory duty to give priority to domestic law over Strasbourg jurisprudence in specified situations.

The loss of section 3 – the duty to interpret legislation as compatible with Convention rights ‘so far as it is possible to do so’ – would also make little difference unless, under some new Act, judges were told to engage in such interpretation only when legislation is ambiguous. A lack of ambiguity, however, is a rare commodity, especially in cases in the appeal courts.

Nor would the inability to make formal declarations of incompatibility under section 4 of the Act matter very much. Such declarations are already neutered by section 4(1)(i), their only purpose being to alert government to the possibility of fast-track reform under section 10, get rid of the Act and judges could still express a clear view that domestic legislation is inconsistent with what is required by Strasbourg.

But the repeal of section 7, which allows civil suits to be brought against public authorities for violating Convention rights, would be a more serious matter. There is nothing in the domestic courts’ jurisprudence to suggest that in parallel with the statutory cause of action they have developed common law claims for breaches of human rights. Indeed, in the contexts of the right to life and the right to privacy they have specifically refused to do so (Smith v Chief Constable of Sussex Police [2008] UKHL 50 and Campbell v MGN Ltd [2004] UKHL 22).

The repeal of the Act would also cast doubt on existing UK law relating to the extra-territorial scope of the Convention: the decision that British soldiers serving abroad can claim the human rights baton. Its attempts to do so prior to the US Constitution rights was firmly extinguished. Judges’ adherence to ‘the mirror principle’ (doing ‘no more and no less than the European Court when protecting Convention rights), their refusal to apply the 1998 Act horizontally, and their affirmation that public authorities can ignore human rights when making decisions so long as what they ultimately decide does not in fact violate a right, all suggest a certain complacency in the common law sphere.

The recent decision of the Supreme Court in R (Osborn) v Parole Board [2013] UKSC 61 may however be a turning-point. With the consent of the Lord Reed repeatedly stressed that UK domestic law can protect rights other than through the Human Rights Act. Examples of its doing so, however, are few and far between, and there is not yet any clear common law principle that public authorities cannot do things which violate the ECHR, notwithstanding the new focus on proportionality. I know that judges can rise to the challenge, perhaps by citing Blackstone and ‘the principle of legality’, but they need to do so quickly, before the Human Rights Act disappears.

When does the EU Charter of Fundamental Rights Apply? The Case of Fransson and Why We Should Care
By Dimitrios Kyriazis | 16 November 2013

The recognition of fundamental rights as part of the general principles of EU law by the Court of Justice of the EU is not novel. The Court had already accepted this in cases such as Stauder (1999), underlining the fact that EU fundamental rights may be invoked when (but only when) the contested measure comes within ‘the scope of application of EU law’ (Johnston paras. 17-19). According to the Court’s case-law, this means that fundamental rights are binding on Member States both when they implement EU rules, and when they derogate from EU law provisions.

After the Charter of Fundamental Rights of the EU (‘the charter’) ‘acquired binding legal status in 2009, a vexed question surfaced: does Article 51 of the Charter restrict the scope of the EU fundamental rights standard? Article 51 (1) states that the Charter is only binding on Member States “when they are implementing Union law”, whereas its previous case-law referred to the “scope of application of EU law.” EU Justice Commissioner Viviane Reding responded: “I personally have some trust in the Court of Justice that it would not accept such a restriction easily, even though the drafters of the Charter clearly intended it.” The Court didn’t disappoint her.

The recent decision in Fransson is informative. Mr Fransson allegedly provided false information to the Swedish tax authorities. He was subsequently fined by them; and criminal proceedings were instituted against him. Mr Fransson claimed that the criminal proceedings violated the double jeopardy principle found in Article 50 of the Charter. The preliminary question, however, was whether the Charter applied at all in this case. Swedish VAT legislation indeed implemented an EU Directive, but the Swedish legislation providing for the fines and the criminal proceedings did not. So, was Sweden “implementing EU law”? Furthermore, does that matter as far as the applicability of the Charter is concerned, or is Article 51 (1) to be interpreted in accordance with the Court’s previous case-law, which referred to “the scope of EU law”?

The Court held, in para 18 of its judgment, that Article 51 simply confirms the Court’s previous case-law on the scope of EU human rights guarantees. It began by referring to the “implementation of EU law” and then referred to “situations governed by EU law”, and national laws being “within the scope of EU law”, the final phrase being the one used in its previous Charter case law. It used these three phrases interchangeably; thus equating “implementation” with “scope of application”. By doing so, it chose not to pay close attention to the Charter’s wording and the drafters’ intentions, but rather based most of its reasoning on the Explanations to the EU Charter, which demand that Member States’ actions be “within the scope of EU law” for it to apply. Under Article 61(1) TEU and Article 52(7) of the Charter, these Explanations have to be taken into consideration when interpreting it.

In summary, the Court considered that the Swedish proceedings were put in place in order to implement Sweden’s EU law obligations to ensure VAT collection and, thus, it was an instance of Sweden ‘implementing EU law’. It seems that, should a national measure’s application directly intend to help the Member State fulfil its EU law obligations, it needs to comply with the EU Charter.

In any case, why should we care about Fransson? The Charter’s field of application operates on two levels. Firstly, national laws that fall within its field must be “Charter-proofed”, otherwise they will have to cede to its provisions, as a hierarchically superior instrument. Secondly, both in Scheerts and Test-Achats, the ECJ was quick to annul an EU measure violating the Charter. This emerging uncompromising stance is perhaps the result of the Court standing on the firmer legal ground of a binding catalogue of rights at an EU level under the Charter. The Court has started placing the Charter at the forefront of its legal analysis.
Constitutions, Institutions, Nation Building and Human Rights
Chapter six

National equality bodies (NEBs) and national human rights institutions (NHRIs) play important roles in promoting respect for human dignity and seek to achieve similar objectives. However, in the majority of member states of the EU, NEBs and NHRIs are separate institutions. The British Equality and Human Rights Commission (EHRC) is at present one of only four integrated bodies in the EU that functions in a comprehensive manner as both a NEB and a NHRI.

This reflects the existence of a broader conceptual divide between ‘equality/non-discrimination’ and ‘human rights’ in legal, political and regulatory discourses across Europe. Even though equality is a fundamental human right, it is common for non-discrimination/equal treatment norms and broader human rights values to be treated as different and distinct spheres of concern by national governments, European institutions and civil society. This divide between equality and human rights has been in part due to the expanding equality jurisprudence of the European Court of Human Rights in cases such as DH v Canada [2004] 47 EHRR 3. It nevertheless remains a significant axis of distinction within the overall system of rights protection in Europe.

However, a number of EU member states have recently established single combined bodies which are designed to perform the functions of both NEBs and NHRIs. Such an integration process has either been recently completed or is currently underway in a number of EU member states, including Italy, France, Belgium, Ireland, the Netherlands and the UK (specifically in Britain), and discussions about establishing integrated bodies are also underway in a number of other European states.

The establishment of these new integrated institutions is the focus of a recently completed research study conducted by the co-authors of this post and generously funded by the Nuffield Foundation. This study analysed the practical lessons that can be learnt from the process of establishing integrated equality and human rights bodies. Its conclusions suggest that such bodies can generate useful synergies between different strands of their remit. However, this potential may remain unfulfilled if the challenges of integration are not adequately addressed. Equality and human rights may be different dialects of a common language, but mutual comprehension should not always be assumed.

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Constitutions, Institutions, Nation Building and Human Rights

Chapter six

Same Script, Different Cast: A Tale of Zambia’s Constitutional Making Process
By Tabeth Masengu | 5 November 2013

On the 24th of October, Zambia celebrated its 49th year of independence from British colonial rule. While Zambia has been fortunate enough to never have experienced war or civil unrest on a large scale, it has been plagued by what can be referred to as a constitutional roller-coaster. This has involved an acute failure to provide a people-driven process in a bid to boast a constitution ‘that stands the test of time’.

49 years after independence, Zambia is still in need of a constitution-making process that ‘is responsive to its citizens and is based on the principles of democracy, participation, accountability and efficiency.’

A critical aspect of this failed process has been the top-down approach that has been adopted by the governments over the years. From as far back as 1991, it has been recommended that any draft Constitution should be adopted by a Constituent Assembly. This has never happened. The 1991 constitution was adopted by an inter-party dialogue and the 1996 Amendment to that constitution, by Parliament. The Mungomba draft Constitution produced in 2005 was supposed to be adopted by a Constituent Assembly but was eventually debated at a National Constitutional Conference in 2007. This body was a compromise, but at least it allowed for a wide range of stakeholders representing a number of groups to get involved. The result was a large constitution that included an extensive Bill of Rights which failed to garner parliamentary majority in 2010 and led to yet another failed attempt at democratic constitution-making.

The current constitution-making process is the fifth one, with each ruling political party over the years promising that it would be the one to deliver a ‘constitution for the people’. The ruling Patriotic Front (PF) was no different and riding on a wave of victory in November 2011, it promised the Zambian people a new constitution in 90 days. Incumbent President Sata appointed a Technical Committee to oversee this process but now, a month shy from two years since that promise was made, citizens are anxious because they are no nearer to having the coveted constitution than they were two years ago.

Over the years citizens have expressed their desire to have a popular body adopting the constitution because Parliament is not representative of all sectors of society. They have consistently asked for a formulation that is more inclusive, broad based and gender representative in order to give the constitution-making process legitimacy. They realise that the success or failure of a constitution-making process largely depends upon its legitimacy built by consensus. They also recognise that the content of a constitution is protected or corrupted by its process.

Zambia’s former Vice President, Mainza Chona, once said: ‘Zambia needs a Constitution which is more suited to our own conditions and which is pertinent to the aspirations of our people. 40 years later those aspirations include the desire for a process that is responsive to its citizens and is based on the principles of democracy, participation, accountability and efficiency. Right now, the odds are sadly not in their favour.’

Tabeth Masengu is a Research Officer at the Democratic Governance and Rights Unit of the University of Cape Town and the South African Council Correspondent for the Oxford Human Rights Hub Blog.

A New Role for Businesses in Safeguarding Human Rights
By Claire Overman | 10 September 2013

This summer, the European Commission published industry-specific guidelines on the implementation of the UN Guiding Principles on Business and Human Rights. These guidelines, directed at the information and communication technology industry, energy, extractive industries, and the gas and oil industry, mark a further step towards the greater integration of business in safeguarding of human rights.

Increased awareness of the role that business can play in safeguarding human rights has the potential to greatly facilitate their implementation.

The UN Guiding Principles themselves, published in 2011, are a non-binding set of guidelines for businesses. They employ a “protect-respect-remedy” framework, which combines the state’s existing duty to protect human rights with a requirement for businesses to respect human rights by complying with applicable domestic and international human rights laws.

Highlighting businesses’ role in human rights protection stems from the increasing awareness of the power that large companies wield. Large, multi-national corporations now have a very visible global presence, and when combined with their need to protect their international reputation, this creates powerful incentives to ensure that their operations do not contribute to human rights abuses. Further, there are increasing opportunities for corporations to expand into states which have a poor history of human rights protection.

Earlier this year, the EU lifted sanctions on Burma, allowing foreign investment in the former military dictatorship for the first time since they were imposed in 1990. In such cases, where the state itself may be permitting, or even causing, human rights abuses, there is a clear role for businesses to take the initiative in remediating such situations. One example of this is The Naypyidaw Accord for Effective Development Cooperation, signed by the Burmese government, aid organisations and international banks in January 2013. This agreement sets out non-binding obligations on Burma’s authorities to respect the rule of law and human rights.

Companies are also uniquely placed to monitor the human rights situation on the ground. The Guiding Principles recommend that corporations carry out “human rights due diligence,” which involves the identification of actual and potential human rights abuses during their operations. They are able to monitor their human rights impact at a localised level, leading to much more efficient human rights protection.

However, the Guiding Principles do recognise that businesses are subject to constraints that do not apply to states, in terms of their resources and duties to shareholders. As a result, principle 14 requires that businesses “should have in place policies and processes appropriate to their size and circumstances.” Further, the creation of industry-specific guidelines demonstrates that the risks of human rights abuses may differ according to the nature of the business. As the guidelines note, “no one size fits all when it comes to putting respect for human rights into practice.”

It may be argued that the trend towards shifting responsibility for human rights protection from states alone, and onto a multiplicity of actors, is misguided. If states are responsible for human rights violations, then the responsibility for remedying such violations should lie with them alone. However, this is an unduly blinkered view of the responsibility to protect human rights. First, businesses investing in high-risk countries affect the human rights situation in a multitude of ways, some of which may not be immediately apparent, and may have therefore previously been ignored. For instance, their operations may have an impact on the local environment or on traditional livelihoods, as in the case of the Miylston Dam in Burma, which has destroyed local agricultural communities. Secondly, to link the responsibility to protect human rights to a concept of fault or causation is too narrow. By broadening this responsibility, and encouraging those who are able to make an impact, such as big businesses, to integrate respect for human rights into their operations, the protection of the rights of individuals will be much more secure. Finally, it is wrong to suggest that protecting human rights is inimical to a successful business. The guidelines point out that businesses which respect human rights see benefits such as ‘strong health and safety performance, reduced environmental effects from their operations, and sustainable relationships with local communities that benefit from their presence.’

Increased awareness of the role that business can play in safeguarding human rights has the potential to greatly facilitate their implementation. This is particularly so in states where human rights protection is weakest; in such cases, the protection offered by businesses operating in these areas may be the main or only means of upholding individuals’ rights.

Claire Overman has just completed the BCL at the University of Oxford and is a regular contributor to the OxHRH Blog.
The Human Rights Restoration-Revolution
By Marco Duranti | 3 September 2013

Much of the work in the now burgeoning subfield of human rights history traces the causes and consequences of the ‘human rights revolution’ on international law, foreign policy and transnational activism. Few scholars, however, have reflected on why the spectacular efflorescence of human rights movements and norms over the past century should be considered revolutionary in the first place.

Certainly the past decades have witnessed a radical global transformation in the technical apparatuses structuring human rights advocacy networks and institutions. Yet could this be an example of old wine in new bottles, a revolution in forms that masks underlying continuities in substance? For as Tancredi tells his uncle in Giuseppe Tomasi di Lampedusa’s novel The Leopard, ‘if we want everything to remain as it is, it will be necessary for everything to change.’

The 60th Anniversary of the entry into force of the ECHR is a useful moment to pause and reflect upon its history.

The sixtieth anniversary of the entry into force of the 1950 European Convention on Human Rights (ECHR) offers a convenient perch from which to illustrate how this dictum applies to the origins of European human rights law. My research into the history of the ECHR has revealed how the ‘human rights revolution’ became a vehicle for rearticulating, recasting and rehabilitating discredited political agendas in postwar Europe. Marginalized right-wing advocates of free-market economics in the British Conservative Party, for example, played a pivotal role in championing and framing European human rights law after 1945. This was a response to the momentary anxieties of a party in political opposition, some of whose members genuinely feared what they deemed as the ‘totalitarian’ powers of the British Labour government.

The omission of economic and social rights from the ECHR reflected the hostility of conservative politicians such as Winston Churchill and David Maxwell Fyfe towards Labour’s economic and social policies.

Another influential group of postwar ‘human rights revolutionaries’ were French Catholics who before 1945 had been affiliated with French Christian Democracy, the Paris-based intellectual movement known as personalism and/or the think tanks of the authoritarian Vichy regime. French Christian Democrats looked to European human rights law as an international safeguard for the rights of the family in the domain of education, particularly as concerned private Catholic schooling. In the case of personalist intellectuals and Vichy theorists of corporatism, they hoped that the ECHR would catalyze a radical restructuring of French society along medieval (corporatist) lines as well as protect the civil liberties of those accused of collaboration with the Axis enemy.

This is not to deny that many ‘human rights revolutionaries’ traced their lineage from the revolutionary tradition to interwar internationalism, wartime anti-fascism, the postwar restoration of Western European liberal democracy and the postwar (re)construction of social democracy. But we need to recognize that others wavered nostalgic for an idealized anti-stalinist social order of premodern times or for the bourgeois liberal state of the nineteenth century. In this sense, the creation of the European human rights regime was as much a restoration as a revolution.

Dr Marco Duranti received his PhD from Yale University in 2009 and now teaches history at the University of Sydney. He is currently writing a book on the genesis of European human rights law for Oxford University Press.

Cambodia Elections 2013: Is a Cambodian Spring Blossoming?
By Rodolphe Prom | 27 August 2013

Cambodia’s weather oscillates between dry and wet seasons. According to a senior Cambodian official, this means that a Cambodian Spring is technically impossible. Despite this, Cambodians’ exercise of the right to vote during the July 2013 National Assembly elections suggest that a Cambodian Spring may indeed be blossoming.

For 28 years, Cambodia has been ruled by the Cambodian People’s Party (CPP), with the terms “CPP” and “Government” sometimes used interchangeably. The nation often sees headlines with news of its United Nations-backed Khmer Rouge tribunal and reports from the United Nations’ envoy, Surya Subedi, on the nation’s human rights progress.

Unfortunately, these headlines are rarely entirely positive, instead highlighting Cambodia’s ongoing struggle to fully realise democracy. Within this context, political pundits predicted that the CPP was on course for another emphatic win, describing the possibility of victory by the main opposition – the Cambodian National Rescue Party (CNRP) – as a “stunning surprise.”

If not a “stunning surprise,” then Cambodia has certainly experienced an unexpected jolt of democracy. Temporary official results released by Cambodia’s National Election Committee (NEC) suggest the CPP has won 68 of the 123 National Assembly seats – down 22 seats from the 2008 election. The CNRP has taken 55, an increase of 26 seats from 2008 (when it was two separate parties, the Sam Rainsy Party and Human Rights Party).

It is now an intense time for Cambodia. Numerous organisations have reported electoral irregularities which threaten the credibility of the election results. The NEC has wholly rejected all complaints of irregularities. Civil society and CNRP’s calls for independent investigations with international involvement go unanswered, with the CPP appearing divided and indecisive on the topic. The shape of the new government remains unknown.

What is clear is that this has been a victory for freedom of expression.

The campaign started peacefully. Massive opposition rallies were allowed. Momentum gathered on polling day when
Human Rights and Community Justice: A View from Red Hook, Brooklyn
By Julia Spelman | 28 July 2013

The Red Hook Community Justice Center (RHJCJC), the small community court in Brooklyn, New York, seems miles away from lofty, academic debates on human rights. However, in its own way, it addresses economic, social and cultural rights issues in its everyday operations.

To understand how, it is helpful to get a sense of the neighborhood itself. Red Hook was once called the “track capital of America” by Life Magazine. It struggled with high crime rates in the 1980s and 1990s that were amplified by geographic isolation and the fact that residents in the Red Hook Housing projects—which account for 70% of the Red Hook population—experienced high rates of unemployment, drug use and violence.

Launched in 2000, RHJCJC is a project of the Center for Court Innovation, itself a not-for-profit partnership between the New York State Unified Court system and a private foundation. It is located in a refurbished school, just big enough to house the courtroom and staff (including one full-time judge), the onsite social work clinic, the Alternative Sanctions Department, the Housing Resource Center, the Red Hook Youth Court, the Peacemaking Program, the GED Education class, and a range of arts programmes for young people.

A part of the New York State court system, RHJCJC has jurisdiction over misdemeanor offences from the surrounding three police precincts. In addition, the judge hears housing cases from residents in the two housing projects and a limited number of Family Court juvenile delinquency cases.

The community court model is part of the broader problem-solving justice movement. The idea underlying problem-solving justice is that the judge is able to craft a sanction more meaningful than the two traditional options for low level offending: a brief jail sentence or no sanction at all. At Red Hook, defendants regularly undergo a clinical evaluation during the course of a hearing, enabling the judge to consider including individual counseling, drug treatment, assistance with housing issues, education and job training as part of the disposition of the case. Procedural justice is still the cornerstone of court operations at Red Hook and defendants will sometimes opt for a trial rather than engaging with these services.

The RHJCJC has successfully reduced the use of jail, eased fear in the community, and improved approval ratings in the justice system. A forthcoming independent evaluation study shows that after controlling for covariates, Red Hook produced a significant reduction in the probability of re-arrest over two years. Red Hook provides a useful starting point for examining wider issues about the role of the courts in directly coordinating access to services that affect economic, social and cultural rights. Red Hook is somewhat special, as it was conceived as more than just a court (hence the name) and offers all its services free of charge to anyone in the community on a voluntary basis. But beyond Red Hook, there is a question about whether courts should have a direct coordination role in the delivery of social services.

On the one hand, when it is well known that many of those in the criminal justice system, have drug and alcohol issues, mental health issues, and high rates of literacy and unemployment, it makes sense to locate services that will address these needs in the court. On the other hand, the right of access to health services, which arguably includes treatment for drug addiction, should not require an arrest to trigger the appropriate referral. Education and employment should be accessible in the community, as well as through the courts. By bringing more social services within the purview of the criminal justice system, recognition of these rights may become tied to criminality, rather than being universal and community-based.

The US has not ratified the International Covenant on Economic, Social and Cultural Rights and the Constitution guarantees few economic and social rights. But through cases such as Campaign for Fiscal Equality v New York and institutional innovations such as the RHJCJC, courts are taking their own steps to realise these rights. Whilst there may be some debate about the merits of this approach, what is clear is that advocates and scholars focusing on appellate and international human rights developments should take further notice of local community initiatives if they are to gain a broader understanding of human rights practice today.

Julia Spelman received a B(LLL)(Hons) from Victoria University of Wellington and worked as clerk to the Principal Family Court Judge of New Zealand following graduation. She was admitted as a barrister and solicitor of the High Court of New Zealand in 2012. From March–June 2013 she was a Visiting Fellow at the Center for Court Innovation in New York.

Indian Supreme Court Upholds the Right to Negative Voting
By Gautam Bhatia | 9 October 2013

In late September, the Indian Supreme Court, in PUCL v. Union of India (2013) 10 SCC 1, upheld the constitutional right of citizens to cast a negative vote in elections. This judgment crystallizes an emerging theme in Indian constitutional jurisprudence: the connection between the constitutional right to freedom of speech and expression (Article 19(1)(a)) and parliamentary elections.

The judgment of the Court in PUCL v. Union of India clarifies the constitutional status of voting.

In PUCL v. Union of India, the constitutional validity of Rules 41(2)(3) and 49-O of the Conduct of Election Rules, 1961, was impugned. The combined effect of these rules was that persons who did not vote in elections were recorded (by the presiding officer) as having not voted. The petitioner argued that this was a violation of the right to secret balloting, protected – inter alia – by Article 19(1)(a) of the Constitution, which guarantees the freedom of speech and expression.

Relying upon the previous case of Kuldip Nayar v. Union of India, the State raised a preliminary objection on the ground that since voting was not a fundamental or constitutional right, only a “statutory right” brought into existence by the Representation of Peoples Act, the petitioners had no standing to bring the challenge.

Rejecting this contention, the Court distinguished between the “right to vote” and the “freedom of voting as a species of the freedom of expression” [paragraph 19]. This is what explained the Court’s earlier decisions in PUCL v. Union of India and Association for Democratic Reforms v. Union of India, where – despite accepting that the right to vote was a statutory right, the Court nonetheless held that the right to know the antecedents of politicians, in order to exercise one’s franchise responsibly, was protected by Article 19(1)(a) [paragraph 20].

The Court then found that in a system of direct elections, secrecy was essential to ensure the effectiveness of the vote. Since the freedom to vote naturally included the freedom not to vote, it would be arbitrary to extend secrecy to one and not the other [paragraph 31]. It buttressed its argument by invoking Indira Nehru Gandhi v. Raj Narain and Kihoto Hollohan v. Zachillhu for the proposition that an effective democracy functioning through periodic fair and free elections is part of the basic structure of the Constitution [paragraph 45]. In addition, the act of not voting was as much a positive exercise of free expression under Article 19(1)(a) as was voting itself, and so deserved similar levels of protection [paragraph 49]. The Court therefore directed the Election Commission to introduce a “None of the Above [NOTA]” option into the Electronic Voting Machines [paragraph 61].

The judgment of the Court clarifies the constitutional status of voting. What does it mean to say that the right to vote is only statutory, but the act of voting is an exercise of free speech protected by Article 19(1)(a)? Essentially, that the right to vote is statutory insofar as the modalities of voting are regulated by statute (in case of India, the Representation of Peoples Act); eligibility for voting, when and in what manner, what rules political parties must abide by, and so on – these matters are determined by statute, and subject to the control of the legislature.

The act of voting, however, is – at least in theory – the most important act of expression through which the citizen participates in a representative democracy. So, while the right to vote remains a statutory right, parliament may not erect any formal or substantial barriers that render voting ineffective. The freedom to vote is – in its abstract sense – a constitutional and a fundamental right, the contours and lines of which are to be worked out by parliament through statute.

This conclusion follows inexorably from Article 19(1)(a) and from the Constitution. Over more than fifty years, in a series of free speech cases, the Court has located Indian free speech law in a functioning liberal democracy where speech plays the important role. This would mean nothing if the basic mechanism that defines a representative democracy – periodic change in government through elections – was compromised or made ineffective.

In addition, Part XV of the Constitution is devoted to the conduct of elections, including non-discrimination rules (Article 325). Article 326 states that elections to the House and the Assemblies are to be on the basis of adult suffrage. These provisions assume the existence of elections as a prerequisite. Lastly, representative democracy – as the Court held – is a basic feature of the Constitution.

The Supreme Court’s judgment is a welcome step in affirming the centrality of the freedom of speech and expression to the domain of elections and representative democracy.

Gautam Bhatia completed his BCL from Oxford in 2012, and is presently an LLM candidate at the Yale Law School. A longer version of this post may be found on his Indian Constitutional Law blog.
Chapter 7

Gender-Based Violence and Human Rights
## Gender-Based Violence and Human Rights

**Chapter seven**

<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>102</td>
<td>Evolving Strasbourg Jurisprudence on Domestic Violence: Recognising Institutional Sexism</td>
<td>Dimitrina Petrova</td>
</tr>
<tr>
<td>102</td>
<td>Stealing Brides in Kyrgyzstan: Why Multiculturalism and Women's Rights Make Such Uneasy Bedfellows</td>
<td>Liz Fouksman</td>
</tr>
<tr>
<td>103</td>
<td>Silencing Rape on U.S. College Campuses: Evaluating the Clery Act</td>
<td>Greer Feick</td>
</tr>
<tr>
<td>103</td>
<td>Weakening Protections for Victims of Gender-Based Violence in the United States?</td>
<td>Chelsea Purvis</td>
</tr>
<tr>
<td>103</td>
<td>US Congress Reauthorizes Violence Against Women Act</td>
<td>Chelsea Purvis</td>
</tr>
<tr>
<td>104</td>
<td>The Justice JS Verma Committee Report on Amendments to Criminal Law relating to Sexual Violence in India: Preliminary Observations</td>
<td>Dhwani Mehta</td>
</tr>
<tr>
<td>104</td>
<td>Clarifying the Law on Consent in The Verma Report</td>
<td>Meghan Campbell</td>
</tr>
<tr>
<td>105</td>
<td>Disappointing Departures from the Verma Committee Report</td>
<td>Chintan Chandrachud</td>
</tr>
<tr>
<td>105</td>
<td>Lifting As We Climb</td>
<td>Shreya Atrey</td>
</tr>
<tr>
<td>105</td>
<td>Rape and Reform in India: No Legal Fix for a Systemic Problem</td>
<td>Shishir Bail and Sudhir Krishnaswamy</td>
</tr>
<tr>
<td>106</td>
<td>To Whomsoever it May Concern? The Case of Criminal Law (Amendment) Act 2013</td>
<td>Shreya Atrey</td>
</tr>
<tr>
<td>106</td>
<td>Using Public Interest Litigation to Combat Acid Attacks in India</td>
<td>Vrinda Bhandari</td>
</tr>
<tr>
<td>107</td>
<td>Sexual Harassment in the Indian Legal Profession</td>
<td>Jayna Kothari</td>
</tr>
<tr>
<td>107</td>
<td>CSW57: Violence against Indigenous Women and Girls</td>
<td>Claire Overman</td>
</tr>
<tr>
<td>108</td>
<td>The Agreed Conclusion of CSW57 – Reaffirmation of the Universality of Women’s Human Rights</td>
<td>Frances Raday</td>
</tr>
<tr>
<td>108</td>
<td>Violence Against Women in South Africa: President Zuma and the ANC Still Have Not Got the Message</td>
<td>Nabihah Iqbal</td>
</tr>
<tr>
<td>110</td>
<td>Decriminalizing Adultery: Eliminating Discrimination and Violence against Women</td>
<td>Frances Raday</td>
</tr>
<tr>
<td>110</td>
<td>Men and Gender Based Violence: Part of the Problem, But also the Solution?’</td>
<td>The Good Lad Workshop</td>
</tr>
<tr>
<td>111</td>
<td>The Ongoing Search for Justice for Victims of the Japanese War Crimes in Mapanique, Philippines</td>
<td>Harry Roque</td>
</tr>
<tr>
<td>111</td>
<td>Constitutionalising the Violation of the Right of the Girl Child in Nigeria: Exploring Constitutional Safeguards and Pitfalls</td>
<td>Azubike Onuora-Oguno</td>
</tr>
</tbody>
</table>
Evolving Strasbourg Jurisprudence on Domestic Violence: Recognising Institutional Sexism

By Dimitrina Petrova | 20 June 2013

As part of a broader feminist critique of the European Convention on Human Rights, it has been argued that Article 14 of the ECHR (freedom from discrimination) has not been useful in advancing women’s equality due to its reliance on a conception of formal equality. On the other hand, the “gender-related concept of feminist jurisprudence” has resulted in an effective in addressing the substantive concerns of women because there is no need for any reliance on a comparator. This position should be revised in the light of the most recent decisions of the European Court of Human Rights, at least in respect to the adjudication of domestic violence cases.

The Eremia decision is an important milestone in domestic violence jurisprudence.

Four years after Opuz v Turkey (Application No. 33401/02, ECHR 2009), on 28 May 2013, the Strasbourg court, in the case of Eremia and Others v Moldova (Application No. 3564/11), made a step forward in recognising the gender discriminatory aspect of domestic violence against women, along with confirming the possibility of characterising domestic violence as an inhuman treatment within the meaning of Article 3 ECHR.

The Eremia decision is an important milestone in domestic violence jurisprudence in several ways. First, the Court’s treatment of discrimination under Article 14 ECHR has moved forward and further away from a “formal equality” approach, and in the direction of recognising what I would call “institutional sexism”. The applicants, Ms Eremia and her two teenage daughters, claimed that the authorities’ failure to apply domestic legislation was the result of preconceived ideas concerning the role of women in the family, in violation of their Article 14 right to non-discrimination. The 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.

The European Court was persuaded by The Equal Rights Trust’s argument expressed in an amicus brief that domestic violence against women affected them differently and disproportionately and had to be treated as an issue of gender discrimination. The facts in this case meant there was a breach of Article 14 of the Convention. The Equal Rights Trust argued that failure to properly apply domestic violence legislation amounted to a failure to recognise the magnitude of the problem as well as the gendered nature of the assault on women’s dignity; and that the government had a positive obligation under Article 14 to prevent, investigate, prosecute and punish discriminatory violence.

The Court had already found previously that the State’s failure to protect women from domestic violence breaches their right to equal protection of the law and that this failure did not need to be intentional (Opuz, § 191). 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.

The Eremia decision is important for several further reasons: (i) it has now become more firmly established that the issue of domestic violence is not necessarily confined within the box of private and family life (Article 8) and that when reaching a threshold of severity it constitutes inhuman treatment (Article 3). While the domestic violence cases of recent years (Bevacqva and S v Bulgaria, Hajduová v Slovakia, A. v Croatia (merits) (considered) under Article 8 ECHR) has confirmed the breakthrough which took place in 2009 with Opuz, finding an Article 3 violation in respect of a battered woman against the positive obligations of the government to protect from domestic violence, the Court applied a test of effectiveness: while in Opuz the government had been inert, in Eremia the authorities had put in place a legislative framework allowing them to take measures against persons accused of family violence, and had taken a number of steps to protect the applicants, but these steps had not been effective, thus violating Convention rights. (iii) The Court considered that Ms Eremia was “particularly vulnerable”, as her husband was a police officer: the authorities had failed to see the danger to the public of a police officer not complying with the terms of a protection order issued against him, and had suspended the criminal investigation against him. (iv) Finally, by finding a violation of Article 8 in respect of the children of Ms Eremia, the Court recognised the impact of domestic violence on children forced to witness it.

Equality advocates can now rely on some of the relevant elements of the Eremia judgment in bringing domestic violence cases. Equality jurisprudence under the ECHR has also made one small but firm step in the right direction – toward an understanding of substantive equality and the need to recognise and address institutionally entrenched prejudice.

The Eremia decision is an important milestone in domestic violence jurisprudence.

Stealing Brides in Kyrgyzstan: Why Multiculturalism in Women’s Rights Make Such Uneasy Bedfellows

By Liz Fouksman | 20 May 2013

As Susan Okin pointed out in her controversial 1997 article Is Multiculturalism Bad for Women?, purporting to protect culture and tradition has long been a stumbling point for efforts to protect women’s rights. Protecting multiculturalism can ignore within-group inequalities of power, representation and voice – and thus act as an excuse to allow gender-based violence, discrimination or coercion.

The Commission on the Status of Women did (just barely) avoid including the loophole of cultural exceptionalism in its concluding document. And the Kyrgyz parliament did increase the penalty for bride napping to ten years behind bars (still a year short of stealing a cow). But the debate on culture and women’s rights is not going away. This is not a question of one culture imposing on another, but rather the recognition that tradition is a constantly evolving phenomenon, ever-shifting to accommodate a myriad of ideas and practices – including those of justice and rights.

Stealing Brides in Kyrgyzstan: Why Multiculturalism in Women’s Rights Make Such Uneasy Bedfellows

Stealing Brides in Kyrgyzstan: Why Multiculturalism in Women’s Rights Make Such Uneasy Bedfellows

The Kyrgyzs are a small mountainous country which once formed the edge of the Soviet Union, wedged between China, Tajikistan and Uzbekistan. It is a place of rich traditions, including felt making, yurts, and – according to some Kyrgyz – kidnapping women in order to acquire a bride.

This past winter, legal penalties for bride-napping in Kyrgyzstan provoked divisive parliamentary debate. According to Women Support Centre, a Kyrgyz women’s rights organisation, there are at least 11,800 cases of forced abduction of women every year in Kyrgyzstan, and more than 2,000 of these women reported being raped. At the time of the debate the maximum sentence for kidnapping a bride was three years in jail. The maximum sentence for stealing a cow is eleven. And the main argument in parliament against toughening the sentence on kidnapping? The practice is Kyrgyz tradition.

This ‘tradition’ of kidnapping women to pressure or coerce them into agreeing to a marriage is a microcosm of the debate at the 57th Session of the UN Commission on the Status of Women (CSW57) this spring. The Commission, charged with addressing the global crisis in the elimination and prevention of all forms of violence against women and girls, quickly ran into dissent. A number of countries, including Iran, Egypt, the Vatican and – startlingly – Russia objected to the document’s stance on reproductive rights, sexual orientation, or sex education. The main justification for such objections? Tradition.

Only with this recognition can we move beyond the multiculturalism stand-off, and continue the global conversation on women’s rights.

Liz Fouksman is a DPhil in International Development at the University of Oxford, currently based in Kyrgyzstan for field research.
Gender-Based Violence in the United States?

Why is the Clery Act failing to protect American students?

Over the years, the Clery Act has been amended to provide increased protection to rape survivors. In 1992, the Act was amended with the “Campus Sexual Assault Victim’s Bill of Rights.” On March 7, 2013, the Clery Act was expanded through the Campus Sexual Violence Elimination Act (Campus SaVe), which requires universities to educate students on sexual violence.

Despite the expanding legal requirements, in practice, it has proved difficult to ensure that colleges are transparent about rape on campus. Fisher et al. have argued that the Clery Act is “symbolic rather than substantive” – it reaffirms values but lacks teeth. A quick glance at the statistics indicates that many U.S. colleges report only 0-20 rapes in the past year, unlikely figures given that an estimated 20% of American women are raped at college (which would mean an estimated 50 rapes a year on a campus of 1,000 students).

But if the official statistics are questionable, as of 2011, only seven schools had been fined for violating the Clery Act. In one of the most horrendous cases in 2006, Eastern Michigan University was fined $350,000 for covering up the rape and murder of a student, and leading her family to believe she died of natural causes.

The Clery Act has arguably raised awareness about campus crime among higher education professionals, but these statistics rarely trickle down to students and parents. A report from the Center for Public Inquiry found that schools often train advisors to tell students who have experienced sexual violence to talk to counselors rather than campus police – a move that sidesteps the reporting procedures of the Clery Act, which require only certain campus personnel to report rape. The Clery Act also does not explicitly require campuses to report certain crimes that occur “off campus,” which means that there is a complete lack of transparency around the sexual violence students face on university-sponsored study abroad programs and on off-campus research projects. A study by Kathryn Clancy of the University of Illinois, first discussed in 2013, found that 60% of female students who conducted research in biology Anthropology experienced sexual abuse in the field; this is certainly a cause for great concern.

The greatest challenge with the implementation of the Clery Act is a conflict of interest. There is an information asymmetry between students and college administrators, and it is the responsibility of colleges, which are dependent on high rankings, academic reputations, and alumni donations, to self-regulate. Hopefully, the increasing number of Clery Act violations will encourage a new investigation of a culture shift – a less stance on campus rape cannot be tolerated.

Greer Feick is an M.Phil. Candidate in Development Studies.

Weakening Protections for Victims of Gender-Based Violence in the United States?

In 1994 VAWA created a national framework for preventing and responding to gender-based violence (GBV), filling gaps in state laws and funding critical services for victims of violence. The original act strengthened criminal penalties for sex offenders. It provided funding to states, local governments and tribal governments to develop law enforcement responses to GBV. The act improved inter-state enforcement of protection orders. It authorized funding for victim support and established a national domestic violence hotline. VAWA also filled a major gap in existing immigration law: it allowed immigrant spouses and children of abusive citizens (or legal permanent residents) to apply for a change in immigration status without the support of their abusers.


Under VAWA, the US has seen intimate partner violence fall dramatically. But GBV is still pervasive. One major gap in federal law on GBV is the lack of protections for Native American victims of GBV. The vast majority of violence against Native women is perpetrated by non-Natives. But tribal courts lack jurisdiction over non-Natives, and US attorneys do not sufficiently prosecute crimes of GBV referred to them by Native authorities.

VAWA came up for reauthorization in 2012. The Senate’s reauthorization bill provided needed reforms to VAWA. The bill extended tribal jurisdiction over non-Natives in cases of domestic violence. It also improved protection for people in custodial settings, provided grants for reviewing backlogs of rape kits, expanded eligibility for immigrants applying for relief, and extended protections for LGBT victims of abuse.

But House conservatives strongly opposed the reforms to tribal jurisdiction and to expanded protections for immigrants and LGBT people. The House produced its own reauthorization bill, stripped of these reforms. Because the House and the Senate could not agree on a bill, VAWA expired at the end of 2012.

The Senate drafted a new bill in 2013 which included most of the 2012 reforms. The bill passed in the Senate with bipartisan support in February. But conservatives in the House continued to object to the Senate’s version. UN experts spoke out against the House’s delay, urging Congress to reauthorize and reform VAWA.

On Friday the House released an updated version of its own VAWA reauthorization bill. While a modest improvement over the 2012 bill, it continues to lack crucial reforms. The bill does not reference LGBT people, and it curtails protections for abused immigrants. The bill requires that tribal courts be “certified” to try non-Natives for domestic violence, and it permits defendants to remove their cases to federal courts. The House is expected to vote on the bill Tuesday.

Chelsea Purvis is a Yale Law School legal fellow at Minority Rights Group International in London (the opinions expressed in this post are her own). She received her M.Phil. from Oxford as a Rhodes Scholar in 2008.

1,300 American human rights organizations sent a letter to the House urging it to pass S.47.

Conservative Republicans in the House objected to the Senate’s bill. They drafted their own reauthorization bill, excluding most of the Senate’s reforms. But public pressure mounted on the House to drop its opposition to VAWA reforms. 1,300 American human rights organizations sent a letter to the House urging it to pass S.47.

By Tuesday it became clear that conservative Republicans in the House no longer had enough support to pass their alternative reauthorization bill. The House then agreed on Wednesday to vote on the House’s version and then, if that bill failed to pass (as expected), to vote on S.47.

Yesterday, the US House rejected the House’s version and passed S.47 in a vote of 286-138. President Obama will now sign the bill into law, reauthorizing VAWA and adding crucial protections for Native Americans, LGBT people, and immigrants.

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US Congress Reauthorizes Violence Against Women Act

The United States Congress has for many months been debating the future of the Violence Against Women Act (VAWA). As I explained in my previous post, VAWA is the principle federal law addressing gender-based violence in the United States. When VAWA expired in 2012, the Senate drafted a reauthorization bill (S.47) that provides needed reforms to VAWA. S.47 extends tribal jurisdiction over non-Natives in cases of domestic violence, and it expands protections for immigrants and LGBT victims of abuse.

By Chelsea Purvis | 1 March 2013

The Violence Against Women Act (VAWA) is the principle federal law addressing gender-based violence in the United States. But for the first time since its enactment in 1994, VAWA’s reauthorization faces substantial opposition.

By Greer Feick | 9 May 2013

Silencing Rape on U.S. College Campuses: Evaluating the Clery Act

The Steubenville rape verdict a few months ago has sparked a broader conversation about the United States’ endemic “rape culture,” and the responsibility of innocent bystanders and inaction to end it. One place where the silencing of sexual violence is an ongoing problem is on U.S. college campuses. The Clery Act — named after Jeanne Clery, a Lehigh University freshman who was raped and murdered in her dorm room in 1986 — is a conflict of interest. There is an information asymmetry in the field; this is certainly a cause for great concern.

April 2013, found that 60% of female students who conducted campus-sponsored study abroad programs and on off-campus research projects. A study by Kathryn Clancy of the University of Illinois, first discussed in 2013, found that 60% of female students who conducted research in biology Anthropology experienced sexual abuse in the field; this is certainly a cause for great concern.

The greatest challenge with the implementation of the Clery Act is a conflict of interest. There is an information asymmetry between students and college administrators, and it is the responsibility of colleges, which are dependent on high rankings, academic reputations, and alumni donations, to self-regulate. Hopefully, the increasing number of Clery Act violations will encourage a new investigation of a culture shift – a less stance on campus rape cannot be tolerated.

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Chelsea Purvis is a Yale Law School legal fellow at Minority Rights Group International in London (the opinions expressed in this post are her own). She received her M.Phil. from Oxford as a Rhodes Scholar in 2008.
The Justice JS Verma Committee Report on Amendments to Criminal Law relating to Sexual Violence in India - Preliminary Observations
By Dhvani Mehta | 24 January 2013

The Justice JS Verma Committee, set up by the Government of India after the horrific gang-rape in Delhi on December 16, 2012, submitted a 630 page report on 23 January 2013, setting out its recommendations for the reform of India’s sexual violence laws. The Committee received over 80,000 responses to its call for submissions. A copy of the report is available at https://docs.google.com/file/d/0B5kKCI4vZkacMzFtM1I0YmMtODUu/dl. Television coverage of the press conference releasing the report can be viewed here.

The report makes recommendations on a wide range of issues, confined not just to rape and sexual assault, but also to sexual harassment in the workplace, trafficking of women and children, child sexual abuse and honour killings, adequate safety measures for women, and the medico-legal examination of the victim.

Professor Sandra Fredman, assisted by members of Oxford Pro Bono Publico, submitted recommendations to the Committee, drawing upon best practices from Australia, Canada, South Africa and the UK as well as international law sources such as the Convention on the Elimination of All Forms of Discrimination Against Women and the United Nations Division Advancement for the Advancement of Women Handbook. The Women’s Law Handbook on Violence Against Women. Some of these recommendations include:

(a) framing the issue as a violation of women’s human rights to autonomy, agency and integrity rather than a question of honour or decency

(b) removing the exception on marital rape by clarifying that the marital relationship does not constitute a valid defence against crimes of sexual violence, nor is it to be treated as a mitigating factor justifying lower sentences, and that the relationship between the accused and the complainant ought not to be relevant to the question of consent to the sexual activity

(c) retaining the separate offence of rape while redefining it to include all forms of non-consensual penetration of a sexual nature, while introducing separate offences of sexual assault and sexual harassment to prohibit other non-consensual and non-penetrative forms of sexual touching and unwelcome conduct of a sexual nature respectively

(d) shifting the burden to the accused to show that all reasonable steps were taken to obtain full and freely informed consent to the specific sexual activity

It is encouraging to note that the Committee has adopted these recommendations in its report. Thus, it recommends that Section 375 of the Indian Penal Code (which defines rape) be amended to clarify that consent is not to be relevant to the question of consent to the sexual activity

The Commission then examines the law of consent in Section 375 of the Indian Penal Code, rape must either be (i) against her will or (ii) without her consent. The Verma Report provides a useful summary of the current state of Indian law on consent and draws on the comparative analysis contributed by Professor Sandra Fredman, Oxford University and Oxford Pro Bono Publico to make its recommendations on how to reform this challenging area of criminal law.

To make out the offense of rape under section 375 of the Indian Penal Code, rape must either be (i) against her will or (ii) without her consent.

The courts have clarified that these are two separate tracks to proving rape: ‘against her will’ means the woman has resisted and there was opposition while ‘without her consent’ would comprehend an act of reason accompanied by deliberation. The Indian Penal Code then elaborates on circumstances in which consent is obtained by threats to the safety of a third party, where the victim is mistaken as to the identity of her husband, there is a lack of a conscious mind or the victim is under 16 years old. The Commission then examines the law of consent in Canada and England & Wales. Under Canadian law, the accused when charged with sexual assault cannot argue he subjectively believed there was consent. Rather, he must demonstrate that he believed there was consent because he took reasonable steps to ascertain consent to the specific sexual activity. In England & Wales, a person consents if he or she agrees by choice and has the freedom and capacity to make that choice. The law in England & Wales statutes deliberately draws, in almost identical circumstances to India, where consent does not exist.

In Appendix 4, the Verma Committee sets out draft amendments to the Indian Penal Code which clarify the nature of consent. First, penetrative sexual activity is rape when a man induces the victim to consent by impersonating another. This expands the previous definition which only confined mistaken identity to marital relationships. Second, consent cannot be presumed because of any existing marital relationship between the parties. Third, the Committee adopts the Canadian reasoning and recommends the law require unequivocal voluntary agreement, verbal or non-verbal, to participate in the specific act. Finally, consent cannot be presumed because the victim does not offer actual physical resistance to the act of penetration.

The Verma Report’s recommendations substantially improve the legal position on consent. However, there are two remaining anachronisms which should be modified when the Indian government reforms the laws. The pronoun ‘her’ should be replaced with gender neutral language in recognition that men can be victims of rape and sexual assault. Similarly references to ‘man’ in mistaken identity should be reframed in gender neutral terms. The Report concludes with the two track approach to consent (i) against her will and (ii) without her consent. In spite of the specific recommendation that consent does not require physical resistance, also defining rape as ‘against her will’ continues to reflect ideas that victims of rape must behave in a certain manner for the offence to be made out. This should be removed in recognition that respect for sexual integrity and autonomy does not require the victim to fit into any stereotypes on how he or she should behave. The inconsistency in these two positions could create confusion and undermine the strong position the Verma Report takes on requiring positive consent to penetrative sexual activity. The Verma Report makes some very important recommendations to reform the law and cultural attitudes regarding rape and sexual assault which hopefully will guide the Indian legislature when reforming the definition of consent.

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Clarifying the Law on Consent in The Verma Report
By Meghan Campbell | 31 January 2013

After the tragedy of the gang rape in Delhi on December 16, 2012, the Committee on Amendments to Criminal Law (The Verma Report) has submitted recommendations to the Prime Minister of India on reforming the laws on rape. The definition of legal consent to rape and sexual assault raises many challenging issues on the roles of men and women with respect to sexual activity.

The Verma Report includes recommendations to reform the law and cultural attitudes regarding rape and sexual assault which hopefully will guide the Indian legislature when reforming the definition of consent. However, there are two remaining anachronisms which should be modified when the Indian government reforms the laws. The pronoun ‘her’ should be replaced with gender neutral language in recognition that men can be victims of rape and sexual assault. Similarly references to ‘man’ in mistaken identity should be reframed in gender neutral terms. The Report concludes with the two track approach to consent (i) against her will and (ii) without her consent. In spite of the specific recommendation that consent does not require physical resistance, also defining rape as ‘against her will’ continues to reflect ideas that victims of rape must behave in a certain manner for the offence to be made out. This should be removed in recognition that respect for sexual integrity and autonomy does not require the victim to fit into any stereotypes on how he or she should behave. The inconsistency in these two positions could create confusion and undermine the strong position the Verma Report takes on requiring positive consent to penetrative sexual activity.

The Verma Report makes some very important recommendations to reform the law and cultural attitudes regarding rape and sexual assault which hopefully will guide the Indian legislature when reforming the definition of consent.

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Disappointing Departures from the Verma Committee Report
By Chintan Chandrachud | 3 February 2013
The Union Cabinet of the Government of India has cleared an ordinance making changes to India’s rape laws. This comes a few days after the Justice Verma Committee submitted its report (discussed here and here) recommending comprehensive reforms in the criminal law in the light of the horrific gangrape in New Delhi in December. The ordinance, which will become law when promulgated by the President, would need to be passed by Parliament within six weeks of reassembling. Although the government’s demonstrable urgency is welcome, the ordinance makes some disappointing and some would say, disturbing, departures from the Justice Verma Committee Report.

First, the ordinance extends capital punishment in cases where rape results in the death of a victim or leaves the victim in a persistent vegetative state, in spite of well-documented arguments that the gravity of the death penalty might result in overcautious judging and lower conviction rates for rape. Coupled with the familiar argument that death penalty does not serve as a greater deterrent than life imprisonment, this provision of the ordinance is regressive. If the ordinance (and a law on similar lines) comes into being, it won’t be long before the capital punishment provision faces serious constitutional challenge, on grounds similar to those in Coker v Georgia and Kennedy v Louisiana before the US Supreme Court.

Second, the ordinance is silent on the issue of eliminating the ‘marital rape’ exception. The Verma Committee provided detailed reasons for why Sir Mathai Hale’s affirmation that a wife’s consent is irrevocable is inconsistent with the values of an egalitarian society. This marks the failure to recognize the Indian woman as an independent, rights-bearing citizen as opposed to the property of her husband.

Third, the ordinance bears no mention of the Armed Forces Special Powers Act (AFSPA), which provides sweeping powers to security personnel in conflict zones, including immunity from prosecution in regular courts. As the Verma Committee observed, the AFSPA has lead to ‘deep disenchantment and alienation’ of people in these areas.

If the President promulgates the ordinance, one can only hope that political pressure within government and outside it results in a course correction to the proposed reform of rape laws.

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Lifting As We Climb
By Shreya Atrey | 6 February 2013
Upon the formation of the National Association of Colored Women’s Club, the chosen motto read: Lifting As We Climb. This principle was guided by the aspiration that the movement of Anganwadi workers would also guarantee the upliftment of all sisters and indeed all dispossessed. To them, inclusiveness and diversity was of central significance to the upliftment of all sisters and indeed all dispossessed. To them, inclusiveness and diversity was of central significance in feminist politics. In comparison, the women’s movement in India surrounding the reform of rape laws has been fractured by its apparent display of universality. Within the demand of gender justice for all women and in particular for the 23 year old Physiotherapy student who lost her life fighting the brutal gang-rape and violence, is a small but strong sub-current for recognizing intersectionality in women’s identities for redressing these violations. These feminists urge that sexual violence is not just a matter of gender subordination but is also shaped by experiences of the intersections of gender with caste, creed, religion, class, age, disability or sexual orientation. In this sense, the experiences of rape or sexual assault are vastly dissimilar but equally shocking. The expression and the timing of this learning in intersectionality, has been dubbed as anti-feminist or at least unnecessary considering it is itself a part of general rape laws will generally benefit all women.

Although absent from the Criminal Law Amendment Ordinance 2013 and the Criminal Law Amendment Bill 2012, the Justice Verma Committee Report ("the Report") is not oblivious to the absence of any concrete provision in this respect. At relevant points, it recognizes that discrimination and violence are not only gendered but are also equally borne out by the claimant’s caste, creed, religion or class. For example, in speaking of dismantling of stereotypes, the Report emphasizes on correction of aberrations like ‘the claim of upper caste to be able to overpower women belonging to dalit and oppressed sections of society’. The Report also considers how gender-based violence is compounded by the inequities of social status, caste prejudices, and economic deprivation. However, at other points the understanding remains additive and not synergistic, in that the discrimination suffered by a Dalit woman, on account of her Dalit identity is only “in addition” to being a woman. Thus, the intersection creates ‘double disadvantage’ rather than a unique experience through the interaction of the several intersecting grounds. This additive or compounded understanding conflates the uniformity and deflates the differences in women’s experience.

The possibility of having this ‘other’ narrative recognized in the language of law seems no brighter than it was several decades ago. Bhanwari Devi, the rape survivor from the case of Vishaka v State of Rajasthan was gang-raped because she was a Dalit woman working as an Anganwadi saathi, trying to convince her village against child marriage and hence challenging the authority of the upper castes. The outrage over her gang-rape gave all women the ‘oomph’ to challenge the Court guidelines on the prevention and protection of women against sexual harassment. What went unnoticed was her own personal fight for justice or the collective fight of Dalit women for emphasizing that their intersectional identity is itself a reason of sexual violence against them. We lost an opportunity there (and much before in the case of Mathura, where the tribal minor girl who was gang-raped in police custody) and we will lose one now if we continue without redefining the terms of the rape debate. Our response must both be intersectionalist and feminist – we must come together as women and must then reflect the realities of all women. Thus, if the Parliament decides to insert a provision on aggravated sexual assault or rape perpetrated on the grounds of the claimant’s religion, race, caste, place of birth, age, disability, sexual orientation or any of them, we would have reflected our realities as women through intersectionality. And there can be nothing more feminist than that; that we lift those below us as we advance the ladder of gender equality.

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Rape and Reform in India: No Legal Fix for a Systemic Problem
By Shishi Baili and Sudhir Krishnaswamy | 25 April 2013
The brutal rape and mutilation of a 5-year-old girl in Delhi last week has sparked fierce protests reminiscent of the national outrage invoked by the December 2012 gang-rape of a student, also in Delhi. Very quickly political parties have joined these protests to demand swift justice. Late last year, the government moved quickly to establish the Justice J.S. Verma Committee, which recommended substantive reform of India’s law relating to sexual violence. Parliament enacted the Criminal Law Amendment Act 2013 less than 50 days after the December incident. While substantive legislative reform is no magic wand, this month’s incident has provoked demands for further legal reform to address the myriad sexual crimes in India. We suggest three reasons to pause before another round of hasty amendments.

Law reform proposals in India are invariably proposals for legislative reform. Civil society groups, political parties and bureaucratic committees agree that broader definitions of crime backed with higher penalties will contain the country’s epidemic of sexual offences. Though existing criminal law covered both incidents of rape and there is no empirical evidence that the severity of punishment has any deterrent effect in India, the Indian political class enthusiastically offers substantive legislative reform as a panacea for all ills. Lawmakers ensure a steady supply of new laws with no meaningful prospect of social change.

Despite overwhelming evidence of, and considerable public outrage at, the failure of the police to prevent sexual crimes or to respond seriously to complaints, there have been no substantive initiatives to reform policing in India. In the high-profile cases above, the accused have histories of repeat offending and violent behaviour that went unchecked either by the police or the ‘neglected’ mental health system; such impunity for early offending can contribute to escalating violence. However, the public protest as well as the political debate has not resulted in a sustained effort at institutional reform of policing and prosecution. The Supreme Court’s effort to lead police reform in the Prakash Singh case has yielded a bounty of unimplemented orders. Unless political protest is focused on structural changes to the institution and practices of policing, prosecution and the criminal trial process in India, no amount of tinkering with the substantive law relating to sexual crimes will be meaningful.

Finally, culture features strongly as explanation for, and the cause of, rape in India. Last December, various political actors routinely described rape to be a uniquely urban problem; the result of ‘westernization’ and the erosion of traditional values. As the accused in the April incident are immigrants from the State of Bihar, the political debate on the urban and rural character of rape has intensified. This impoverished Indian public debate is an example of how outrage is manufactured on the most unsustainable premises. In a recent paper analysing all available data sources, we show that the ‘urban epidemic’ claim is unfounded and empirically unsupported. Our findings reveal that the only discernible geographical pattern in rape reporting in India is regional: the highest reported rape incidence found in central and northeast India—deserves careful explanation.

So long as the popular outrage against rape in India relies on untested empirical claims and avoids careful social and institutional analysis of the entire criminal justice system, it is unlikely that we will make significant progress to prevent or reduce sexual violence in India.

Shishi Baili and Sudhir Krishnaswamy are from Azim Premji University in Bangalore, India. Their April 18 paper entitled ‘Urban-Rural Incidence of Rape in India: Myths and Social Science Evidence’ (co-author: Rohan Kothari) is available online.
To Whomsoever it May Concern? The Case of Criminal Law (Amendment) Act 2013

Shreya Atrey | 3 April 2013

The Criminal Law (Amendment) Bill 2013 was passed by the Indian Parliament and now awaits the sanction of the President before it replaces the Criminal Law (Amendment) Ordinance 2013, which can be termed as the third wave of women’s movement in India, the law disengages with the national and feminist consciousness which has emerged post the December 16 Delhi incident. Although the law introduces some useful provisions like defining ‘consent’ for the purposes of section 375 and criminalizing stalking, acid attacks, sexual violence and sexual harassment — the overall message remains regressive in both what the law has chosen to address and omit. This post discusses how Chapter II of the approved Bill concerning the amendments to the Indian Penal Code betrays the feminist agenda in its content and context.

Despite, what can be termed as the third wave of women’s movement in India, the Criminal Law (Amendment) Bill 2013 disengages with the national and feminist consciousness which has emerged post the December 16 Delhi incident.

Context
Perhaps the greatest disappointment with the new law is its disengagement with the very constituency for whom it is meant for—women. It immediately negates the Justice Verma Committee report and the continuing efforts of women’s groups since 2009 including the National Commission for Women to formulate better laws for women. This legislative ‘unlearning’ especially when at least the Justice Verma Committee was appointment by the Parliament itself is a bizarre oversight. And so is the absence of any legislative consultation before passing the amendments. The Criminal Law (Amendment) Act has no philosophical or grounding preamble — deeming it unimportant to give even a facial recognition to the developments leading up to the amendments. In effect, it reinforces the patriarchic position of law as an isolationist and deeply hierarchal (patrarchal) institution. Speaking for and to women rather than as and with them, this law doesn’t quite speak in the tone set by the national feminist movement today.

Content
The new law disappoints with both what it does and doesn’t; such that it reinforces the legal paternalism for protecting women against gender-based violence rather than addressing it within the framework of rights. The content of the law is focused on harsher punishments for new or existing crimes. The death penalty is introduced despite clear voices against it. In reducing the response to gender-based violence to enhanced sentences (rigorous imprisonment and in some cases extending to imprisonment for life without the possibility of release), the law confirms allegiance to patriarchal forms of sentencing, which do not find any resonance with the theories of reformation and correction.

Neither is there any mention of creating a robust structure of rehabilitation, counseling, support and assistance for rape survivors, nor is the amendment couching in the language which sees sexual crimes as a breach of bodily integrity and sexual autonomy. In fact, the Amendment Act leaves untouched Sections 354 and 509 of the Indian Penal Code, which are meant for—women. It immediately neglects the Justice Verma Report. Lastly, the strategy for protecting women by excluding men from the protection of these laws is a clear violation of right to equality and non-discrimination.

Further, there is no introduction of a broader provision on sexual assault or aggravated sexual assault committed against women with intersexual identities. The retention of section 377 despite the judgment of the Delhi High Court in the Naz Foundation decision, age of consent at 18 and the continued legality of rape in marriage remain problematic despite the stance of the Justice Verma Report. Lastly, the strategy for protecting women by excluding men from the protection of these laws is a clear violation of right to equality and non-discrimination.

In the several hits and misses of this Amendment Act, the question which remains is this: to whomsoever does this law concern? Neither does it seem to address the ilk of 16 December Delhi incidents nor does it seem to be emancipatory for all women and men. The Parliament then, really seems to have created a law unto itself.

To Whomsoever it May Concern? The Case of Criminal Law (Amendment) Act 2013

Shreya Atrey is a DPhil Candidate in Law at the University of Oxford.

Using Public Interest Litigation to Combat Acid Attacks in India

By Vrinda Bhandari | 11 August 2013

Laxmi was 15 years old when her 32 year old neighbour declared his love for her. He sent her repeated text messages and when she did not respond, approached her at a crowded bus station and threw acid on her face. Her face and arms were charred forever and her ears melted (see here and here). But she is not alone.

Although there are no official figures on the number of acid attacks in India, estimates by activist groups range from three acid attacks every week to 1,000 a year. Most of these horrific attacks are carried out by jilted men, seeking revenge. They have easy access to acid, which was until recently, available for purchases in any general store. The Central Government, despite repeated assurances to the contrary, had not regulated the sale of acid and was even criticized by the Court for not being “serious” about framing a policy to curb its sale. This is all set to change, following the court’s intervention pursuant to the Public Interest Litigation (PIL) filed by Laxmi in 2005. The PIL had highlighted the inadequacy of laws for the prosecution of accused in acid attacks and the absence of any victim compensation schemes.

After surviving a brutal acid attack when she was 15, Laxmi is now engaging in Public Interest Litigation in India to seek greater justice for acid attack survivors.

Acid attacks raise three key issues: first, the effective regulation of the retail sale of acid across States. Secondly, the stipulation of measures for the proper treatment, after care and rehabilitation of the victims of acid attacks. Thirdly, the creation of uniform victim compensation schemes across States, given that under pre-existing norms, compensation varied between Rs. 25,000 (approximately £270) in Bihar and Rs. 200,000 (approximately £2,150) in Rajasthan.

On the first issue, the regulation of retail sale of acids can only take place after the Central government consults with the States to classify corrosive acids like Hydrochloric Acid and Sulphuric Acid as ‘poisons’ under the Poisons Act, 1919. Although it has recently drafted model rules titled “The Poisons Possession and Sale Rules, 2013”, these have not been enacted by all States. This compelled the Indian Supreme Court to pass interim orders in Laxmi’s PIL last month, prohibiting over-the-counter sale of acids unless the seller declared all stocks of acid with the Sub-divisional Magistrate and maintains a log/register recording acid rates, the details and address of the buyer and the quantity of acid sold. Furthermore, the buyer has to produce a valid photo ID (to prove he is not a minor) and specify the purpose for procuring the acids. Violation of these rules results in a fine of Rs. 50,000 (£540) imposed on the seller.

This has been accompanied by a legislative amendment to the country’s penal code in 2013, inserting sections 326A and 326B which make acid attacks a non-bailable offence with a minimum ten year imprisonment term (extending to life) and a ‘just and reasonable’ fine payable by the accused to the victim to meet (usually) her medical expenses.

Thus for the first time, the Judiciary and the Legislature have come together to deal with acid attacks through a multi-pronged approach: stringently punishing the perpetrators and attempting to prevent the attacks by regulating access to acids. This will be contingent on, (as is most often the case in India), the effective implementation of the law; the proactive initiative taken by the government in educating police and law enforcement agencies about the rules; and the ability to provide effective redressal through the legal system. All eyes are now set on the Supreme Court’s next hearing on Laxmi’s PIL on 3rd December, 2013.

Vrinda Bhandari is currently reading for a Masters in Public Policy at the University of Oxford.
Gender-Based Violence and Human Rights
Chapter seven

Sexual Harassment in the Indian Legal Profession

By Jayna Kothari | 3 April 2013

Two big sexual harassment complaints have sent shock waves in India this month— one by a legal intern complaining of sexual harassment from a retired Supreme Court judge and another by a journalist in a well known media house, complaining of harassment by her employer.

The complaint by the legal intern is timely because it raises the real problems of sexual harassment that women lawyers and legal professionals face. The Supreme Court has set up a 13-member committee to inquire into this complaint but it is rather shocking that this committee is not in accordance with the Supreme Court’s own guidelines in the Vishaka judgement. The Vishaka guidelines and the provisions of the Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act 2013 mandate that every committee dealing with sexual harassment should have at least 50% women, should be chaired by a woman and should have one external member who is familiar with issues of harassment. The present Committee set up by the Supreme Court has only one woman member instead of two and it has no external member as mandated. The external member is required, in the words of J. Verma of the Supreme Court, “to prevent the possibility of any under pressure or influence from senior levels, such Complaints Committee should involve a third party, either NGO or other body who is familiar with the issue of sexual harassment.” When the complaint is against a former Supreme Court judge, and the committee consists only of sitting Supreme Court judges, it is a very serious concern. It was precisely for such cases that the external member requirement was made in Vishaka and in the new legislation. It is being flouted by the Supreme Court.

The legal profession the world over is male-dominated. Women face sexual harassment of varying degrees and sexual harassment laws need to be interpreted to keep in mind such instances. First, sexual harassment laws usually address harassment at the workplace. For women lawyers, the ‘workplace’ is often the courts. However, lawyers practising in the courts are not ‘employees’ of the judges, and therefore the definitions of workplace, employers and employees in sexual harassment law needs to be interpreted broadly.

Secondly, it is extremely difficult for women lawyers to complain of harassment. Women lawyers would face sexual harassment in various ways – from co-lawyers; senior lawyers; judges; co-workers and their employers. Law students, legal interns and paralegals are particularly prone to harassment as well as others who access the system such as clients or litigants. In India, women, especially those who do not adhere to conventional norms are at risk of sexual harassment in the form of sexual gossip and comments by male lawyers in the courts. The court corridors become a hub where almost every woman lawyer is observed and discussed by male lawyers, as to their dress, mannerisms, relationships. This gossip often gets carried to the judges, court staff and clerks. Women lawyers face sexual harassment from senior lawyers and judges where sexual comments are often made openly in the courts, making it impossible for the woman to speak out publicly. Requests for sexual favours are made. In one case a woman lawyer in Andhra Pradesh even committed suicide due to the sexual harassment she faced. Complaints against a senior lawyer or a judge has huge repercussions on the woman’s future legal career because of the power that judges and senior lawyers wield in the legal profession. Additionally, because the ‘workplace’ is so broad, making a complaint would make the woman conspicuous in the entire legal community of the city/town where she practices.

The recent complaint has prompted the Supreme Court to set up a 10-member Gender Sensitisation and Internal Complaints Committee to receive complaints against sexual harassment. Most high courts all over India however do not have complaints committees which would take up complaints of sexual harassment. Even if they do, they are largely non-functioning.

Setting up the complaints committees is one part of the battle. The real challenge lies ensuring that these complaints are inquired into seriously and action is taken against the perpetrators, even if they are judges or senior lawyers. Only then will the bar of the Supreme Court recognise that sexual harassment is not a trivial matter and women will come forward to make complaints.

Jayna Kothari is the Director, Centre for Law and Policy Research, Bangalore and an advocate practising in the Karnataka High Court at Bangalore.

CSWS7: Violence against Indigenous Women and Girls

By Claire Overman | 12 March 2013

At the 57th session of the UN Commission on the Status of Women in New York, one topic which was considered on March 6 as part of the broader discussion on violence against women and girls was the situation of indigenous women in particular. The panel was comprised of Agnes Leina (representing Kenya’s pastoralist women), Martha Muhawenimana (representing Rwanda’s Batwa women), and Shimrechion Luihua-Emi (representing India’s Naga women).

The fact that violence against indigenous women was discussed as a separate issue highlights the danger of treating violence against women as a universal problem requiring broad brush consideration: rather, the panel emphasised the unique situation of women in their countries. In Kenya’s pastoralist community, female genital mutilation is the biggest problem, with female circumcision rates at almost 100%. In contrast, in Rwanda, Batwa women are subjected to domestic violence and rape due to myths that sexual intercourse with these indigenous women has medical benefits. Yet another form of violence exists in India, where land-grabbing and development projects have led to militarisation of geographical areas, with military agents engaging in rape and torture.

The unique status of indigenous women is compounded by the fact that they are often subjected to a double burden of discrimination – on the ground of being female, and also on the ground of being part of an indigenous population. This was highlighted by Luihua-Emi, when she pointed out that the Naga community are seen as insurgents when they object to development projects, but women within those communities are seen as inferior by men. For instance, preference is given to boys in matters of education.

However, despite these differences, some common themes can be seen in relation to the violence experienced by indigenous women in these communities. For instance, all three members of the panel highlighted the role of the lack of educational opportunities afforded to these women and girls. Leina noted that, for a pastoralist girl in Kenya, the only way to alleviate her family’s poverty is to be circumcised and married, rather than to have a job. As such, all the members of the panel emphasised the way to improve the situation of indigenous women was through education: both short-term, in respect of teaching them about their legal rights, and long-term, through women’s increased participation in governmental decision-making bodies. Muhawenimana pointed out that in the Rwandan constitution there was even a quota for 30% of women to hold government positions.

The panel’s discussion therefore highlights the fallacy of treating violence against women as a universal problem, and of ignoring the cultural and social context. In particular, the increased vulnerability of these women, as part of communities which are already marginalised, means that the immediate threats they face are often very different from those faced by women in more developed countries. Nevertheless, the root causes of this violence are remarkably similar – despite the differing cultural situations of these women, a lack of educational opportunities has been identified as an overarching problem. By tailoring broad solutions to the specific needs of indigenous women, the panel hopes to improve the unique plight of this particularly vulnerable subgroup.

Claire Overman is currently reading for the BCL at the University of Oxford and is a regular contributor to the OxHRH Blog.
The Agreed Conclusion of CSW57—Reaffirmation of the University of Women’s Human Rights
By Frances Raday | 10 April 2013

The Agreed Conclusions of the 57th Session of Commission on the Status of Women (CSW), on the theme of “The elimination and prevention of all forms of violence against women and girls”, represent a considerable achievement for the women’s universal human rights focused Member States, in particular most of the European countries. In addition to the well-constructed provisions on domestic violence, two themes which are particularly welcome are the reaffirmation of the universality of women’s human rights and the recognition of the public dimensions of violence against women. Skilful organisation by the CSW Bureau and its Chairperson and forceful argument and side events by numerous women’s civil society organisations resulted in the inclusion in the Agreed Conclusions of important issues that had not appeared in the earlier draft.

The reaffirmation of the universality of women’s human rights is a crucial rejection of the attempt in recent years to restore traditional values to the interpretation of human rights. This attempt has been promoted by a cross-regional group, which variously includes Russia, Syria, UAR, Malaysia, Kuwait, Libya, Indonesia and Bangladesh Egypt, Tunisia, Qatar. States from this group have succeeded in having resolutions on traditional values adopted by the Human Rights Council and were pivotal in preempting agreement by the CSW in 2003 on the theme of violence against women and, in 2012, on the theme of empowerment of rural women. The issues which are contentious for the traditional values block are, inter alia, women’s reproductive rights and services; minimum marriage age of 18; in accordance with art. 19 CRC and art. 16 CEDAW and CEDAW GR 21 on equality in marriage and family relations; protection for women involved in prostitution; protection of “useful traditional practices”; sexual orientation and sex education.

The CSW firmly rejected the adoption of a relativist approach at both the theoretical and the operative levels.

It reiterated that all human rights are universal, indivisible and interdependent and interrelated and urged states to “strongly condemn any form of violence against women and girls and to refrain from invoking any custom, tradition or religious consideration to avoid their obligations with respect to its elimination”.

At an operative level, the CSW included a significant range of obligations which are at the core of the traditionalist camp’s opposition. The Agreed Conclusions included promotion and protection of women’s human right to control over and decide freely and responsibly on matters relating to their sexuality, including sexual and reproductive health freely and autonomously, and called upon states implement laws and policies which protect their fundamental freedoms, including their reproductive rights. It also called for a review of the minimum age of consent and age for marriage and an end to the practice of “child, early and forced marriage”, while this provision falls short of fixing a minimum age for consent and marriage at 18, as the CEDAW Committee has called for, in its concluding observations, it goes beyond the traditionalist approach which may allow marriage after puberty by adding the concept of early or forced marriage. The CSW addressed the need to ensure access to services and programs on preventing early pregnancy and sexually transmitted infections, to ensure institutional support and continued post-primary education for girls who were “married and/or pregnant”. It also talked of the need for comprehensive evidence based education on human sexuality and need to provide formal and informal education to girls to develop their self-esteem and access to a sustainable livelihood. A recommendation was included that emergency contraception and safe abortion be provided for women who have been raped.

This said, the battle over traditional values has not yet been entirely won. There was no mention in the agreed conclusions of harmful traditional practices, intimate partner violence, prostitution or violence on grounds of sexual orientation or gender identity.

The Working Group on Discrimination against Women was particularly satisfied to see the inclusion in the Agreed Conclusions of a series of issues on violence against women in their stab at all as the private sphere, which, I, as Vice Chairperson, had presented to the CSW in an interactive dialogue, on the basis of the Working Group’s 2012-1013 work on the theme of women’s public and political lives. The Working Group is looking at violence against women as a cross-cutting issue in the four thematic areas it has established as its conceptual framework: public and political life; economic and social life; family and culture; health and safety. It regards elimination of gender based violence against women in all these spheres as crucial for women’s empowerment. WAG also included a much welcomed reference to the need to support and protect human rights defenders, who face particular risks of violence. It also addressed the need for new public space of ICT and social media, with all its potential for empowerment of girls and the need to develop mechanisms to combat its emerging forms of VAW, such as cyber stalking and privacy violations that compromise women’s and girls’ safety.

There is much room for satisfaction and appreciation of the CSW’s achievement and some place for optimism that it sets us on a good path for the future.

Frances Raday is the President of the Concord Research Center for Integration of International Law in Israel, Professor of Law, Hebrew University, Jerusalem (emerita) and a Mandate Holder in the UN Human Rights Council.

Violence Against Women in South Africa: President Zuma and the ANC Still Have Not Got the Message
By Nabihah Iqbal | 21 February 2013

The recent tragedy of Anene Booysen has brought widespread attention to the pandemic of violence, especially sexual violence, against women in South Africa, a country labelled by Interpol as the ‘rape capital of the world’, and where it is estimated that a woman is raped every 17 seconds. South Africa is labelled by Interpol as the ‘rape capital of the world’, and where it is estimated that a woman is raped every 17 seconds. Booysen’s case has been heralded as marking a turning-point in the country’s attitude towards gender-based violence, but any pragmatist should be wary of the false hopes that this is a wake-up call for the the country’s African National Congress (ANC) government, whose approach to gender-related issues can only be described as ‘sluggish’ at best.

What the struggle against gender-based violence needs most from the State is the allocation of resources and funding, in order for existing legislation and policies to be fully implemented. So far the government has failed to make any specific budget allocations to help tackle violence against women. For example, the South African Police Service (SAPS) receives no explicit funding, in order for existing legislation and policies to be fully implemented. However, more bureaucracy is not the answer. Taking heed of recent statistics, the government needs to realize that more immediate, affirmative action is the way to combat this spiralling problem. Violence against women is still on the rise in South Africa according to a 2012 report by Human Rights Watch. Research carried out across South Africa between 2010 and 2012 shows that, in some provinces, between 50 and 77 per cent of women have experienced some form of violence in their lifetime. The failure of the criminal justice system to investigate and punish sexual violence, and patriarchal norms and attitudes that excuse or legitimize the use of violence against women have created a culture of impunity. That (sexual) violence against women has become almost ‘normalized’ in South African society is troubling and seriously undermines the country’s progressive legislation on the issue.

What the struggle against gender-based violence needs most from the State is the allocation of resources and funding, in order for existing legislation and policies to be fully implemented. So far the government has failed to make any specific budget allocations to help tackle violence against women. For example, the South African Police Service (SAPS) receives no explicit funding, in order for existing legislation and policies to be fully implemented. So far the government has failed to make any specific budget allocations to help tackle violence against women. For example, the South African Police Service (SAPS) receives no explicit funding, in order for existing legislation and policies to be fully implemented.
By Kelly Stone | 18 July 2013

“I pay tribute to the mothers and wives and sisters of our nation. You are the rock-hard foundation of our struggle.” - Nelson Mandela, February 1990

Lessons from the South African Constitutional Court: a duty of care for police in England and Wales?
By Olivia Bliss | 12 November 2013

Last month at the inquest of Rachael Slack, a 38-year-old woman stabbed to death by her ex-partner, the jury ruled that police failures had contributed “more than minimally” towards her death. The ruling has prompted calls for a public inquiry into what the coroner described as an “epidemic” of domestic violence towards women. Slack’s family have announced their intention to sue the police.

In South Africa, a jurisdiction plagued by violence against women, the courts have expressly acknowledged the State’s obligation under constitutional and international law to protect women from harm.

In Carmichele v Minister of Safety and Security, a woman was brutally attacked by a man awaiting trial for the violent rape of another woman. A catalogue of police failings led to the man’s release on bail. The Constitutional Court recognised that the courts are under a duty to develop the common law to promote the spirit, purpose and objects of the Constitution, leading to a finding that the police had a positive duty to protect the woman from action that would infringe upon her constitutionally protected rights.

The English courts have made no such affirmations. Hill v Chief Constable of West Yorkshire established that the police did not owe a duty of care to victims of crime. This case still forms the bedrock of this area of law, although certain aspects of it have been tempered by subsequent courts. In Brooks v Metropolitan Police Commissioner, Lord Steyn doubted whether the optimistic view of the police force articulated in Hill could still be sustained, and in Osman v UK the ECtHR ruled that a blanket immunity from suit for police would amount to a breach of the right to a fair trial. Importantly, Smith v Sussex Police held that a member of the public who had fallen victim to a criminal that the police should have caught (Hill) was inapplicable to a person who had alerted the police to the danger they faced from an identified individual, and a duty of care was therefore recognized in that case. Smith is a step in the right direction for English courts, but a stronger position is needed. In Smith, the police had failed to carry out even the most elementary steps to protect the claimant. The threshold for establishing police liability ought to be lowered.

Although the South African Constitution expressly grants citizens the right to be free from violence, domestic violence contravenes a number of rights granted by the ECHR, including the right to life, the right to be free from inhuman and degrading treatment, and (on the reasoning of Baloyi, above) the prohibition on discrimination. Moreover, the Human Rights Act compels courts to develop the common law in a way that is compatible with Convention rights. The ECHR, and the provisions of CEDAW (signed by the UK in 1981) present English courts with a strong case for the modification of the traditional common law position, and a departure from the precepts of Hill.

In Smith, Lord Rimer said that the considerations in Hill which led to the court conferring immunity on the police (diversion of manpower and defensive policing) are now better regarded as reasons why it would not be fair, just and reasonable for a duty of care to be imposed. The nature of domestic violence ought to be recognized as a competing interest when the courts make their assessment of duty of care. In Baloyi, domestic violence was distinguished from other crimes by its ‘hidden, repetitive character’, ‘immeasurable ripple effects on society’ and the fact that it is ‘so often concealed and so frequently goes unpunished’. These features, as well as the intense vulnerability of the victim, their unwillingness to speak out, and the rising levels of violence towards women in the UK add weight to the arguments in favour of imposing liability on the police.

The South African Constitution is a product of the country’s unique past, designed to enhance citizens’ rights and protect them from abuses of State power. The UK is a different country with a different past, and yet the circumstances of Rachael Slack’s death raise questions about police failings in the context of domestic violence. The UK should look to and learn from the South African model, created with human rights and protection from State abuse at the top of the legal agenda.

Olivia Bliss is a BPTC graduate, currently interning at the Women’s Legal Centre in Cape Town, South Africa. Email: olivia_bliss77@hotmail.com
Decriminalizing Adultery: Eliminating Discrimination and Violence against Women

By Frances Raday | 2 November 2012

The UN Working Group (WG) on discrimination against women in law and practice has issued a call to Governments to repeal laws criminalizing adultery. The WG notes that the enforcement of these laws results in discrimination and violence against women in law and in practice.

The experts on the Working Group emphasized that the criminalisation of sexual relations between consenting adults is a violation of their right to privacy, infringing the International Covenant on Civil and Political Rights, as established almost two decades ago by international human rights jurisprudence. It is a violation of CEDAW’s prohibition of discrimination in the family. Maintaining adultery as a criminal offence—even when, on the face of it, it applies to both women and men—means in practice that women will continue to face extreme vulnerabilities, and violation of their human rights to dignity, privacy and equality, given continuing discrimination and inequalities faced by women.

The Working Group on the issue of discrimination against women in law and in practice was established by the Human Rights Council in 2010 to identify ways to eliminate existing discrimination in law and practice, and helping States to ensure greater empowerment and autonomy for women in all fields. The Group is currently composed of four independent human rights experts: Kamala Chandrakirana, Chair-Rapporteur (Indonesia); Emma Aouï (Tunisia); Frances Raday (Israel/United Kingdom) and Eleonora Zielinska (Poland).

Frances Raday is Vice-President-Rapporteur of the Working Group on Discrimination against Women in Law and Practice; Honorary Researcher, Centre for the Study of International Law and Women, University of London; Foundation Director, Concord Research Center for Integration of International Law in Israel, The Haim Striks School of Law; COLMAN; Professor of Law, Hebrew University, Jerusalem (emeriata).

Men and gender-based violence: part of the problem, but also the solution?

By The Good Lad Workshop | 1 November 2013

Universities may well call the future leaders of our governments, economies, and communities—they are places of intellectual growth, development. But does that square with what we know about how often university women face sexual harassment and unwanted advances?

The statistics on gender-based violence amongst university students in the UK are staggering: one in seven women report a serious physical or sexual assault during their time in university, and a quarter of women reported unwanted sexual contact. Most strikingly, 68% of women reported some degree of physical or verbal harassment during their time in university. In addition to the National Union of Students’ prioritisation of this issue, other groups have begun to take notice: Amnesty International UK has pointed to the increasingly clear problem of sexual violence amongst university students, while a recent and holly debated article in The Guardian connected ‘lad culture’ to the high prevalence of sexual violence (e.g. sexual assault), persons known to those who report this violence. So, if the people perpetrating these acts are not strangers but fellow students (e.g. sexual assault), persons known to those who report this violence.

To effectively address this epidemic of gender-based violence, an approach that addresses norms, culture, and attitudes is key. Changing the way that men relate to women across the board is essential in reducing the prevalence of harassment and other harms—and more broadly, to improving men’s relationships with women.

Enter the Good Lad Workshops. This programme is focused on developing ‘positive masculinity’—a way of being that encourages men not to view gender rights and equality as offences to avoid, but rather as opportunities for excellence. Men should involve themselves as part of the solution to these problems, and by doing so can produce positive outcomes for themselves, people they have relationships with, and the community as a whole. This is positive masculinity. Through small group discussions, reflection and conversation, participants are encouraged to reflect on their own relationships across gender lines. Participants develop skills that will enhance their relationships, and—and most importantly—become better men.

In sum, we can make headway in reducing the epidemic on gender-based violence in our university culture by targeting larger cultural issues as well. Better yet, we can do this in a way that promotes excellence and positivity, and that reveals our best selves in our relationships with others. We hope you’ll join us, because together we can make our university campuses better places for women and men alike.

The Good Lad Workshop is a group of men in Oxford committed to beginning the conversation on what men can do to end gender inequity. You can get in contact with us at goodladworkshop@gmail.com.

Sexual harassment and violence does happen amongst people like us—we, and people like us, are perpetrators, and we are also victims.

In these cases, most assailants or harassers are not strangers, but rather fellow university students and, specifically in the case of sexual violence (e.g. sexual assault), persons known to those who report this violence. So, if the people perpetrating these acts are not strangers hiding in the bushes, who are they? What does this tell us about our larger university culture—one marked by such a well-documented problem? And, most importantly, what can we do about it?

Men should involve themselves as part of the solution to these problems, and by doing so can produce positive outcomes for themselves, people they have relationships with, and the community as a whole. This is positive masculinity. Through small group discussions, reflection and conversation, participants are encouraged to reflect on their own relationships across gender lines. Participants develop skills that will enhance their relationships, and—and most importantly—become better men.

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Chapter seven
Gender-Based Violence and Human Rights

The Ongoing Search for Justice for Victims of the Japanese War Crimes in Mapanique, Philippines
By Harry Roque | 31 August 2013

On November 23, 1944, Japanese troops descended on the town of Mapanique in the Philippines. The troops gathered men and boys in the town and proceeded to castrate them. Afterwards, the men were forced to put their severed sexual organs in their mouths before they were burned to death en masse. Women and girls were marched to what is known today as ‘Bahay na Pula’ (red house) in San Ildefonso, Bulacan. There, they were interred and repeatedly raped.

The magnitude of the Japanese cruelty in Mapanique can be attributed to several causes. The town was known to be a hotbed of resistance to Japanese rule. It was in Central Luzon where the guerilla movement, HUKBALAHAP, was formed only months before the siege. One of the movement’s most respected leaders Commander Dayang Dayang was a native of Mapanique. The Japanese troops were also growing desperate because they knew they had already lost the war.

Fifty years later, inspired by the revelations of South Korean women who publicly admitted that they were victims of the Japanese comfort women system, about 60 victims of war crimes from Mapanique formed the group known as Malayta Lola’s, or liberated grandmothers. While primarily an organization of women who were raped by the Japanese during the Mapanique siege, it also includes in its roster women whose husbands, sons and other male loved ones became victims of Japanese war atrocities.

In 2004, the Malayta Lolas filed suit in the Philippine Supreme Court to compel the Philippine government to espouse, or base the argument on, the violation of right but bereft of a legal remedy. The intervention of the Court to argue that pacta sunt servanda cannot prevail over the jus cogens prohibition on rape. The intervention of the ECCHR in the case was facilitated by a non-profit organization, the Bertha Foundation, which has been funding young lawyers in both the ECCHR and Centerlaw, and counsel of the comfort women in the Philippine case.

Harry Roque is a Professor of International Law at University of the Philippines and Chair of the Center for International Peace and Human Rights. He is currently an LLD candidate and Tutor in the Center for Human Rights at the University of Pretoria. His research interests are human rights and international law with a particular focus on minority rights (Indigenous People and Gender) and the right to education.

Constitutionalising the Violation of the Right of the Girl Child in Nigeria: Exploring Constitutional Safeguards and Pitfalls
By Azubike Onuora-Oguno | 5 August 2013

The Senate of the Federal Republic of Nigeria, the highest legislative arm in Nigeria, is on the verge of enshrining the legality of child marriage. This is a direct implication of the voting pattern anchored by Senator Yerima (former governor of Zamfara State) refusing the deleting of Section 29 (4) (b) of Nigeria’s current Constitution. Nigeria’s 1999 constitution left open a possibility for the legality of child marriage: Section 29 (4) of the 1999 Nigeria Constitution provides that age of maturity is age 18. However, Section 29 (4) (b) includes an exception for girls child and proclaims that girl children reach maturity when they marry, regardless of the age of marriage. Thus, marriage arguably elevates even a ‘1 year’ old female child to the status of womanhood. Removal of the above section portends the inferred exclusion of child marriages.

6 years after the filing of the Vinuya case, and after 20 of the original petitioners had died, the Philippine Supreme Court unanimously dismissed the Malayta Lola’s petition.

In its 33 page decision, the Court said that the claims for compensation are barred because of the San Francisco Peace Pact. In exchange for nominal war reparations, the government was said to have waived any and further claims for compensation from Japan, a view consistently espoused by the Department of Foreign Affairs. Furthermore, the court ruled that while it commiserates with the sufferings of the women of Mapanique, this, allegedly, is one instance where there is a violation of right but bereft of a legal remedy. The Court also said that while rape is prohibited, there is no non-derogable obligation to investigate, prosecute and punish those who committed mass rape as a war crime. This decision is the second siege of the women of Mapanique.

Fortunately, the women of Mapanique have found new allies in their continuing search for justice. Pending resolution of their motion for reconsideration, the Korean Constitutional Court, ruling on a petition with the same issues as those in the Philippine Supreme Court, ruled that the Korean government must espouse the claim of the Korean comfort women. Further, the European Center for Constitutional and Human Rights filed intervention in the Philippine Supreme Court to argue that pacta sunt servanda cannot prevail over the jus cogens prohibition on rape. The intervention of the ECCHR in the case was facilitated by a non-profit organization, the Bertha Foundation, which has also been funding young lawyers in both the ECCHR and Centerlaw, and counsel of the comfort women in the Philippine case.
Chapter 8
Socio-Economic Rights and Labour Rights as Human Rights
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>115</td>
<td>The New Politics of Socio-Economic Rights</td>
<td>Dennis Davis</td>
</tr>
<tr>
<td>115</td>
<td>Mind the Gap: The Joan Fitzpatrick Memorial Lecture on Poverty and Equality Delivered</td>
<td>Professor Sandra Fredman</td>
</tr>
<tr>
<td>115</td>
<td>Gendered Poverty: A Role for the Right to Social Security</td>
<td>Beth Goldblatt</td>
</tr>
<tr>
<td>116</td>
<td>Engendering Social Welfare Rights</td>
<td>Shanelle van der Berg</td>
</tr>
<tr>
<td>116</td>
<td>The Rise of South Africa’s Education Adequacy Movement</td>
<td>Chris McConnachie</td>
</tr>
<tr>
<td>117</td>
<td>Ready to Learn?</td>
<td>Chris McConnachie</td>
</tr>
<tr>
<td>117</td>
<td>Denied Education is Denied Survival: The Case of The Nasa People</td>
<td>Ethel Castellanos-Morales and Camilo Castillo-Sanchez</td>
</tr>
<tr>
<td>118</td>
<td>Public Duties and Private Schools: The Indian Supreme Court’s Landmark Ruling</td>
<td>Gautam Bhatia</td>
</tr>
<tr>
<td>118</td>
<td>Cultivating a Common Bond: The Right to Adequate Education in South Africa and the United States</td>
<td>Scott Wadding</td>
</tr>
<tr>
<td>119</td>
<td>Horizontal Application of the Right to Education in India</td>
<td>Jayna Kothari</td>
</tr>
<tr>
<td>119</td>
<td>Education Suspended, Rights Infringed</td>
<td>Jadine Johnson</td>
</tr>
<tr>
<td>119</td>
<td>Conceptualising Meaningful Engagement in South Africa: Eviction Cases’ Exclusive Gem?</td>
<td>Shanelle van der Berg</td>
</tr>
<tr>
<td>120</td>
<td>Yordanova and others v Bulgaria: An Illustration of the Absence of Watertight Divisions Between the Social Right to Adequate Housing and the Civil Right to Respect for one’s Home.</td>
<td>Adelaide Remiche</td>
</tr>
<tr>
<td>120</td>
<td>The Bedroom Tax: The First Six Months</td>
<td>Justin Bates</td>
</tr>
<tr>
<td>121</td>
<td>Waking Up On The Wrong Side Of The Bedroom Tax</td>
<td>Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>121</td>
<td>Provoking Debate: The UN Special Rapporteur and the Right to Housing in the UK</td>
<td>Jesse Hohmann</td>
</tr>
<tr>
<td>122</td>
<td>Spatial Justice in South African Evictions Jurisprudence</td>
<td>Margot Strauss and Sandra Liebenberg</td>
</tr>
<tr>
<td>122</td>
<td>Class actions for South Africa: Children's Resource Centre Trust v Pioneer Food</td>
<td>Ingrid Cloete</td>
</tr>
<tr>
<td>123</td>
<td>Fight Hunger and Discrimination by Empowering Women</td>
<td>Olivier De Schutter</td>
</tr>
<tr>
<td>123</td>
<td>Children of a Lesser God: Food Politics in India</td>
<td>Ashish Goel</td>
</tr>
<tr>
<td>123</td>
<td>Equal Inheritance Rights for Women in Botswana</td>
<td>Vanja Korth</td>
</tr>
<tr>
<td>124</td>
<td>Mmusi Ruling a Watershed Moment for Gender and Customary Law in Botswana and Beyond</td>
<td>Tara Weinberg</td>
</tr>
<tr>
<td>124</td>
<td>Developing the Customary Law to Give Effect to the Constitutional Commitment to Substantive Equality: Mayelane v Ngwenyama</td>
<td>Tarryn Bannister</td>
</tr>
<tr>
<td>125</td>
<td>Pay Equality: When is There a Right to Claim?</td>
<td>Betsan Criddle</td>
</tr>
<tr>
<td>125</td>
<td>Dismissal and the Band of Reasonable Responses; An Unconventional Approach to Convention Rights?</td>
<td>Heather Williams</td>
</tr>
<tr>
<td>126</td>
<td>From Slavery to Strasbourg: The ECtHR Makes the First Article 4 Finding Against the UK</td>
<td>Gwendolen Morgan</td>
</tr>
<tr>
<td>126</td>
<td>Identifying Forced Labour</td>
<td>Gwendolen Morgan</td>
</tr>
<tr>
<td>127</td>
<td>Domestic Workers – The ILO Convention Comes into Force</td>
<td>Einat Albin</td>
</tr>
<tr>
<td>127</td>
<td>Redfearn v United Kingdom: Hard Case Makes Good Law-Part 1</td>
<td>Alan Bogg</td>
</tr>
<tr>
<td>127</td>
<td>Redfearn v United Kingdom: Hard Case Makes Good Law- Part 2</td>
<td>Alan Bogg</td>
</tr>
<tr>
<td>Page</td>
<td>Title</td>
<td>Author(s)</td>
</tr>
<tr>
<td>------</td>
<td>----------------------------------------------------------------------</td>
<td>------------------------------------------</td>
</tr>
<tr>
<td>128</td>
<td>Redfearn v United Kingdom and an Integrated Approach to Labour Rights</td>
<td>Anjoli Maheswaran Foster</td>
</tr>
<tr>
<td>128</td>
<td>A Price Tag for Employment Rights? The New Employee Shareholder Status in the UK</td>
<td>Jeremias Prassl</td>
</tr>
<tr>
<td>128</td>
<td>The Anniversary of the Marikana Massacre in South Africa and Corporate Accountability for Human Rights Breaches</td>
<td>Hannine Drake</td>
</tr>
<tr>
<td>129</td>
<td>We Should All Participate in Articulating the Post-2015 Development Agenda</td>
<td>Daniel Bradlow</td>
</tr>
<tr>
<td>128</td>
<td>CSW57, MGDs and Gendered Poverty</td>
<td>Meghan Campbell</td>
</tr>
<tr>
<td>129</td>
<td>Bread, Freedom and Social Justice for Women Too?</td>
<td>Rhea Fernandes</td>
</tr>
<tr>
<td>130</td>
<td>Entry into force of the New Optional Protocol to the ICESCR</td>
<td>Siobhan McInerney-Lankford</td>
</tr>
<tr>
<td>130</td>
<td>ICESCR Optional Protocol: Reconciling Standards of Review</td>
<td>Adelaide Remiche</td>
</tr>
<tr>
<td>131</td>
<td>Unpaid Interns in the New York Courts: Time to Start Spreading the News?</td>
<td>Darryl Hutcheon</td>
</tr>
<tr>
<td>131</td>
<td>For Love and Money? Unpaid Legal Internships in the Third-Sector</td>
<td>Laura Hilly</td>
</tr>
<tr>
<td>132</td>
<td>What Can we Learn from the Novartis Case?</td>
<td>Swaraj Barooah</td>
</tr>
<tr>
<td>132</td>
<td>Proposed Bahamian Constitutional Reform: No Room for Socio-Economic Rights</td>
<td>Kamille Adair Morgan</td>
</tr>
<tr>
<td>133</td>
<td>Children’s Rights and the Inter-American Court of Human Rights</td>
<td>James Beeton</td>
</tr>
<tr>
<td>133</td>
<td>A New Frontier? Human Rights and Public Finance</td>
<td>Jaakko Kuosmanen</td>
</tr>
<tr>
<td>134</td>
<td>The Role of Public Private Partnerships in Labour Rights Advancement</td>
<td>Fabiana Di Lorenzo</td>
</tr>
<tr>
<td>134</td>
<td>The Mandela I Knew</td>
<td>Bob Hepple</td>
</tr>
</tbody>
</table>
Socio-Economic Rights and Labour Rights as Human Rights

Chapter eight

The New Politics of Socio-Economic Rights
By Dennis Davis | 26 July 2012

The wave of constitutional democracy, which was generated during the latter part of the previous century, has ensured that the enforcement of socio-economic rights had become central to contemporary constitutional debates. At the most obvious level of justification for the inclusion of these rights within a constitution lies the argument that they enhance democracy by way of the guarantee that every member of a political community must enjoy a minimum standard of welfare in order to participate in the social and political life of the society of which he or she is a member.

By contrast, the traditional argument, not only articulated by those who view a constitution as primarily a preservative instrument but also by more progressive legal voices, contends that the involvement of courts in the allocation of public resources can either, at worst, impede economic growth, or, at best, may serve to disrupt social welfare provisioning.

The record of courts in Columbia, South Africa and India are employed to counter this criticism. Advocates on behalf of these courts have done an excellent ‘sales job’ in promoting the progressive credentials of these institutions. However, can it be said with any confidence that socio-economic litigation promotes the interests of the poorest of the poor as opposed to those better resourced and who are more often than not the litigants in these cases? To what extent do judgments in these cases materially affect the overall position of inequality, as is claimed?

This question often leads to the observation that a concession about the legitimacy of litigation does not mean that social and economic rights should be viewed in a binary fashion that is: either litigation or politics. However, the greatest potential for the development and enforcement for socio-economic rights should lie in properly structured political engagement. This becomes even more imperative in the second decade of the twenty-first century, within a context of fiscal austerity or, to express it differently, when neo-liberal economics shows a surprising but continued hegemony, even though its core is at war with the ambitions of social and economic rights contained in modern constitutions. The absence of sustained political engagement leads to present day Hungary or the current threats to the South African Constitution.

Dennis Davis is a Judge of the South African High Court, the President of the Competition Appeal Court, Professor of Law at the University of Cape Town, the holder of popular current affairs television programmes, and a former technical advisor to the Constitutional Assembly.

Mind the Gap: The Joan Fitzpatrick Memorial Lecture on Poverty and Equality delivered by Professor Sandra Friedman
By Laura Hilly and Megan Campbell | 6 August 2012

On 24 July 2012, Professor Sandra Friedman delivered the 9th annual Joan Fitzpatrick Memorial Lecture. In light of an austere economic climate, Professor Friedman delivered a timely call for a new understanding of substantive equality that can cast light on the experience of poverty and the ways law can address it.

She argued that the traditional separation of ‘status based equality rights’ on one hand, and redistributive policies on the other is no longer sustainable. Rather, poverty should be recognized as an equality issue and addressed through a multi-dimensional view of equality. Pragmatically, this is important for countries without entrenched protection for socio-economic rights.

With respect to poverty, substantive equality focuses on: - Breaking the cycle of disadvantage associated with poverty: Promoting dignity and worth, and redressing stereotyping, stigma, humiliation, and violence that are often experienced by those living in poverty; - Accommodating difference and aiming to achieve structural change: Promoting full participation of all members of the community, both politically and socially.

Professor Friedman highlighted that poverty is an equality issue that has an impact upon us all: research demonstrates that greater gaps in communities between the ‘haves’ and the ‘have-nots’ lessens the cumulative health of the community. This is further evidenced by the social disharmony resulting from the current banking crisis experienced in the United Kingdom where extreme wealth disparities have heightened tensions. She argued that poverty needs to be defined in terms of both the provision of minimum justice, and comparative wealth (where wealth is understood to include more than just income) if the recognition harms resulting from poverty discrimination are to be addressed.

She argued there are two ways for poverty to be brought into the rubric of an equality analysis: by including poverty as a ground of discrimination and through pro-active equality duties.

She examined the jurisprudence of several different courts: Canada, US, South Africa and the UK and concluded that courts have not been receptive to these arguments. However, this judicial reluctance is not the end but the beginning. Equality illuminates important aspects of poverty that are not addressed by redistributive government policies alone.

This Memorial Lecture began in 2004 in order to honour the life work of Professor Joan Fitzpatrick, Jeffery & Susan Brotman Professor of Law, University of Washington Law School and Oxford Law Faculty Alumni.

In introducing the lecture, Dr Andrew Shacknove, Co-Director of the Oxford/George Washington University Summer Programme in International Human Rights Law described Professor Fitzpatrick as ‘one of the most principled people’ he had ever met and a person of both ‘passion and compassion’. Her work as both a scholar and an advocate covered a wide range of human rights areas and, as Dr Shacknove described, remains ‘well cited and standing the test of time’. She promoted human rights in terms of women’s rights, freedom from torture, rights in states of emergency, prisoners rights, and she played a pivotal role on the Board of Directors of Amnesty International in the 1980s and ’90s, broadening the direction of Amnesty’s work to include, in particular, the rights of gay men and lesbians.

This lecture given as part of the Oxford/George Washington University Summer Programme in International Human Rights Law

Meghan Campbell and Laura Hilly are D.Phil candidates in Law at Pembroke College and Magdalen College, Oxford University, with research interests in equality law.

Gendered Poverty: A Role for the Right to Social Security
By Beth Goldblatt | 27 August 2012

The welfare safety net has been eroded in many developed countries over recent decades. Since the global financial crisis, austerity measures involving welfare cutbacks have worsened poverty in a number of European nations. This crisis has also had a major impact on the economies of the developing world, leading to food insecurity, job losses and increased poverty. Poor women, already on the margins, have often been hardest hit. The General Comment makes no mention of violence against women. Violence and sexual harassment affect many women’s earning capacity, requiring them to leave or move jobs or remain unemployed. Addressing gender-based violence and other discriminatory practices along with labour market restructuring and the reconfiguration of care are essential if women are to have equal rights to social security. The right to social security should be seen as a vehicle for addressing women’s poverty and disadvantage and could also play a role in building more gender equal societies.

Beth Goldblatt is a Visiting Fellow of the Australian Human Rights Centre, University of New South Wales, and an Honorary Senior Research Fellow at the University of the Witwatersrand in South Africa. Beth is the co-organiser, with Professor Lucie Lamarche of the University of Ottawa, of the International Initiative to Promote Women’s Right to Social Security and Protection. The Initiative recently held a series of webinars. The papers and videos from the webinars can be accessed at http://www.cip-hrc.ottawa.ca/?p=4575.

A longer version of this post is published in the Human Rights Defender, a magazine of the Australian Human Rights Centre, Issue 21(2) August 2012.
Engendering Social Welfare Rights
By Shanelle van der Berg | 14 March 2013

Recipients of social welfare must routinely face the fact that many in society regard them as “scroungers” who are undeserving of the support they receive. Welfare recipients are thus compelled to live with the stigma attached to the receipt of social support in addition to the severe problems and stigma that poverty holds in the first place. The problem is compounded for female welfare recipients when the granting of social welfare benefits, and especially cash grants, are made conditional upon women performing certain duties linked to the grants.

Leaving the current system of incentive language coupled with punitive measures for social welfare unexamined may reinforce gender stereotypes and serve to further feminise socio-economic burdens.

In a recent seminar delivered at the Socio Economic Rights and Administrative Justice research group at Stellenbosch University, South Africa, Professor Sandra Fredman of Oxford University sought to develop an evaluative framework through which social welfare rights could be viewed from a gendered perspective. While not attempting to prescribe what precise social welfare system would be ideal or advocating the abrogation of the cash grant, Fredman acknowledged that leaving the current system of incentive language coupled with punitive measures unexamined may reinforce gender stereotypes and serve to further feminise socio-economic burdens.

A gendered evaluative framework would, firstly, entail a redistributive dimension which recognises that addressing poverty generally cannot be equated with addressing gender disadvantage specifically. There is a need to move beyond income poverty in order to acknowledge that uneven power distribution within families can result in “hidden poverty”. Moreover, we should acknowledge that discrimination within property law, the law of succession and customary law – coupled with discrimination that hampers women’s education – is impeding redistributive measures aimed at redressing gender disadvantage. Fredman highlighted the need for a recognition dimension within which awareness of the stigma attached to both poverty and welfare could be fostered. Intrusive mechanisms such as means-testing can serve to exacerbate the stigma attached to receiving welfare benefits while simultaneously strengthening male and female stereotypes. A shift from a perception of welfare as charity to welfare as a right is required. A transformational dimension could serve to address gendered structures and stereotypes rather than merely reflecting them. Finally, a participative dimension could promote the perception of women as agents rather than as passive recipients of benefits while acknowledging the impact that intersectionality of disadvantage can exercise on the complex myriad of issues at stake.

While not purporting to be the panacea for all the problems associated with poverty and social welfare, Fredman’s four-dimensional framework could serve as a quintessential paradigm from which to re-think the way we approach the gendered nuances of social welfare rights.

Shanelle van der Berg is a doctoral candidate and member of the Socio Economic Rights and Administrative Justice research group at Faculty of Law, Stellenbosch University, South Africa.

The Rise of South Africa’s Education Adequacy Movement
By Chris McConnachie | 21 August 2012

This week we feature news on recent education rights litigation in South Africa and India. In this piece, Chris McConnachie discusses the emergence of the education adequacy movement in South Africa, which is increasingly using litigation in an attempt to improve conditions in schools.

South Africa is a pioneer in the recognition and enforcement of socio-economic rights. While there has been extensive litigation over housing, healthcare, social security and a range of other socio-economic rights, the right to a ‘basic education’ under section 29(1)(a) of the Constitution has been largely neglected. This is not for a lack of need.

South Africa’s education system is in a terrible state. The World Economic Forum’s recent global competitiveness report ranks South Africa 129th out of 139 countries in primary education. This reflects the poor conditions in South African schools. According to government statistics, thousands of schools lack basic amenities, eighty per cent of schools lack sufficient textbooks, only seven per cent have stocked and functioning libraries, and ten per cent have working computer facilities. Teaching standards also remain weak, compounded by the state’s failure to fill vacant teaching posts. These conditions are the product of apartheid policies which produced vast disparities in the education system. Since the end of apartheid little progress has been made in improving these conditions and, in many areas, conditions have worsened.

It is only in the last three years that civil society groups, school governing bodies and parents have begun to use the right to a basic education to compel the state to take action. This started with test litigation in 2010 over inadequate school facilities in the Eastern Cape Province. This focus on school facilities has since expanded into ongoing litigation to force the Minister for Basic Education to produce national norms and standards for school infrastructure. There has also been headline-grabbing litigation over the state’s failure to provide textbooks to schools in the Limpopo Province, resulting in a far-reaching court order requiring the government to take immediate action to provide textbooks and to implement a catch-up plan. Most recently, Eastern Cape schools have succeeded in obtaining a court order requiring the state to fill vacant teacher posts in the province after a decade of inaction.

This demonstrates the rise of an ‘education adequacy’ movement in South Africa, akin to the movement that emerged in the United States in the late 1980s and early 1990s. The South African movement is still in its infancy, but this early litigation has revealed two key trends.

The first is that litigants have sought to capitalise on the ‘unqualified’ nature of the right to a basic education. Unlike many of the other socio-economic rights in the South African Constitution, the right to a basic education is not qualified by the requirements that the state must take ‘reasonable’ steps to implement the right ‘progressively’ within its ‘available resources’. The Constitutional Court interprets these qualifications to mean that individuals do not have a positive right to socio-economic goods on demand but merely have a right to have the state implement reasonable programmes to provide access to these goods over time. This imposes an onerous burden on litigants, as they must establish that the state’s programmes are unreasonable. In Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others at [37] the Constitutional Court affirmed that the right to a basic education is different. It is a right to receive a basic education; anything less is a limitation of the right requiring the state to justify the limitation. The implications are yet to be fully worked out, but it is clear that the unqualified right eases the burden of proof on litigants and focuses attention on the poor conditions at their schools. The education adequacy movement has made good use of these advantages.

The second important trend is that litigation has not been treated as an end itself but as one element of a broader range of strategies to secure improvements in education. This is evident in the current litigation over norms and standards for school infrastructure which has been accompanied by protest marches, pickets, fasting and petitions. The litigation over textbooks in Limpopo has also been used as a tool to focus media and political attention on this issue. This is a clear example how litigation can be used to complement rather than to replace structured political engagement, as Dennis Davis emphasised in his recent post.

Many challenges lie ahead. Uncertainty remains over the proper interpretation of the right to a basic education, there have been real problems in enforcing court orders, and there are difficult questions over the appropriate role of the courts in addressing systemic problems in the education system. The movement will soon need to address these challenges.

Chris is a MPhil Candidate at Lincoln College, Oxford and is the administrator of the Oxford Human Rights Hub. He is the co-author of ‘Concretising the Right to a Basic Education’ (2012) 129 South African Law Journal 554, an article documenting recent litigation over school facilities in South Africa.
Socio-Economic Rights and Labour Rights as Human Rights
Chapter eight

Ready to Learn?
By Chris McConnachie | 6 November 2013


Followers of South Africa’s socio-economic rights case law will be familiar with the hard-fought legal campaigns over the rights to housing, healthcare, social assistance, water, and other goods. The Constitutional Court’s judgments on these rights are studied around the world and the underlying legal strategies have been carefully dissected for lessons on how to litigate socio-economic rights effectively.

In contrast, the recent wave of education rights litigation has received limited attention internationally. Most of these cases have settled before going to court. Others have resulted in High Court judgments that have not been widely circulated. Some cases have reached the Constitutional Court, but none has resulted in an authoritative judgment on the right to a basic education. Education in South Africa still awaits its Grooteboom—its path-breaking judgment on housing rights that clarified the way for further litigation.

The Legal Resources Centre (LRC), South Africa’s oldest and largest public interest law organisation, has been at the forefront of these efforts to secure the right to a basic education. In a series of cases, the LRC has achieved settlement agreements and court orders requiring the national and provincial governments to:

- Commit R8.2 billion to the eradication of ‘mud schools’ and the improvement of school infrastructure across South Africa;
- Fill 7,000 vacant teaching posts in the Eastern Cape Province;
- Complete a comprehensive audit of Eastern Cape schools’ furniture needs and explain how each student will be provided with a desk and a chair;
- Publish binding norms and standards on school infrastructure — including adequate classrooms, electricity, water, sanitation, libraries, laboratories, sports and recreational facilities, and perimeter security — for all South African schools by November 2013.

Until now, information on these cases has not been easily accessible. In Ready to Learn? A Resource for Realising the Right to Education, a new book available for free download, the LRC offers the first consolidated account of its work, including summaries of the key cases; extracts from court documents, judgments, and orders; and candid discussions of the strategies informing past and future cases.

This is an important resource for understanding the development of education rights litigation in South Africa. It also offers lessons for lawyers and campaigners around the world in how to use courts to secure education rights.

The LRC’s work shows that litigation can achieve a great deal when it is properly planned and executed. It is also a reminder of courts’ limitations in the face of government incapacity and intransigence. As this book details, South Africa’s national and provincial governments have routinely failed to comply with court orders and settlement agreements, requiring the LRC and its partners to engage in patient negotiations, media campaigns, and further litigation to ensure compliance.

In his foreword to the book, Dr Kishore Singh, UN Special Rapporteur on the Right to Education, emphasises the need for lawyers and academics around the world to share their ideas and experiences in enforcing education rights. The LRC has benefited greatly from this shared knowledge in formulating its legal arguments and strategies. Ready to Learn more than returns the favour.

Chris is a South African DPhil candidate at Lincoln College, Oxford.

Denied Education is Denied Survival: The Case of The Nasa People
By Ethel Castellanos-Morales and Camilo Castillo-Sánchez | 17 May 2013

Colombia is a country with a modern constitutional system that allows it to recognize its different ethnic groups and protect the diversity that is inherent in this multicultural society. Human rights are further protected by the fact that Colombia integrates several international human rights treaties in the constitution and they can be invoked in certain internal judicial processes. Nevertheless, the human rights situation for indigenous people is worrying and deserves attention. To shed light on this issue, the case of the Nasa people of the Northern Cauca region will be highlighted.

The lack of security in the Northern Cauca caused by the armed conflict between the guerrillas, the army, and the drug traffickers affects the day-to-day life of the Nasa people. Exacerbated by its geographic isolation and absence of infrastructure such as roads, bridges, telephones, electricity and water services, it stands in stark contrast to the various reservoirs and hydroelectric dams seen throughout the rest of the Cauca Valley. In this challenging context, the Nasa are fighting to preserve their indigenous customs, language, beliefs and to live in peace in their resguardo (reservation), the land designated to them by the Constitution.

After more than twenty years struggling for their rights with limited success, the Nasa have decided to prioritize their constitutionally guaranteed right to education as a mechanism for preserving their culture.

They are convinced that education is fundamental as it facilitates the transmission of their knowledge, language and identity to younger generations. To this end, they began legal actions designed to confront the government and force it to change its negligent attitude towards their community.

The first stage included formal and informal petitions to the government. After more than ten years without an appropriate answer, the community moved forward and decided to present an Acción de Tutela, a constitutional and informal writ to protect the fundamental constitutional rights of all persons in Colombia.

The four central arguments of the suit are: (1) The Colombian government violates the International Covenant on Economic, Social and Cultural Rights by charging tuition in primary education. (2) The Colombian government does not sponsor and support ethnic education by building schools, hiring prepared teachers, providing text books in the community language. (3) The Colombian government does not guarantee children’s access to schools through roads, transportation, and safety. (4) The Colombian government’s position is condemning this indigenous group to extinction by denying them the ability to transfer their ancestral knowledge to younger generations.

Two judicial reviews rejected the lawsuit on the grounds that other legal resources to demand these rights were never used. However, the plaintiffs argue that the judges ignored the community’s prior legal actions and never made a decision specifically about the key demand, the right to education for indigenous people as a survival mechanism. In April, the Constitutional Court selected the petition for an extraordinary review where it is awaiting a judgment. The question before the Court is whether the government violated the constitution by failing in its duty to avoid and correct violations of the Nasa people’s right to education and by extension their right to survive.

Ethel Castellanos-Morales and Camilo Castillo-Sánchez are Ph. D. students and legal advisors of the Nasa people.
Public Duties and Private Schools: the Indian Supreme Court’s Landmark Ruling
By Gautam Bhatia | 23 August 2012

Problems of affordability and access have perennially plagued the Indian educational system. State-run schools, while affordable, have suffered from a severe absence of quality in every respect; and private schools have been beyond the financial reach of a vast majority of Indians. Over the years, the government and the judiciary undertook many efforts to rectify the situation, culminating in the passage of the Right of Children to Free and Compulsory Education Act (‘RtEA’) in 2009. On 12th April 2012, a three-judge bench of the Indian Supreme Court, by a 2:1 majority, rejected a constitutional challenge to the RtEA 12th April, in a judgment that is bound to have far-reaching consequences for basic education in India.

A brief legal background is apposite at this point. The Indian Constitution, originally, did not guarantee the right to education as a justiciable, legally enforceable right. It placed the right to education in Article 45(1), the provision of free and compulsory education for children until the age of fourteen (Article 45), and special provisions for educating the economically and socially weaker sections of society (Article 46) among the ‘directive principles of State policy’ (‘DPSPs’) – i.e., aspirational, non-enforceable legislative goals that the Constitution exhort the government to try and achieve. Over the years, however, the distinction between the Bill of Rights (Part III), and the DPSPs has been eroded by the judiciary in many ways, and particularly as far as education is concerned. In Mohini Jain v State of Karnataka, for instance, the Supreme Court held that a ‘right’ to education flowed from the enforceable right to life and personal liberty guaranteed by Article 21 of the Constitution, since there could be no ‘dignified enjoyment of life’, or the realization of other rights, without adequate education. Unnikrishnan v State of Andhra Pradesh gave specificity to the Mohini Jain holding by imposing an obligation upon the State, again flowing from Article 21, to provide free education to all children until the age of fourteen. The State responded to Unnikrishnan by amending the Constitution in 2002, and crystallizing the dictum of the Court in a new Article 21A. The RtEA 2009, then, enacted by the government to fulfill its obligations under Article 21A and Unnikrishnan.

Of particular interest to us is s. 12(1)(c) of the RtEA, which requires privately-run schools, receiving no aid from the State, to admit, ‘in Class I, to the extent of at least 25% of the strength of that class, children belonging to weaker section of the community, state, and nation;

Cultivating a Common Bond: The Right to Adequate Education in South Africa and the United States
By Scott Wadding | 11 September 2013

As the newest wave of education adequacy litigation crashes upon the shores of South Africa, courts there face the enormous task of breathing life into a socio-economic right that is at once amorphous and rapidly evolving. But South African courts are not alone. In the United States, several state high courts recognize the right to an adequate education under their respective state constitutions. US decisions wrestling with the right to an adequate education offer a wealth of knowledge that can be cultivated by South African courts as they refine the nature of a basic education under the South African Constitution.

As South African courts continue to draw upon the collective experience of humanity in the education context, they may find a common bond with their American counterparts.
Suspended students are often left at home unsupervised, which may lead to arrest and juvenile court involvement. At school, some students are arrested for minor misbehaviour like cursing or running down the halls. Children as young as five have been arrested for temper tantrums. These patterns are often referred to as the school-to-prison pipeline. In December, the U.S. Senate Judiciary Subcommittee on the Constitution, Civil and Human Rights held a hearing on the school-to-prison pipeline urging school districts to reexamine their discipline policies. Many districts are beginning to question why they rely so much on out-of-school suspensions even though this reliance has a detrimental effect on students.

Absent expulsion, suspension is the most extreme form of school discipline available in many public schools. And research shows suspensions are not equally distributed. Recent civil rights data shows that students with disabilities are more likely to be suspended. Nationally, black students are three or four times more likely to be suspended than white students. Two weeks ago, the US Department of Justice filed a consent decree in Meridian, Mississippi to address and prevent racial discrimination in school discipline.

School discipline is important, but it should be effective, instructive, and it should not harm students. Districts should adequately fund and implement discipline alternatives to suspension like restorative justice. Such methods will improve student behavior and the overall environment for students, teachers and administrators.

The Southern Poverty Law Center advocates on behalf of the residents of South Africa: Eviction Cases’ Exclusive

By Shanelle van der Berg | 16 November 2012

The recent judgment of the South African Constitutional Court in Schabbert Park Residents Association has again demonstrated the flexible nature of meaningful engagement. Meaningful engagement encompasses government to engage meaningfully with citizens and was first used as a remedy in an eviction case in the light of the values of the Constitution, the constitutional and statutory duties of the municipality and the rights and duties of the citizens concerned. The outcome of the engagement was a detailed agreement that included measures to render the buildings safer and more habitable and to provide alternative accommodation for the occupants in the Johannesburg inner-city. Meaningful engagement has subsequently been used mainly in eviction cases.

However, in Schabbert Park, residents had been dispossessed of their homes in circumstances of urgency. The Court held that the High Court’s dismissal of the residents’ application for restoration of occupation could not replace an order for eviction as required by section 26(3) of the South African Constitution and that the residents were entitled to occupation of their homes as soon as reasonably possible. Several pronouncements by the Court recognised that meaningful engagement could potentially apply to a range of cases beyond evictions where the Court has to conduct a hearing. The Court has stated that the right to meaningful engagement is to be welcomed, but how can this notion be conceptualised to expand its scope optimally? One possible conceptualisation entails the recognition that administrative law’s requirement for procedural fairness can be substantively developed to incorporate meaningful engagement. This will allow meaningful engagement to be applied in eviction and other cases where administrative justice is required.

Reasonableness review in socio-economic rights adjudication - whereby courts determine whether government policies, laws and actions aimed at progressively realising socio-economic rights are reasonable - has been widely criticised as constituting a weak, administrative-law model of review that fails to engage with the substantive content of socio-economic rights or to recognise immediately enforceable claims to these rights. In 2003, Danie Brand termed this the ‘proceduralisation’ of socio-economic rights jurisprudence. Meaningful engagement, which avoids the substantive interpretation and enforcement of rights by largely deferring to the outcome of engagement between the litigating parties, has likewise been criticised as constituting a further step in this deferential retreat into proceduralisation.

A positive conception of meaningful engagement as substance-infused procedural fairness can serve to counter this criticism in this regard by situating it within the sphere of administrative justice rather than within reasonableness review - thus not watering down reasonableness review any further. Recognising it as ancillary to reasonableness review can avert the danger that this procedural requirement will replace the need for substantive interpretation of socio-economic rights. Meaningful engagement conceived of as the evolution of administrative law’s procedural fairness, on the one hand, and substantive interpretation of socio-economic rights, on the other, will allow meaningful engagement to be applied in eviction cases to form a collaborative partnership. This synergy would result in the content of the socio-economic right determining the intensity of engagement rather than a simple ‘question of law’ or choice where the content of the right is subsumed by administrative-law like, procedural considerations. Indeed, as meaningful engagement substantive procedural fairness and reasonableness review can operate in tandem, a place for the substantive interpretation of socio-economic rights will be preserved. A positive conceptualisation of meaningful engagement as substance-infused procedural fairness may serve administrative justice and socio-economic rights better than a negative conceptualisation of meaningful engagement as yet another instance of the proceduralisation of socio-economic rights.

Shanelle van der Berg is a junior visiting academic at the University of Oxford and a research assistant of the Socio-Economic Rights and Administrative Justice research group at Stellenbosch University, South Africa. Her research visit to Oxford was made possible by an Oppenheimer Memorial Trust scholarship.

Suspended students miss valuable class time, and endure major setbacks in their educational and emotional development.
Socio-Economic Rights and Labour Rights as Human Rights

Chapter eight

Yordanova and others v Bulgaria: an Illustration of the Absence of Watertight Divisions Between the Social Right to Adequate Housing and the Civil Right to Respect for One’s Home

By Adelaide Remiche | 28 February 2013

On 24 April 2012, the European Court of Human Rights (ECtHR) handed down a unanimous judgment in the case of Yordanova and others v Bulgaria, in which it ruled against Bulgaria for its attempt to remove Bulgarian nationals of Roma origin from their homes which had been unlawfully built on a municipal land in the neighbourhood of Sofia.

Yordanova v Bulgaria shows that the Article 8 right to respect for one’s home is not interpreted in isolation from the social right to adequate housing.

In short, the Court found that the enforcement of the removal order would amount to a violation of the applicants’ right to respect for their home guaranteed by Article 8 of the European Convention on Human Rights (ECHR). Even though the eviction order was in accordance with domestic law and pursued legitimate aims, it was not ‘necessary in a democratic society’ as the decision-making procedure ‘did not offer safeguards against disproportionate interference [with the right to respect for one’s home] but also involved a failure to consider the question of “necessity in a democratic society”’ (§ 114).

The judgment shows that the Article 8 right to respect for one’s home is not interpreted in isolation from the social right to adequate housing, protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC). Rather, when the ECtHR assesses the compatibility of an eviction with the right to respect for one’s home, it tends to mobilise similar principles as the ones developed by the Committee on Economic, Social and Cultural Rights (CESCR) and the European Committee of Social Rights (ECSR).

First, even though both the ECtHR and the Committees accept that evictions may be justifiable, in particular when a land or a dwelling is unlawfully occupied, neither considers this to be a sufficient condition.

As a matter of fact, both the Committees and the ECtHR consider that a balance ought to be struck between the right to property and other rights and interests. Moreover, independent of whether the issue of forced evictions is dealt with under the right to respect for one’s home or the right to property, the jurisprudence of the Court and the Committees highlights that the two same questions have to be asked: are the procedural safeguards sufficient to protect the interests at stake against disproportionate interference?; and is the forced eviction proportionate to the legitimate aims pursued?

Second, both the ECtHR and the Committees insist on the need to consider, and take seriously, the risk of homelessness that may result from forced evictions. Even though the right to respect for one’s home cannot (yet?) be interpreted as the right to respect for one’s home cannot (yet?) be interpreted as the decision-making procedure ‘did not offer safeguards against disproportionate interference [with the right to respect for one’s home] but also involved a failure to consider the question of “necessity in a democratic society”’ (§ 114).

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For instance, in its General Comment no 7 the CESCR urged States to take seriously the risk of homelessness, pointing out that the right to adequate housing imposes on States to avoid carrying out evictions that would result in individuals becoming rendered homeless or vulnerable to the violation of other human rights” (§ 16). However, neither the Court nor the Committees imposes an unqualified duty on national authorities to provide evicted people with alternative housing.

The Bedroom Tax: The First Six Months

By Justin Bates | 13 October 2013

The UK ‘bedroom tax’ (Reg B13, Housing Benefit Regulations 2006 (as amended)) came into force on April 1, 2013. It reduces housing benefit payments to those renting in the UK allowed an appeal in circumstances where the room in question was “never intended to be a bedroom” and had never been used as a bedroom nor used as such. It was not enough that the eviction order was in accordance with domestic law and pursued legitimate aims, it was not ‘necessary in a democratic society’ as the decision-making procedure ‘did not offer safeguards against disproportionate interference [with the right to respect for one’s home] but also involved a failure to consider the question of “necessity in a democratic society”’ (§ 114).

The judgment shows that the Article 8 right to respect for one’s home is not interpreted in isolation from the social right to adequate housing, protected by the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Social Charter (ESC).

Discriminatory impact

Perhaps the most far-reaching decision on the bedroom tax is Re: Glasgow City Council SC108/13/11351, in which the FTT held that the bedroom tax was incompatible with Art. 14 and Art.1, Protocol No.1, ECHR and re-interpreted Reg B13. The appellant in that case was permitted to receive housing benefit for an otherwise disqualified bedroom.

In Glasgow City Council, the appellant’s housing benefit was reduced by 14%. She appealed to the First-Tier Tribunal. She suffered from multiple sclerosis and needed an electric wheelchair for mobility. There were two bedrooms in the flat. The second bedroom was used by her husband, as her disabilities made it impractical for them to share a bed.

The FTT found that the failure of the housing authorities to make provision for this situation amounted to a violation of Art.14. The Tribunal was required by s.3, Human Rights Act 1998, to “so far as is possible” read the regulations so as to be compatible with the Convention rights of the parties. It was possible to read in an exemption for overnight care provided by family members.

It is not entirely clear how this decision squares with the failed judicial review, where apparently similar factual scenarios were found not to amount to unlawful discrimination.

Nonetheless, the decision in Re: Glasgow City Council provides a glimmer of hope.

Justin Bates is Barrister at Arden Chambers, Vice Chair of HLPA.
To politicians and lawyers, the ‘bedroom tax’ is just media shorthand for statutory rules relating to housing benefit reductions for under-occupancy of housing association property, ushered in by the Welfare Reform Act 2012. To the many individuals affected by the policy, however, it represents a loss of security which is much more personal and tangible. Those原有的人们继续受到现行政策的处罚。一些人则需要额外的存储空间，但因此带来的安全感是无法替代的。得州公民咨询中心的报告称，这一政策对许多贫困家庭造成了严重的不公平影响。

Thankfully, the unfair impact of the bedroom tax on some people has become vividly, uncomfortably apparent.

In her blog post for the Oxford Human Rights Hub, Dr. Jessie Hohmann lucidly explains and substantiates concerns raised by a UN Special Rapporteur about the adequacy of the UK’s social housing policy. This post outlines my experience on the front line with the Citizens Advice Service, dealing with many people who have found themselves on the wrong side of the bedroom tax.

For three months, I have been volunteering in a Citizens Advice Bureau in North West England, where reportedly more people are affected by the recent welfare reforms than anywhere else. Even in that short time, the inequitable impact of the bedroom tax on the livelihoods of many people has become vividly, uncomfortably apparent.

The aim of this blog is to help individuals out of the housing market – at the center of decision-making. If the government reaction to it, is a timely reminder that housing sits at the centre of big political questions the UK must address.

If the UN Special Rapporteur’s visit can provoke a public, person-centred, need-aware debate on housing in the UK’s current political climate of market austerity, she will have done much for the right to housing even in advance of her official report.

Raquel Rolnik, UN 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, conducted a country mission to the UK in August/September 2013. At the end of her visit, she issued a press statement in which she both praised the UK for an impressive history of housing provision for the poor and vulnerable, and indicated areas of concern. She made three preliminary recommendations. These included first, that the ‘bedroom tax’ (also known as the new under-occupancy rules) provided for by the Welfare Reform Act 2012 be repealed until its impact on vulnerable families and individuals is ascertained. Second, she called for regulation of the private rental sector to ensure affordability and access. Finally, she advocated a renewed governmental commitment to investment in social housing.

The government’s outraged response, which included a Conservative Party complaint to the UN Secretary General, illustrated a profound misunderstanding of the UN Special Rapporteur’s mandate, mission, and the relationship between UK law and the international human rights norms to which the UK has subscribed. While the exasperated and hostile government response could be dismissed as a storm in a teacup, to do so would be to misunderstand the profound questions raised by the issues highlighted by the Special Rapporteur.

We should understand that how we house individuals, families and communities is at the heart of any social and political contract. Housing provides some of our most fundamental needs. It gives us a material base from which to build a livelihood and take part in the life of the community and the state. Moreover, housing provides a space in which our psychological and spiritual needs can be met and fostered.

The legal norms which enshrine a right to housing as a human right are based on an appreciation of the importance of housing to privacy, autonomy and freedom; its function in facilitating participation and inclusion in society; and its role in providing the material goods that make these things meaningful and possible. In an important sense, like all human rights, the right to housing insists that in order to be human, we need to be housed in conditions of adequacy and dignity.

First, the right to housing treats the individual as part of the political community. This was best expressed by the Indian Supreme Court, which in the 1996 case of Chameli Singh v State of Uttar Pradesh noted that ‘in a democratic society . . . one should have permanent shelter so as to physically, mentally and intellectually equip oneself to improve his excellence as a useful citizen . . . and equal participant in democracy.’ Yet today, here as well as in India, housing is seen as a consumer good and homes, as well as homeowners, are viewed as ripe for exploitation in the global financial market. The ‘bedroom tax’ is a timely example. This initiative rests on an assumption that the house is an asset, and that rational economic principles dictate the full economic exploitation of that asset. The ‘bedroom tax’ indicates little, if any, regard for the home as a space of privacy where personal or family development might take place.

More broadly, current UK housing policy illustrates that questions of housing are no longer seen as about how we live together in community, or how we realise privacy and family life, or how we increase social mobility. Those unable to participate as players in the financial game of housing come to be seen not as fellow citizens but as the undeserving. Their inability to consume housing in the market is equated to a lesser personhood. Yet as the UN Special Rapporteur noted in her press statement, in order to realise the right to adequate housing, we must ‘place housing needs – and not housing markets – at the center of decision-making.’ If the UN Special Rapporteur’s visit can provoke a public, person-centred, need-aware debate on housing in the UK’s current political climate of market austerity, she will have done much for the right to housing even in advance of her official report.

If the UN Special Rapporteur’s visit can provoke a public, person-centred, need-aware debate on housing in the UK’s current political climate of market austerity, she will have done much for the right to housing even in advance of her official report.

Dr. Jessie Hohmann is a lecturer in law at Queen Mary, University of London, and the author of The Right to Housing: Law, Concepts, Possibilities (Hart 2013).
Socio-Economic Rights and Labour Rights as Human Rights

Chapter Eight

Spatial Justice in South African Evictions Jurisprudence

By Margot Strauss and Sandra Liebenberg | 7 September 2013

Apartheid’s legacy has entrenched patterns of spatial injustice in South Africa. Poor, overwhelmingly black residents are geographically concentrated in poorly serviced townships or informal settlements on the periphery of towns and cities. Redressing the spatial disparities created by apartheid’s land and housing laws is a major policy challenge identified in the National Development Plan 2030 and an important theme in recent jurisprudence on evictions and relocations.

As a result, the court’s task in this case was firstly, to set out when class actions may be pursued, and secondly, to lay down procedural requirements.

The judgment of the Supreme Court of Appeal provides clear guidance on the approach to be adopted in class actions.

Finally, the court lays down a certification requirement for class actions (para 23). Secondly, it lays down rules that must be followed before a class is certified. The class must be “defined with sufficient precision that a particular individual’s membership can be objectively determined by examining their situation in the light of the class definition” (para 29). In addition, there must be a cause of action raising a triable issue (para 35), and issues of fact, law, or both, that are common to all members of the class (para 44). In formulating clear requirements for instituting class actions, the court paid considerable attention to the position in other jurisdictions. Much of the information regarding comparative law came to the court’s attention through the arguments of the Legal Resources Centre – a South African public interest law firm that acted as amicus curiae in the matter. The Legal Resources Centre, in turn, relied heavily on a report compiled by Oxford Pro Bono Publico, in crafting its heads of argument. OPBP’s report was a comparative analysis of class action law in Europe and the United States, compiled specifically for the LRC for use in the litigation. Jurisdictions covered included the USA, Finland, Norway, the United Kingdom, Italy, Sweden and Denmark.

The court ultimately decided in favour of the legal developments proposed by the Legal Resources Centre. By providing the information that assisted the LRC in crafting persuasive arguments based on comparative approaches, OPBP’s research contributed directly to the development of South African law.

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The Spatial Planning and Land Use Management Act (‘SPLUMA’, signed into law on 5 August 2013) establishes a clear link between the need for an inclusive spatial planning and land use management system and the imperative to realise the housing rights of disadvantaged communities in South Africa. A key feature of the Act is the inclusion of the principle of spatial justice, which aims to redress past development imbalances by improving access to well-located land and promoting integrated human settlements. The principle of spatial justice is consistent with the Constitution’s broader commitment to social justice and should constitute a central guiding principle in judicial, legislative and policy interpretations of the right of access to adequate housing in section 26 of the Constitution.

However, attention to spatial justice has been elusive in the burgeoning evictions jurisprudence on section 26. This is because the fact that the eviction and relocation of impoverished communities, from densely occupied informal settlements or inner-city properties to ill-located peripheral areas, remains a patent cause of spatial displacement. Evictions deepen vulnerability by disrupting fragile community networks, removing people far from livelihood opportunities and interfering with existing arrangements for child care and education. Temporary accommodation provided in the aftermath of evictions also tends to acquire a permanent character, which undermines the objective of creating integrated human settlements.

The issue of spatial justice, as a key element in relation to housing rights, was pertinently raised in the case of Residents of Joe Slovo Community, Western Cape v Thubelisha Homes (‘Joe Slovo’). The provincial government and a housing development agency applied for the eviction and relocation of approximately 20,000 residents from a large informal settlement to a temporary resettlement unit (‘TRU’), some 15 kilometres away on the urban periphery, in order to facilitate the upgrading of the settlement. The residents and amicus curiae advanced arguments regarding the impact of the relocation of the community to the TRU.

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Socio-Economic Rights and Labour Rights as Human Rights
Chapter eight

Fight Hunger and Discrimination by Empowering Women
By Olivier De Schutter | 7 March 2013

In rural areas around the world it is often men who migrate first to cities in search of waged labour. When they do so, it falls to women to sustain small-scale farms – and with them the food security of families and entire communities. Yet all too often women are denied the tools to improve their situation on and off the farm.

The burden of cooking, cleaning and caring for the young and elderly – not to mention fetching water and firewood – imposes a major time and mobility constraint on women and girls, which makes it impossible for them to attend school or training sessions. Lower levels of education mean that women have less access to economic opportunities, and in turn hold weak bargaining power within the household. As such they are often saddled with a disproportionate burden of household responsibilities, and the cycle of discrimination closes.

Women are thus held back from prospering on and off the farm, despite ample evidence now showing that women’s empowerment – as well as being necessary in order to fulfill their rights – is the single most important factor in reducing hunger, and that global hunger could be reduced by up to 17% if women had access to the same productive resources as men.

What must States do to break the cycle of discrimination and fight hunger by empowering women?

They must go beyond piecemeal actions, and start to think systematically and holistically about challenging gender roles. Measures such as quotas for women in Indian public works schemes are a positive step, but women will not benefit if no provision is made for childcare services and they remain bound by domestic chores. Efforts to expand female school attendance are also welcome and several Asian countries have introduced stipends to keep girls in school – but many schools lack adequate sanitation facilities, and there is often a shortage of female teachers, thus discouraging socially conservative families who do not want their daughters taught by men. Credit is another area where development strategies have tried to target women. Countries like Indonesia have introduced microfinance programs earmarked for female-headed households, but credit-worthy women can be used as intermediaries to channel funding to businesses run by their male relatives.

Individual measures such as these are susceptible to fail unless more is done to tackle the underlying norms and cultural practices. States must therefore pursue transformative food security strategies that address cultural constraints and redistribute roles between women and men.

Pioneering schemes in several countries are already showing how this might be achieved. In Bangladesh, the Building Resources Across Communities initiative has provided women with poultry – a less labour-intensive asset than livestock – alongside subsidized legal and health services, clean water and sanitation. The scheme has thus freed women up in order to prosper as farmers and in other economic activities. Meanwhile, a conditional cash-transfer program in the Philippines, now covering 3 million households, not only looks to alleviate rural poverty, but also includes a gender action plan that requires that bank accounts be set up in women’s names, trains women on their rights with respect to domestic violence, child care, nutrition and other areas; and trains fathers to share responsibility as caregivers. These schemes have proved themselves gender-sensitive, and taken action to challenge the underlying gender roles.

Steps like these are the most effective way to empower women, and are a shortcut to tackling hunger and malnutrition.

Olivier De Schutter is the UN Special Rapporteur on the right to food.

Children of a Lesser God: Food Politics in India
By Ashish Goel | 25 August 2013

The tragic loss of 23 children who ate contaminated food at a government-run primary school in the East-Indian state of Bihar, near Patna, speaks volumes about the continued policy paralysis afflicting governance in the health and education sectors in India.

The Bihar incident, together with several equally fatal incidents in Rajasthan, West Bengal and Odisha, has brought India’s famous Mid Day Meal Scheme (MDMS) – which feeds over 120 million children every day and costs $2 billion an year – under the scanner. The Bihar CM, Nitish Kumar, in his defence, alleged conspiracy against his government; while primary teachers boycotted the MDMS, fearing charges of mismanagement. The responsibility for the children’s deaths, however, is yet to be owned – individually or collectively.

The MDMS was first conceptualised during the British rule in 1920s for the disadvantaged children of Madras, now Chennai, and later replicated in Pondicherry by the French. After India gained independence, MDMS ran in few southern states but was mostly dormant across the country. In 2001, the Indian Supreme Court, sitting on public interest litigation, directed all government-run primary schools to provide midday meals to children. However, India continues, even today, to fight for the legal right to subsidised food. For example, the recent Food Security Bill guarantees eligible citizens subsidised food grains but, stands little chance of passing in Parliament. Even if the bill did pass, in its current form it lays more emphasis on eliminating hunger than on improving nutrition and cannot address the issue of neonatal and child mortality in India.

The MDMS fiasco in Bihar cannot be understood in isolation from the politics influencing health and nutrition in India. Bihar is arguably India’s most backward state – economically and socially. Widely poverty and mass illiteracy make the state prone to corruption as the population can get easily tricked by local politicians’ grand talks about growth and development. CM Kumar’s model of ‘good governance’ may have reaped more benefits than that of his predecessor, but, the fact of the matter is that, centrally funded development schemes, such as MDMS and others, rarely reach their targeted groups. The fear of food contamination due to improper storage and distribution facilities is only a facet of a bigger problem.

India’s food security story is paradoxical: India is one of the world’s largest producers of wheat, rice, fruits and vegetables; but, still, four children die every minute from hunger, malnutrition and hunger-related, treatable diseases. The MDMS went a long way in encouraging parents in rural India to send children to school; employing women as cooks; and, of course, ensuring primary education. But the government’s apathy has reduced an otherwise generous scheme to mere vote bank politics, and for the children who died, a tragedy. For the Indian poor, food insecurity is a hard reality with which they have long grappled and, of late, have had to come to terms with.

Ashish Goel is a young lawyer educated in Calcutta and London and has travelled widely in rural Bihar.

Equal Inheritance Rights for Women in Botswana
By Vanja Karth | 19 October 2012

The latest decision of the Botswana High Court on inheritance rights in Edith Mmusi v Ramanile is a pivotal step for women in Botswana and Africa as a whole.

A number of African countries still have discriminatory customary law practices that effectively leave women with nothing on the death of a male family member. In this case, the Ngwaketse customary law of inheritance was challenged on the grounds that it violated the right to equal protection of the law under section 3(a) of the Constitution of Botswana.

This law confirmed the right to inherit the family home on the last born male, thus excluding women, irrespective of their position in the birth order.

Judge Dingake rose to the occasion by affirming the Constitution of Botswana as the supreme law of the country and accordingly declared that the customary law was unconstitutional and should be subsumed by cultural practice. It is to be hoped that other African legal systems will follow this example to ensure that women are not forced into inheritance-based discrimination that is so entrenched in some African societies.

The judgment considered the nature of the relationship between section 3(a) of the Constitution (which confers upon all persons the equal protection of law) and section 15 (an anti-discrimination provision which contains a savings clause for customary law).

The court held that the customary law is biased against women, with the result that women have limited inheritance rights as compared to men, and that daughters living in their parents’ homes are liable to eviction by the heir when the parents die.

Judge Dingake argued that ‘this gross and unjustifiable discrimination cannot be justified on the basis of culture. Section 3 requires that all laws must treat all people equally save as may legitimately be excepted by the Constitution. Thus, to the extent that the customary law denies the right of women to inherit intestate solely on the basis of their sex, it violates their constitutional right to equality under section 3, notwithstanding the savings clause under section 15.

The court also held that the Government of Botswana’s ratification of a number of international legal instruments implied that it was committed to modifying social and cultural patterns of conduct that adversely affected women through appropriate legislative, institutional and other measures. In particular, these ought to aim at achieving the elimination of harmful cultural and traditional practices based on the idea of the inferiority or the superiority of either of the sexes, or on stereotyped roles for women and men. Therefore, the court also declared that there was an urgent need for Parliament to abolish all laws inconsistent with section 3(a).

Vanja Karth is Programme Manager of the Democratic Governance and Rights Unit, University of Cape Town. Researchers at Oxford Pro Bono Publico provided research assistance to Judge Dingake on comparative law.
Mmusi Ruling a Watershed Moment for Gender and Customary Law in Botswana and Beyond
By Tara Weinberg | 23 September 2013

On September 3rd, the Court of Appeal in Botswana decided that Edith Mmusi’s parents’ home belonged to her and her sisters. In doing so, Botswana’s highest court struck a blow to rigid versions of customary law and breathed new meaning into the Botswana Constitution’s provisions to prevent unfair discrimination.

Edith Mmusi’s story
Edith Mmusi, 80, was born in the village of Kanye in southern Botswana. When Mmusi’s father died, she and her sisters contributed to the upkeep of the homestead and looked after their mother until her death in 1988. Mmusi moved from her parents’ home when she married but returned in 1991 after her husband’s death. Owing to a dispute with her in-laws, Mmusi was unable to inherit anything from her late husband’s estate.

Mmusi has lived in her parents’ home until the present day. However, recently her nephew in the Mlaglosi family claimed the family home belonged to him. The basis of his claim was that under Ngwaketse customary law, the family home always passes to the youngest son.

Since elders and family members could not agree, the issue passed through several courts before reaching the Court of Appeal, Botswana’s highest court.

Implications of the case
The Mmusi case has far reaching implications for women’s ability to inherit but there remain some challenges.

There are three striking features of the Mmusi ruling, which have wide-reaching implications for customary law and gender equality in Botswana.

First, the Court strengthened the legal protection from unfair discrimination in Botswana. The Court clarified the relationship between the rights and freedoms enshrined in section 3 of the Constitution and the limits placed on these rights and freedoms. This was important because section 15 specifically excludes matters of inheritance and marriage from its prohibition on discrimination. Ramantele’s team said that discrimination against women in inheritance under customary law was permitted.

The Court disagreed with this interpretation. Building on a landmark 1992 case Attorney General of Botswana vs. Unity Dow, it found that the umbrella guarantee of equality before the law is contained in section 3. That guarantee can only be limited where the limitation prevents prejudice to the rights of others, or promotes the public interest. Discrimination against women in inheritance matters fails on both grounds.

A second striking feature of the Court’s ruling relates to its interpretation of Botswana’s Customary Law Act. According to the Court, where the content of customary law is in doubt, it should be determined in line with underlying values of “humanity” that should guide all law in Botswana.

The Court concluded that the underlying value of Ngwaketse inheritance laws was that those responsible for looking after the family, or who had invested in the property or who were in need of the home as a result of their circumstances should be prioritized. Edith Mmusi fitted all these categories and the court decided it would be counter to the sense of “humanity” underlying customary law – and all Botswana law – for her to be deprived of her inheritance rights.

A third important element of Mmusi’s victory relates to the Court’s articulation of living customary law. Until this case, Botswana’s jurisprudence spoke little of the notion of “living law”. The Court referred to evidence in the historical and anthropological literature, the testimonies of the litigants, and the records of the lower customary courts, to show that customary law is “living” – that is, constantly in flux and subject to changing social dynamics. The judgment noted this “there is no rational and justifiable basis for insisting on the narrow norms of days gone by when such norms go against current value systems” (paragraph 80).

The Mmusi ruling has recognised and elevated the social reality of women’s inheritance over customary law stereotypes of exclusively male heirs. The historical literature shows that women have almost always inherited their mothers’ personal property and agricultural fields. In addition, encouraged by Kgosi Linchwe II’s pronouncements, women inherited cattle on a more widespread basis in the latter 20th century. Evidence from the 1980s onwards shows that it has become increasingly common for unmarried daughters to inherit the family plot and that women have become the guardians of family plots even when men were around.

The Mmusi case has far reaching implications for women’s ability to inherit but there remain some challenges. Although the decision of the Court of Appeal applies to all women in Botswana regardless of their marital status, in practice married women might find it difficult to inherit as often women are barred from inheritance not just because of their sex but because they are married.

The ruling also provides the courts with the discretion to read their own interpretations of social practice into customary law. This could be exploited in contexts where the court is conservative or runs too far out of step with public sentiment.

For now, though, Edith Mmusi and her sisters can live out their last years in a house that they have won the right to inherit, on the basis of Constitution as well as customary law in Botswana.

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Developing the Customary Law to Give Effect to the Constitutional Commitment to Substantive Equality: Mayelane v Ngwenyama
By Tarryn Bannister | 20 August 2013

The South African Constitution expressly provides for the horizontal application of the Bill of Rights, stating that these rights apply to all law. Section 39(2) also states that when interpreting legislation or developing the common law or customary law the courts must: “promote the spirit, purport and objects of the Bills of Rights.” In spite of these provisions, a coherent jurisprudence on the interaction between the Bill of Rights and the private law has yet to develop. In addition, certain private law rules continue to undermine the constitutional commitment to social justice and substantive equality. For example, domestic partnerships and Muslim marriages have also had severe implications for the socio-economic security of vulnerable family members.

In the recent Constitutional Court case of Mayelane v Ngwenyama and Another, the Court considered the development of the customary law relating to Tsonga marriages, relying primarily on section 39(2). In this case the applicant had been married to the deceased in terms of customary law since 1984. The deceased then entered into a second marriage with the respondent in 2008 and then passed away in 2009. The issue was whether the customary law relating to Tsonga marriages required that the first wife had to consent to the second marriage in order for it to be valid. Ultimately the Court developed the customary law to require the first wife’s consent.

While this goes a long way in effectively protecting the constitutional rights of the first wife, the Court has been criticised for ruling that the second marriage is automatically void. This is due to the fact that automatic invalidity could have serious economic and social consequences for the second wife and any children from the relationship. While the first wife’s consent should be required, the appropriate remedy should depend on all the circumstances of the case, including the constitutional rights of the “discarded” second wife. This is necessary as she may have been in a vulnerable position when she entered into the relationship, where marriage provided an irresistible economic and social pull. She may have also been unaware of her partner’s previous marriage. If she and her children depended on the economic assistance of her husband for their survival, automatic invalidity would then place them in a vulnerable position, effectively exacerbating the feminisation of poverty.

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**Socio-Economic Rights and Labour Rights as Human Rights**

**Chapter eight**

**Pay Equality: When Is There a Right to Claim?**
By Bettsan Cridde | 30 October 2012

The important decision of the Supreme Court in Birmingham City Council v Abdulla establishes that a claimant who is out of time to pursue an equal pay claim in the Employment Tribunal (‘ET’) may issue a claim in the civil court as of right if that claim is in time.

Gender pay inequality claims remain unique in the discrimination field, in that the mechanism for enforcement is contractual rather than tortious: the statutory equality clause modifies the terms of the woman’s contract to be no less favourable than the terms of her male comparator’s contract. Accordingly, the ET and the civil courts have always enjoyed a concurrent jurisdiction over equal pay claims, albeit that in practice, claims are usually issued in the ET. Where the ET gives its specialist expertise and the lack of costs penalty for bringing an unsuccessful claim.

The time limits for bringing a claim also differ as between the jurisdictions. In the ET, a claim must be presented within six months of the end of the employment relationship to which the claim relates, usually (but not invariably) the end of the discriminatory employment contract. The ET has no discretion to extend time in the woman’s favour to consider an out of time claim. By contrast, a claim in the civil court can be issued within six years of the breach, which can be later. This gives rise to the prospect of out of time ET claims nevertheless being in time in the civil courts.

In Abdulla, the Council sought to rely on section 2(3) Equal Pay Act (‘EqPA’) 1970 (now section 122 Equality Act (‘EqA’)) 2010, which provides a civil court the power to strike out an equal pay claim if it appears dismissing employer that provided a reasonable equal pay claim could more conveniently be determined by the ET. The Council argued that this meant that, where a claim issued in the civil courts would be out of time presented in the ET, it should be struck out unless the woman could show a reasonable excuse for not having presented the claim in the ET.

The majority disagreed. The ability to strike out a claim because it could be dealt with more conveniently before the ET (for reasons of expertise and costs) did not mean that the civil claim should be struck out, leaving the woman without any potential remedy. Lord Wilson, giving the majority judgment, considered the absolute nature of the ET time limit an important consideration: no discretion to extend time in the ET is consistent with the prospect of a right to bring a claim at a later date (see s.41). Importantly, the majority held that it would never be relevant to conduct a factual inquiry into why the claim had not been submitted earlier in the ET. This is a welcome rejection of yet another procedural hurdle being placed in the way of determination of equal pay claims, an area of law that is bedeviled by such arguments.

Will this decision lead to a rash of equal pay claims being issued in the civil courts? The answer is almost certainly no. Equal pay claims remain rare outside the public sector where mass claims concern with structural pay inequalities between male and female occupational groups have dominated in recent years. Where claims are issued, they tend to arise together with other claims at the end of the employment relationship. That fact, together with the practical benefits of ET proceedings in terms of expertise and costs is likely to keep equal pay claims within that sphere.

Further, although Lord Sumption in the minority raised the possibility that a restrictive BORR in fact operates differently to a Wednesbury test in practice.

**Dismissal and the Band of Reasonable Responses: An Unconventional Approach to Convention Rights?**
By Heather Williams | 4 December 2012

The Court of Appeal recently decided in Turner v East Midlands Trains Ltd [2012] EWCA Civ 1470 that the band of reasonable responses test ("BORR"), applied by Employment Tribunals to determine whether a dismissal is fair or unfair for the purposes of the Employment Rights Act 1996, meets the standards of justification required by Article 8(2) of the European Convention on Human Rights when engaged by the consequences of a dismissal.

In support of this conclusion, both Elias LJ and Sir Stephen Sedley stressed that the BORR entailed a higher standard of review than a public law Wednesbury type test, as it involved an objective assessment of the decision to dismiss by the Tribunal, who should expect a more rigorous investigation from an employer where the consequences were particularly serious in terms of reputational damage and/or future employment prospects.

However, it seems doubtful that the BORR in fact operates differently to a Wednesbury test in practice.

Countless Court of Appeal authorities have stressed that the Tribunal cannot substitute its own judgment for that of the dismissing employer, but that a reasonable employer could have dismissed, the decision to do so is lawful. It is hard to envisage many circumstances in which a dismissal would be sufficiently unreasonable to fall outside the BORR available to the employer, but not extreme enough to be characterised as perverse.

Furthermore, where Article 8 is engaged, Article 8(2) requires the Court/Tribunal to make its own assessment of the proportionality of the measure, including, where there is a relevant dispute, by conducting its own assessment of the facts and its own evaluation of the competing interests involved; see for example, the Supreme Court’s decision in the housing context in Manchester City Council v Pinnock [2010] 3 WLR 1441. By contrast a BORR test presupposes just that; a range of permissible responses, so that a dismissal may be lawful even though some reasonable employers would not have decided to dismiss. It is hard to see how this equates with a proportionality test under which the Tribunal makes its own assessment of the proportionality of the dismissal and may conclude that dismissal in the particular circumstances was disproportionate. Indeed, those repeated injunctions against Tribunals forming their own views of the facts and/or substituting their own view as to whether the employee should have been dismissed, seem to directly conflict with the conventional Strasbourg approach to proportionality under Article 8(2) in the employment context, see for example Kyriakides v Cyprus (2009) App. No. 39058/05 and Schult v Germany (2011) 52 EHRR 32.

Further, both the European Court of Human Rights and the House of Lords has rejected the proposition that a “super Wednesbury” test entitled heightened scrutiny is analogous to a Convention compliant proportionality assessment, for example see Smith & Grady v United Kingdom (1999) 29 EHRR 493 and R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532.

Despite having considered employment discrimination cases on countless occasions, neither the House of Lords or the Supreme Court has ever examined the legitimacy or application of the BORR, even though it entails a restrictive test that is nowhere to be found in the apparently wide words of section 98 of the Employment Rights Act (which, in turn, makes it rather ironic that Elias LJ noted in his judgments that proportionality was not a word that was to be found in Article 8 itself). Perhaps the Supreme Court could now be persuaded to do so, tempted by the particular challenge of exploring the interface between domestic unfair dismissal law and Convention rights.

More encouragingly from a claimants’ perspective, Elias LJ’s judgment contains a detailed analysis of recent European Court of Human Rights authorities indicating when Article 8 will be engaged by the consequences of a dismissal, including by virtue of the damage to reputation involved or, less commonly, by the adverse effect upon future employment opportunities and/or the disruption to relationships with, for example, work colleagues. Domestic law has previously contained little guidance on this issue, if, as seems likely from this assessment, Article 8 is potentially engaged when, for example, dismissal, decisions on redundancy and management, this may in turn call into question whether current unfair dismissal law provides what Strasbourg would regard as an ‘effective remedy’ given that heads of compensation are restricted by statute and for example, no award may be made for injury to feelings.

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From Slavery to Strasbourg: The ECHR Makes the First Article 4 Finding Against the UK
By Gwendolen Morgan | 5 December 2012

In November 2012, the European Court of Human Rights handed down judgment in the case of CN v. UK. The court unanimously held that there had been a violation of Article 4 (prohibition of slavery, servitude and forced labour) of the European Convention on Human Rights.

The court confirmed that “There will be a violation of Article 4 where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.” [§67]. Due to this absence of specific legislation criminalising domestic servitude and forced labour, the investigation into CN’s case had been rendered ineffective.

In her recent OHCHR post, the Special Representative and Co-ordinator for Combating Trafficking in Human Beings at the OSCE highlighted the extent of the forced labour phenomenon in the modern, globalised labour market. She cited the International Labour Organization’s 2012 estimates that 20.9 million people are victims of forced labour globally, though the organisation stresses that this is a conservative estimate.

The UK signed the International Labour Organisation Forced Labour Convention in 1930, and has been under a positive obligation to effectively penalise forced labour since then.

The court’s ruling understands why it matters to have a ‘bespoke’ criminal offence which goes to the heart of the mistreatment at stake: blackmail, theft, and kidnapping do not suffice alone. In practical terms, in the absence of a specific offence targeting the core of the criminal activity, other offences such as fraud, robbery, assault, or abetting an offence do not suffice alone. In practical terms, in the absence of a specific offence targeting the core of the criminal activity, other offences such as fraud, robbery, assault, or abetting an offence do not suffice alone. In practical terms, in the absence of a specific offence targeting the core of the criminal activity, other offences such as fraud, robbery, assault, or abetting an offence do not suffice alone. In practical terms, in the absence of a specific offence targeting the core of the criminal activity, other offences such as fraud, robbery, assault, or abetting an offence do not suffice alone.

Following a campaign spearheaded by Anti-Slavery International and Liberty, with an influential opinion from Helen Movern QC and the former DPP, the last Government introduced a new offence of slavery, servitude and forced labour in 2010. It remains to be seen if that new legislation will lead to a maximum mandatory sentence of life imprisonment, as proposed.

The way in which slavery is obscured within the UK is summarised by Adel Abadeer (2004: cited in Craig et al. 2007): “Modern-day slavery victims are typically very poor, vulnerable and marginalised … they are unaware of the imperfect nature of contract or of transaction terms, the process of enslavement, and they lack viable secondary sources. The perpetrators, in contrast, exploit the incoherence of contracts or transactions in terms of the significant information gap between them and the victims … and the desperate state of the enslavements that results from their ignorance, vulnerability and the absence of viable alternatives.”

The 2011 Modern Slavery Act on forced labour explored the conceptual and practical difficulties in clearly defining forced labour so as to criminalise and prevent its occurrence: “It is important to understand forced labour as a process that may start with deception and move into more direct forms of coercion (Anderson and Rogaly). This idea is developed by Skrivanova, who suggests that ‘the reality of forced labour is not a static one, but a continuum of experiences ranging from decent work through minor and major labour law violations, to extreme exploitation in the form of forced labour’.”

In CN v. UK, discussed in detail in a previous post, the court helpfully analysed CN’s situation through the prism of the International Labour Organisation’s forced labour indicators, which were all present in her case at various points, although the police had failed to recognise that pattern given the lacuna in the criminal law at that time:

1. Threats or actual physical harm to the worker.
2. Restriction of movement and confinement to the workplace or to a limited area.
3. Debt bondage: where the worker works to pay off a debt or loan, and is not paid for his or her services. The employer may provide food and accommodation at such a cost that there is no remnant of wages.
4. Withholding of wages or excessive wage reductions, that violate previously made agreements.
5. Retention of passports and identity documents, so that the worker cannot leave, or prove his/her identity and status.
6. Threat of denunciation to the authorities, where the worker is in an irregular immigration status.

This approach echoes the statement of Lord Tunnock, the Government spokesman who moved the amendment which was to become section 71 Corrons and Justice Act 2009. He emphasised that the new offence of forced labour, slavery or servitude should not be interpreted restrictively. He explained the Government’s approach as follows: “The behaviour that the new offence prohibits is holding another person in slavery or servitude or requiring another person to perform forced or compulsory labour where the offender either knew or ought to have known that the person was being held or required to perform labour in such circumstances. Broadly speaking, the offence will require proof of a relationship of coercion between the defendant and the worker, and the circumstances will need to be such that the defendant knew that the arrangement was oppressive and not truly voluntary or had deliberately turned a blind eye to that fact. Precisely what constitutes slavery, servitude and forced or compulsory labour will be determined by the courts using existing case law on Article 4 of the European Convention on Human Rights and Section 4 of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 as they develop. In the vast majority of cases, we do not anticipate any difficulty for the courts in deciding whether the behaviour that they are asked to consider amounts to prohibitive behaviour under the new offence. In addition, we anticipate that sentencing guidelines will include a range of factors which will provide an indication of the relative seriousness of the prohibited behaviour. We would expect these to draw on the types of indicators in the International Labour Organisation’s conventions.”

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She was CN’s solicitor, instructing Helen Law and Helen Mountfield QC from Matrix Chambers.
Domestic Workers – The ILO Convention Comes into Force
By Einat Ablin | 18 November 2013

On the 5th of September 2013, the ILO Domestic Workers Convention (C189) came into force. The adoption of the Convention and its subsequent recommendation, in June 2011, was a landmark moment for domestic workers and for the international labour law regime.

For domestic workers it entailed recognition that they are part of the paid labour market and that they have rights at work. For the international labour law regime it was a moment when a human-rights, sectorally-focused approach was adopted within an international regulatory tool, offering to promote substantial equality for domestic workers through a view of domestic work as necessarily part of anyone’s work, regardless of where it ‘works like no other’. Since its adoption, the Convention was ratified by ten Countries, but only three – Mauritius, Philippines and Uruguay – have put it into force.

Convention 189 is an important regulatory tool to further the recognition and protection of the marginalized group of domestic workers in the labour market, mainly women, migrants and children. These form the majority of workers employed in the domestic work sector. A recent ILO study estimates that during 2012 nearly 17.2 million children aged 5-17 were engaged in domestic work in the world. In 2010 around 43.6 million women were employed in domestic work. Many of those employed in this occupation are migrants, although due to data limitations it is difficult to give estimates on their numbers.

Redfearn v United Kingdom: Hard Case Makes Good Law-Part 1
By Alan Bogg | 17 December 2012

On 6 November 2012, the European Court of Human Rights (ECHR) handed down judgment in Redfearn v United Kingdom (app. no. 47335/06). In his majority judgment, Judge Alan Bogg argues that the ECHR reached the correct decision and considers the implications of this judgment.

Mr Redfearn stood as councillor for the British National Party (BNP).

At the relevant time the BNP was a ‘whites only’ political party that was incompletely committed to the ideal of non-white immigration

Mr Redfearn worked as a driver for Serco, a company which provided transport services to Bradford City Council for vulnerable elderly and adults with physical and mental disabilities. Many of the service users and employees of Serco were of Asian origin. Following complaints from trade unions about Mr Redfearn’s political orientation and his subsequent election as a BNP councillor, Mr Redfearn was summarily dismissed by Serco. It was not disputed that he was an exempted employee in his employment. Nevertheless, Serco took the view that his continued employment posed serious reputational risks, given his membership of the BNP’s UK branch’s ability to continue in its contractual arrangements with Bradford City Council. Mr Redfearn was not able to bring an unfair dismissal claim because of the limited period of service (at that time 1 year, now 2 years) as an employee. Furthermore, dismissal by reason of political belief was not included as an ‘automatically unfair’ reason for dismissal that operated as a ‘day 1’ statutory right. Nor was there any free-standing anti-discrimination provision in respect of political opinion or affiliation. His claim for race discrimination – predicated somewhat unusually upon the race of some of his fellow employees and not upon his own race – was dismissed by the Court of Appeal.

In a brave decision, the Fourth Chamber of the ECHR concluded by a majority that domestic law breached Mr Redfearn’s Art 11 right to freedom of association. A number of important propositions were reiterated by the Court. First, Article 11 is capable of generating positive obligations to intervene in private relations to further an employee’s right to freedom of association. This would necessitate positive interventions that were ‘reasonable and appropriate’ to secure the right to form a trade union.

Secondly, dismissal is a particularly destructive interference with an applicant’s Convention rights, especially given Mr Redfearn’s age (he was 56 years old when dismissed). Thirdly, political parties (like trade unions) are an especially important associative form that are ‘essential to the proper functioning of democracy’ (para 55). For this reason, it was particularly important that there be a legal mechanism in place to secure the applicant’s Convention rights. Fourthly, it followed from this that the one-year continuity threshold in place at the time was inappropriate for individuals in Mr Redfearn’s position. While the Court accepted that a qualifying period could in principle be legitimate in the interests of job creation, and indeed was legitimate in domestic settings in the UK at the time of Mr Redfearn’s complaint, the 1 year continuity threshold needed to be dispensed with in Mr Redfearn’s situation. This would enable a tribunal to scrutinise the fairness of Mr Redfearn’s dismissal, given the competing interests at stake. The possibility of dismissal ‘solely on account of the employee’s membership of a political party’ opened the way for an abuse of citizens’ rights under Article 11 (para 55). Alternatively, it was open to the UK Government to enact a free-standing right to be discriminated against because of political opinion or affiliation.

Redfearn v UK is a brave decision. It is also the right decision. There are two obvious ironies to the outcome. First, the BNP is an exclusion zone in this situation. It would be their solemn duty to ensure that the eligibility for bringing an unfair dismissal claim is ascertained when we consider Redfearn in the light of ASLEF.

Most labour law regimes exclude domestic workers from various employment entitlements, placing them in a situation of legal precariousness.

British labour law, for example, does not apply the Working Time Directive’s guarantees of health and safety legislation to domestic workers. It offers no protection under the National Minimum Wage Act if these workers are viewed as family members, and its provisions on protection against unfair dismissal are rarely relevant to those employed in domestic work. Moreover, the domestic work sector is historically a non-unionised sector, and the organisation of workers in the sector continues to face various difficulties.

The legal precariousness of domestic workers in labour regulation is rooted in historical labour regulation – in legislation and court judgements – and is related to the conceptualisation of this group of workers as being part of the family, with unique, personal and intimate work relations. Law makers claimed in the 19th and 20th centuries that it was extremely difficult, and unjustifiable, to regulate such work relationships. But the necessity of this situation today is hard to justify. There is growing acceptance that domestic work is work like any other, and that those engaged in the paid labour market, be it in someone’s home or in the more visible public sphere, should not be denied basic labour rights. This is particularly true when consideration is given to the groups employed in domestic work. Many of those employed in this occupation are migrants, although due to data limitations it is difficult to give estimates on their numbers.

(3) A possible response of the Government might be to do precisely nothing in response to Redfearn v UK. Following the prisoners’ voting rights debate, respect for the International Labour Organization was not assurred. This raises a constitutional quandary for judges developing the common law in a manner that outflanks statutory restrictions on unfair dismissal protection (such as the cap on the compensatory award) that have been imposed by the Government’s latest anti-immigration legislation. It is arguable if an individual meets the statutory qualifying periods to bring an unfair dismissal claim. That is not the situation for the European Court of Human Rights, where the right to be informed about fixed term employment contracts is protected.

Redfearn v United Kingdom: Hard Case Makes Good Law- Part 2
By Alan Bogg | 19 December 2012

(a) What about ASLEF v United Kingdom? It will be recalled that in ASLEF v United Kingdom (app. no. 11002/05) the Court held that the right to form a trade union was a fundamental human right while ASLEF’s trade union from BNP members whose political orientations were anathema to those of the trade union. Is there any inconsistency between ASLEF and Redfearn, given that the employer’s negative freedom of association was determined to be subject to legal restrictions especially where the sole reason for dismissal was the employee’s membership of a political party? It is submitted that there is no inconsistency in ASLEF since the limits of the trade union’s right to exclude individuals from membership would be breached if rules were unreasonable or arbitrary or if the consequences of exclusion resulted in exclusion in other circumstances. The trade union’s autonomy as guaranteed in International Labour Organisation instruments was to be respected as an element of Article 11. Where the employer breaches the Convention, both the trade union’s autonomy and the freedoms of workers should be protected.

(b) What about the future of continuity thresholds in respect of unfair dismissal protection? First, the ramifications of Redfearn might be far reaching in this regard. Secondly, the domestic work sector from BNP members whose political orientations were anathema to those of the trade union. Is there any inconsistency between ASLEF and Redfearn, given that the employer’s negative freedom of association was determined to be subject to legal restrictions especially where the sole reason for dismissal was the employee’s membership of a political party? It is submitted that there is no inconsistency in ASLEF since the limits of the trade union’s right to exclude individuals from membership would be breached if rules were unreasonable or arbitrary or if the consequences of exclusion resulted in exclusion in other circumstances. The trade union’s autonomy as guaranteed in International Labour Organisation instruments was to be respected as an element of Article 11. Where the employer breaches the Convention, both the trade union’s autonomy and the freedoms of workers should be protected.

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By Alan Bogg | 19 December 2012

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Socio-Economic Rights and Labour Rights as Human Rights
Chapter eight

Redfearn v United Kingdom and an Integrated Approach to Labour Rights
By Anjoli Maheswaran Foster | 23 December 2012

In recent years, the Strasbourg Court has made use of an ‘integrated approach to the protection of social labour rights.’

Through this approach, the Court has used the civil and political rights under the European Convention on Human Rights (the Convention) to protect social labour rights, for example, the right to work, the right to join trade unions, the right to safe and healthy working conditions. This is based on the idea that civil and political rights have inherent social and economic components. Several cases illustrate this approach. In Sidabras v Lithuania (2004) the applicants were dismissed from their jobs under Lithuanian law, because they had previously worked for the KGB. The Court held that this fell within the ambit of Article 8, and was discriminatory under Article 14. Thus, the Court used Convention rights to private life and family to protect what would have been traditionally classed as a social- the right to work. Also, in Energi Yapi-Yol Sen v Turkey (2009) the Article 11 right to freedom of association was used to protect the social right of workers to join trade unions and have them represent their interests. In the recent case of CN v UK (2012), the Court used the Article 4 prohibition on slavery, servitude and forced labour to protect paid work from slavery in the labour market. In the Redfearn case, the Court continued with this approach. The Court used Article 11 to protect Mr Redfearn’s right to work.

This ‘integrated approach’ assumes essential importance in the context of labour rights because social labour rights themselves are not strongly protected. Labour rights are protected by the European Social Charter, but the rights in the Charter cannot be enforced through the Strasbourg Court. Rather, the Charter uses a ‘soft’ method of enforcement through reporting procedures and a collective complaints procedure. Social labour rights are also protected through various International Labour Organisation (ILO) Conventions - once again, however, these conventions in general contain only ‘soft’ methods of enforcement. Therefore, the Strasbourg Court’s use of civil and political rights in the Convention to protect social labour rights places the latter on a much stronger footing.

Anjoli Maheswaran Foster read for the BA in Jurisprudence at Keble College, Oxford, and is currently reading for the Bachelor of Civil Law.

A Price Tag for Employment Rights? The New Employee Shareholder Status in the UK
By Jeremias Prassi | 7 May 2013

Section 31 of the recently enacted Growth and Infrastructure Act 2013 has added a third employment status to the existing categories of ‘employee’ and ‘workers’ in English law: the notion of the ‘Employee Shareholder’. The introduction of this new category, based on Adrian Beecroft’s controversial report on Employment Law reforms, has been the most high-profile change in employment law since the Coalition Government came to power.

During consultation on the proposals in the autumn of 2012, responses from employee and business representatives as well as the legal community were near-unanimously hostile, even a protracted battle between the Houses of Parliament in the spring of 2013, however, did not deter the government from pressing ahead with its plans.

Under the new status, employees who receive capital gains tax-exempt shares in their employer (or a controlling enterprise) valued at £2,000 or more in the case of ‘employee shareholders’ are no longer entitled to the following employment rights:

- The right to not be unfairly dismissed (with the exception of automatically unfair dismissals, and those in contravention of the Equality Act 2010)
- The right to statutory redundancy pay
- The right to request flexible working
- The right to request to undertake study or training
- Employee shareholders’ are furthermore subject to longer notice periods before returning from maternity, paternity or adoption leave (up from six or eight weeks’ notice to sixteen weeks).

In the face of significant opposition in the House of Lords, the Government made a series of procedural concessions in creating the ‘employee shareholder’ category. Prospective ‘Employee Shareholders’ need to be issued with a detailed statement of particulars, including the terms at which shares will be issued, as well as list of rights denied. Following receipt of this statement, the worker is entitled to a seven-day cooling-off period. Provisions have furthermore been made to protect existing employees from suffering detriment in employment and/or unfair dismissal as a result of a refusal to become an employee shareholder. Finally, the government has given an undertaking that jobseekers could not be forced to accept employment as ‘employee shareholders’ at pains of losing their entitlement to receive jobseekers’ allowance.

As these safeguards are primarily procedural, however, it is unlikely that they will bestow significant protection on employees – most importantly in so far as there is no protection for prospective employees, who may be offered employee shareholder jobs on a ‘take-it or leave-it’ basis.

The exchange of employment rights for shares is deeply problematic: first, because it suggests that such rights can be clearly valued in monetary terms. Given the inherent inequality of bargaining power in the vast majority of employment contexts, it is highly improbable that employees will be able to bargain for more than the prescribed minimum amount of shares. The fact that employees may stipulate for a compulsory repurchase upon the termination of employment, second, exposes employees to additional risks, such as equity market fluctuations: during periods of underperformance (which will frequently be linked with other areas of statutory regulation? What would happen in the case of a TUPE transfer? or company law (In which entity should the shares be issued? What rights, if any, should be attached to the shares? Can the Deakin has convincingly argued, it is furthermore ‘completely unnecessary and counterproductive […] to link [employee ownership] to the loss of employment protection’.[15] The Advisory Group of the Nuttall Review of Employee Ownership has demonstrated, existing legislation already provides the necessary framework for genuine employee ownership. It is therefore difficult to see what, if any, benefits could be derived from this new status.

The Anniversary of the Marikana Massacre in South Africa and Corporate Accountability for Human Rights Breaches
By Hannine Drake | 21 July 2013

It is almost a year since more than 40 striking miners were killed in a clash with local police on the South African platinum belt. Many argue that the Marikana massacre was not simply the result of an illegal wage strike that got out of hand. Rather, its causes are complex and are borne from a socio-economic desperation cultivated by decades of inequality, and employee and community alienation from unions, government and mining houses.

Human rights disasters in the workplace require the scrutiny of not only the role of government but also the role and responsibility of corporate stakeholders which include the corporate employer, the supply chain, institutional investors, and lenders. It is the duty of juristic persons, which require bespoke law as their form and influence, vary greatly from both individuals and states, are both holders of rights and therefore have the ability to infringe rights. And yet, the traditional view holds that international law does not regulate juristic persons and therefore corporations have a ‘moral’ or voluntary responsibility to respect human rights.

A growing body of work has recently developed which suggests otherwise. For example, Ratner’s seminal four-pronged theory on ‘corporate complicity’ for human rights violations on a primarily ‘do no harm’ basis already more than a decade old. More recent developments have taken theory to practice and include the so-called ‘Ruggie Principles’, a voluntary framework endorsed by the UN Human Rights Council which provides extensive human rights guidance to companies. The Ruggie Principles require inter alia companies who subscribe thereto to comply with the International Bill of Rights and the ILO’s fundamental principles and rights at work and to conduct ongoing human rights due diligence. In response the OECD and IFC have updated their guidelines to include aspects of the Ruggie Principles. The USA now requires certain companies with new investment in Burma to file human rights reports effective 1 July 2013.

South Africa is in an ideal position to develop the corporate human rights accountability debate as its Constitution requires the ‘horizontal application’ of the Bill of Rights and expressly extends such application to juristic persons. Despite select case law on juristic persons’ ‘human rights’ which include the constitutional right to privacy and the right to dignity and freedom of expression, the extent to which human rights and obligations apply to juristic persons has been underexplored by South African courts and legislation.

The Marikana disaster is testimony that, despite some degree of recognition in the Constitution, the courts and other stakeholders, an unsustainable and volatile imbalance between migrant workers’ rights to dignity and socio-economic justice and corporate profit margins remains in post-apartheid South Africa. If companies find the developing legal framework around corporate human rights accountability unconvincing, then the link between social and business risk and its resultant threat to the bottom line should compel both local and global companies to re-assess their human rights agendas with urgency.

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We Should All Participate in Articulating the Post-2015 Development Agenda
By Daniel Bradlow | 16 October 2012

The projected end date for the Millennium Development Goals is 2015. The UN Secretary General recently appointed a High Level Panel to advise him on creating a vision for a post-2015 development agenda that incorporates economic growth, social equality, and environmental sustainability.

The Panel has a choice. It could be cautious and merely propose a revised version of the MDGs. Alternatively, it could set out a vision of sustainable and equitable development that is applicable to all individuals and states, and that makes development a shared project of the whole international community. Such a vision could help us resolve complex problems like poverty, inequality, unemployment, climate change, and poor national and global governance. Consequently, we need the Panel to choose the latter option even though we know that it cannot be merely imposed by a UN decree.

The last time the UN articulated a grand vision for how societies should be structured was in the Universal Declaration of Human Rights. At the time, it was considered so ambitious and idealistic that most states that voted for it did not think that it would have any practical significance. Over time, however, and thanks to the hard work of many state and non-state actors, the UDHR has reshaped the relationship between governments and their own citizens and has influenced international relations and international law. The UN’s effort to articulate a post-2015 development agenda could have a comparably radical effect over time.

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CSW57, MDGs and Gendered Poverty
By Meghan Campbell | 8 March 2013

One of the themes the delegates at CSW57 will be confronting over the next two weeks is the challenge of de facto achievement of the Millennium Development Goals (MDGs) for women and girls. As the first post in the UNHRI CSW57 themed post series, Meghan Campbell looks at the issue of gendered poverty and the MDGs.

The Convention on the Elimination of Discrimination Against Women (CEDAW), complements the CSW, as it approaches women’s issues from a legal and human rights perspective. CEDAW has been described as the Magna Carta for women. It addresses women’s civil, political, economic, social and cultural rights. Therefore, it is somewhat surprising that CEDAW does not make any substantive reference to poverty. This is doubly so when the in 2012 the World Development Report on Gender Equality and Development emphasized the role of poverty significantly limited women’s gains in education, health and paid labour force.

Currently, the CEDAW Committee’s treatment of gendered poverty has been rather patchwork. The latest General Recommendation released in 2013, on the economic consequences of marriage, family relations and their dissolution touches upon poverty. The Committee recommends that States “eliminazie “property disposition/ grabbing” and protect the inheritance rights of the surviving spouse. This will help reduce poverty and does not result in economic insecurity for women. However, there are still significant gaps. When reviewing State reports, the Committee has noted that in some States there is a disturbing trend of marrying young girls to older richer men in neighbouring countries. The Committee has identified the family’s extreme poverty as a motivating factor, yet the General Recommendation makes no reference or recommendations in respect of how this type of poverty and freedom to choose a spouse.

The CEDAW Committee needs to give serious consideration to drafting a comprehensive General Recommendation on women’s poverty and human rights. This recommendation should build on the work of the CSW and could link poverty to gender equality to emphasize the gendered nature of poverty and to highlight the entrenched and systemic nature of the wrong. The CEDAW Committee can use the General Recommendation as opportunity to show how each right in CEDAW can be interpreted to have evaluative reference to gendered poverty. This will ensure that the problem is approached holistically and can capture the many inter-locking rights violations experienced by impoverished women. Additionally, a CEDAW General Recommendation on poverty can have a spillover effect so that other branches of the UN, such as the CSW can squarely address the wrong of gendered poverty.

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Bread, Freedom and Social Justice for Women Too?
By Rhea Fernandes | 17 April 2013

As member states unanimously passed the final draft proposal at the 57th session of the United Nations Commission on the Status of Women, Egypt’s Muslim Brotherhood reinforced its conservative position on women’s rights by condemning aspects of the declaration as antithetical to Islam.

The 57th session of the United Nations Commission on the Status of Women ended on March 15th with the passage of a new declaration primarily aimed at eliminating and preventing all forms of violence against women and girls. The two-week session was heralded as a victory by many, including the head of the Egyptian delegation, Movat El-Tallawy, who deemed the declaration a gift to Egyptian women. El-Tallawy’s voice on women’s rights in Egypt is a sharp contrast to the statement released by the Muslim Brotherhood, which called the declaration “the final step in the intellectual and cultural invasion of Muslim countries.” They argued that some provisions such as replacing guardianship with partnership among married couples, granting wives the right to file legal complaints in the case of spousal rape, and providing equality in marriage legislation, do more than just undermine the institution of the family but “subvert the entire society” as a whole.

The sentiments expressed by the Brotherhood reflect the reservations held by countries such as Iran and the Holy See, and point to a longstanding tension between tradition, and women’s rights. However, the response by the Brotherhood reveals less about the content of the declaration than the deepening alienation of Egypt itself. With strong links to President Morsi’s Freedom and Justice Party, the increasing power and presence of the Brotherhood and the subsequent crackdown on women’s participation in political and social spheres reflects the regressive state of Egypt’s revolutionary ambitions.

The 2011 protests that precipitated the fall of long-time dictator Hosni Mubarak were comprised of nearly 50% women. Even as the chants from Tahrir Square calling for “Ash, Homya, Adala Egtema’eya” (Bread, Freedom, Social Justice) echoed throughout the city, female protesters were being subjected to virgity checks, beatings, and strip-searches by soldiers. Last August, General Abdul Fattah al-Sisi, a defender of the virginity checks, was appointed commander of Egypt’s armed forces. Yet the blatant disregard for women’s rights is more pervasive than the appointment of al-Sisi. Egypt’s highly-criticized constitution, drafted by an unrepresentative, overwhelmingly male and Islamist-dominated constituent assembly, limited women’s rights to those compatible with Islamic law. It makes use of vague language in addressing protections for women and minorities, leaving them vulnerable to the caprices of the conservative and Islamist leaders who currently dominate Egyptian politics. The law has no recourse for women who have been raped by their husbands, and allows for leniency in “honour killings.”

In Egypt today, tradition and law work in tandem to reinforce discrimination against women. The 2013 Freedom House Report documents discrimination throughout the Egyptian civil service, and notes the presence of merely 10 women out of 508 seats in the parliament.

The story of Egypt’s revolution has not yet ended. There is still time to meet the demands at the heart of the Arab Spring – but such an effort must include freedom and justice for everyone. To discard the voices of women as a hard-fought battle would be a denial of the very movement that made democracy a possibility in Egypt.

Rhea Fernandes is a graduate student reading for her Master of Public Policy at the Blavatnik School of Government.
Entry into Force of the New Optional Protocol to the ICESCR

By Siobhan McInerney-Lankford | 28 June 2013

The new Optional Protocol (OP) to the UN International Covenant on Economic, Social and Cultural Rights (ICESCR) entered into force on 5 May 2013. The OP recognizes the competence of the Committee to receive and consider communications submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, who claim to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant (Article 2). The OP also requires all available domestic remedies to be exhausted before a communication to the Committee can be considered (Article 3). In exceptional circumstances, it allows the Committee to request that the State Party take interim measures, before a determination on the merits has been reached, to avoid possible irreparable damage to victims of alleged violations (Article 5). It also allows a State Party to recognize the competence of the Committee to receive and consider interstate communications relating to the rights protected in the ICESCR (Article 10).

The entry into force of the OP closes a number of gaps that had persisted between the two UN human rights covenants – the ICESCR and the International Covenant on Civil and Political Rights (ICCPR). The ICESCR did not originally avail of a number of the key features of the ICCPR, including the establishment of a Committee (Articles 28-29), provisions on interstate complaints (Articles 41-43) and an Optional Protocol to allow for individual complaints to the Human Rights Committee. As such, the OP redresses a certain imbalance that had existed between the legal and institutional regimes protecting economic, social and cultural rights and civil and political rights.

At an even more fundamental level, the OP represents an acknowledgment of the essential parity among different categories of human rights, despite the distinct characteristics of their corresponding obligations. As the UN High Commissioner for Human Rights, Navi Pillay, stated, “The Protocol makes a strong and unequivocal statement about the equal value and importance of all human rights and the need for strengthened legal protection of economic, social and cultural rights in particular.” By at least leveling the recourse mechanisms open under the two Covenants, the entry into force of this Protocol fundamentally renews the universality, indivisibility, interdependence and interrelatedness of all human rights.

As the new OP’s provisions are enforced, it will be worth observing the interplay between the Committee’s new competences and its existing working methods, the creative use of which led commentators like Matthew Craven to identify an “unofficial petition” procedure in the pre-OP Committee. More broadly, it will be interesting to assess whether and how this treaty affects the normative standing and perception of economic and social rights around the world, both through establishing a new international complaints procedure and through the influence such a procedure may have on the domestic justiciability of economic and social rights, given the recent experience of a number of developing countries.

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ICESCR Optional Protocol: Reconciling Standards of Review

By Adélaïde Remiche | 16 July 2013

Until very recently, there was no individual complaint procedure for a violation of the rights enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR), for almost forty years, the only way to monitor the implementation of the ICESCR was through the reporting mechanism.

With the entry into force of the Optional Protocol to the ICESCR (OP-ICESCR) on the 5th of May, three months after its 10th ratification by Uruguay, the Committee on Economic, Social and Cultural Rights (CESCR) now has the capacity to receive and consider ‘communications … submitted by or on behalf of individuals or groups of individuals, under the jurisdiction of a State Party, claiming to be victims of a violation of any of the economic, social and cultural rights set forth in the Covenant by that State Party’ (Article 2). To date, the CESCR has not rendered any decision based on the OP-ICESCR, nor has it registered any communication.

Amongst the many interesting questions raised by the entry into force of the OP-ICESCR, this post will address just one: what standard of review will the Committee use when assessing the level of respect afforded by State Parties to their conventional duties? At first glance, the Committee may be torn between two different standards: the minimum core and the reasonableness approaches.

On the one hand, the Committee has developed in its General Comments a ‘minimum core’ doctrine according to which each of the rights give rise to a least a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of [them] (General Comment n° 3, § 10). Under this standard of review, a State (in which any significant number of individuals are deprived of essential [necessities of life] is prima facie failing to discharge its obligations in relation to socio-economic rights (ibid.).

On the other hand, Article 8(4) of the OP-ICESCR states that ‘when examining communications … the Committee shall consider the reasonableness of the steps taken by the State Party. Reasonableness has been borrowed to the South African Constitutional Court, which adopted it in an explicit rejection of the minimum core standard. Under this standard, it is expected that the government “devise a comprehensive and workable plan” in order to progressively realise socio-economic rights (Grootboom, § 38). Not only must the programme be “comprehensive” in the sense that it must be determined and implemented by the different spheres of government, but it must also be “coherent”, “balanced” and “flexible” (Grootboom, § 43). This last requirement refers to the need to take into account those in most desperate need.

How will the Committee reconcile these two standards of review?
Unpaid Interns in the New York Courts: Time to Start Spreading the News?
By Darryl Hutcheon | 16 July 2013

In June 2013 in Glatt v Fox Searchlight Pictures No. 11 Civ. 6784 (WHB), a US District Court found that interns on two film productions were not trainees under the Fair Labour Standards Act (FLSA) and the New York Labor Law (NYLL), entitling them to be paid a minimum wage. The key question was whether the claimant interns fell within the “trainee” exception to “employee” status previously established by the U.S. Supreme Court in Walling v Portland Terminal Co.

In deciding that they did not, Judge Pauley refuted the idea – favoured by the US Court of Appeals (6th Circuit) in Sols v Laurenbrook Sanitarium (2011) – that the ultimate inquiry in this context was which party derived the “primary benefit” from the arrangement. The judge stated that an assessment of all the circumstances was needed, but he in fact placed great (if not exclusive) emphasis on six factors identified in a progressive US Department of Labor “Fact Sheet” in concluding that the claimant interns were employees. He emphasised in particular that the internship program was not constructed “for training” (though they may have acquired useful knowledge incidentally), that they had completed tasks which would otherwise have fallen to regular employees; and that the employer obtained an immediate advantage from their work.

The Glatt decision undoubtedly marked a breakthrough for interns and their advocates, and sparked a flurry of intern-claimant lawsuits in summer 2013 leading one commentator to suggest that unpaid internships “may no longer be a viable option by the time summer 2014 rolls around”. This heady forecast seems a little premature since other District Court judges have taken a markedly different approach to Judge Pauley’s decision. For instance, in October 2013 in Wang v Phoenix Television LLC, the judge dismissed an application for summary judgment in favour of internship claimants in a case involving unpaid interns who alleged sexual harassment against their employer.

For Love and Money? Unpaid Legal Internships in the Third-Sector
By Laura Hilly | 30 November 2013

Recent litigation in the United States has successfully challenged the use of unpaid interns by large corporations. However, recent UK research indicates that ‘third-sector’ organisations – not-for-profits and charities – are amongst the highest users of unpaid interns. This is also true in the legal profession, where many social-justice-oriented not-for-profit organisations rely upon the labour source in order to provide much-needed social services.

Can a balance be struck between underfunded third-sector organisations and interns who cannot afford to work for free?

The current state of play concerning the legal position of unpaid interns working for third-sector organisations in the United Kingdom remains, as a 2013 joint report by Intern Aware and Unite the Union highlights, a grey area. Only ‘workers’, not ‘volunteers’, are entitled to remuneration according to National Minimum Wage legislation. However, deciding whether an unpaid intern is in fact a true volunteer or a worker, due associated worker entitlements, is a difficult and fact-specific assessment. Often the role of an unpaid intern will mimic that of a paid worker in all but name. However, any challenge by those who are in fact ‘workers’ but engaged under the label of an ‘intern’ will often require legal mobilisation beyond the reach of many engaged in such positions.

The joint report also acknowledges the organisational reality of third-sector organisations that engage unpaid interns. In times of austerity, and particularly in the face of swinging legal aid cuts, these organisations rely upon the energy and skills of interns in order to maintain the services they provide. Not all, but many, of these organisation would not be able to maintain many of the socially critical services they provide without the assistance of this valuable and enthusiastic resource.

Recently, OPBP announced that it received a major grant to support its activities, including the expansion of its internship fund. This will allow OPBP to provide further support both to third sector organisations that rely upon unpaid interns in order to provide essential public interest legal services; and to aspiring public interest lawyers eager to support these organisations and to acquire skills and experience which will help them achieve their goals.

Initiatives such as the OPBP internship programme only go part of the way to addressing the dilemmas created by unpaid internships in third-sector organisations. They are a piecemeal and stopgap response to a greater problem. However, they demonstrate how with greater support from all parts of society – from universities which have an interest in promoting their talented graduates and from funding from private organisation which may later reap the benefits of the skills developed by these graduates during their internships – these dilemmas are not necessarily insurmountable.

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OPBP mobilises graduate students and Faculty members dedicated to the practice of public interest law on a pro bono basis. As well as running its internship programme, OPBP provides free, high-quality comparative law research for lawyers acting pro bono around the world. OPBP’s work was recognised by the Bar Standards Board in 2013 by the award of the Best Contribution by a Team of Students’ award in the LawWorks and Attorney-General Awards. OPBP welcomes expressions of interest from any individuals or organisations who might wish to support its continued growth: opbp@law.ox.ac.uk.
Socio-Economic Rights and Labour Rights as Human Rights

Chapter eight

What Can we Learn from the Novartis Case?

By Swaraj Barooah | 12 April 2013

Last week’s decision by the Indian Supreme Court to reject Novartis’ patent application over a leading leukemia drug, Glivec, has resonated globally. Many hail it as a victory for patients, while others decry it as a regressive step for pharmaceutical innovation. With money on one end of the scale and lives on the other, perspectives are easily polarised. However, innovation and access are supplementary when it comes to improving health and care. Chipping away at either of these requires a clear understanding of the tradeoffs.

Until 2005, India had only allowed ‘process patents’ which meant processes in drug making could be patented, but not the products. From 2005, in compliance with the WTO TRIPS Agreement, India started granting product patents, although it started accepting applications from 1995. These ‘patent mailbox provisions’ meant that any applications from that period would be considered against the knowledge present until the point of application.

As amended in 2005, section 3(d) of the Indian Patent Act, 1970 prevents the patenting of new forms of known substances unless they show enhanced efficacy. Although this provision is a relatively stringent requirement for ‘non-obviousness’, it is compliant with India’s international obligations and remains unchallenged at the international level.

In 1998, Novartis applied to the Indian Patent Office for the ‘beta crystalline’ form of imatinib mesylate. One year earlier, its US patent application for the same was granted on appeal. Imatinib mesylate, which received FDA approval in 2001, is the salt form of imatinib, patented in the US in 1992.

The Supreme Court held that (i) with this history, imatinib mesylate was in fact a ‘known substance’ (ii) ‘efficacy’ referred to ‘therapeutic efficacy’ and (iii) although it presented evidence of increased bioavailability and better storage ability, Novartis did not present any evidence that the ‘beta crystalline’ form provided any enhanced efficacy over the known substance imatinib mesylate. In its decision, the Court was not required to define the therapeutic efficacy threshold required by section 3(d), so the case can only be viewed as limited precedence.

What about the concerns regarding drug innovation though? Doesn’t Novartis deserve a patent?

This is a misleading question. As Jamie Love has pointed out, the US patent application for the same was granted on appeal. Imatinib mesylate, which received FDA approval in 2001, is the salt form of imatinib, patented in the US in 1992.

Glivec is just one drug, though. What does this provision do for other drugs?

First, India is not prohibiting patents on new forms of known substances. Rather, it is receiving patent protection, products must show enhanced efficacy. As there is little transparency regarding the costs involved in bringing drugs to the market, it is difficult to tailor laws which allow the recoupment of these costs. Given that the pharmaceutical industry has considerable impact in loosening patent standards in several parts of the world, it is a bad thing to push back on these often rhetoric based claims.

Secondly, pharmaceutical companies make most of their revenues from US, EU and Japanese markets. As such, they direct their business models around these countries. It is very unlikely that sales in developing countries like India would cause net losses on the same drugs being sold as generics in poorer countries. At the same time, India’s buzzing generic industry has ensured that patients across the developing world are able to access otherwise expensive medicines.

Finally, rich countries can pay more for ‘frivolous’ medicines than poor countries can afford for life saving medicines. Stronger patent rights can increase this inequality. Given that by nature of the industry, pharmaceutical market signals are poor indicators of where limited inventive resources are to be directed, it becomes necessary to ensure that legal and policy concerns redirect it in more socially beneficial directions.

Innovation today leads to access tomorrow; the two are not necessarily in conflict. While access today is of course important, innovation today certainly does require substantial investment. What is required is for all stakeholders—big pharma, generics, patients, academics, governments—to come together and work on providing solutions that work towards optimizing, or at least balancing, both access and innovation.

Swaraj Barooah is a doctoral candidate at UC Berkeley and the Editor-in-Chief of SpicyIP.

Proposed Bahamian Constitutional Reform: No Room for Socio-Economic Rights

By Kamille Adair Morgan | 25 July 2013

On July 8, 2013, the Constitutional Commission of the Bahamas presented its report on proposed Constitutional reform in time for the nation’s 40th Anniversary of Independence. Although several useful and necessary recommendations are made, the recommendation for the deliberate exclusion of socio-economic rights is striking.

The declared intent of the process of reform is ‘to tread new ground in constitutional development’ (Report, ¶1.18). Against that backdrop, coupled with the country’s recent ratification of the International Covenant on Economic Social and Cultural Rights (ICESCR) in 2009, it would be expected that any reform proposal would, as a matter of priority, call for the express recognition of socio-economic rights.

With a population of just over 300,000 and a GDP per capita unmatched by any other Caribbean nation, it is arguable that budgetary allowances can be made, given the right priorities, for inclusion of economic, social and cultural Rights.

The report highlights two reasons for the recommended exclusion of socio-economic rights. First, it is argued that the rights enshrined in the ICESCR are made contingent on the availability of resources and are therefore progressively realisable (Report, ¶15.85). In the view of the Commissioners, this raises issues of implementation and enforcement, attempting to ‘make justiciable rights which might be unattainable, even if legally recognized’. Secondly, it is feared that the inclusion of these rights will open up the Constitution to litigation over enforceability, as has been the experience for its Caribbean counterparts Guyana and Belize in relation to the right to work recognized by those States (Report, ¶15.86).

In fact, Caribbean nations have tended to shy away from a full embrace of socio-economic rights. Jamaica, for example, in its 2011 amendment to the Constitution to introduce a new Charter of Fundamental Rights and Freedoms, recognises only the right of every child, who is a citizen of Jamaica, to publicly funded education at the pre-primary and primary levels (Jamaica Constitution, section 132(c)(i)). These approaches are perhaps reflective of an oft-held belief that socio-economic rights entail only positive, resource-intensive obligations and require the State to immediately provide maximal levels of each right to all within its jurisdiction—a standard that cash-strapped, developing nations are unable to meet. It appears Caribbean legislatures prefer to await the day when the State is financially able to fully realise these rights before legally recognising them. That day, however, may never come.

The Committee on Economic, Social and Cultural Rights has noted that the notion of progressive realisation does not allow for a State to completely avoid its obligations under the ICESCR on the basis of insufficient resources. Rather, States are obliged to take the necessary steps ‘to the maximum of its available resources’ towards the full realisation of the enshrined rights (General Comment 3, ¶10). This recognises that a State may take steps that fall short of full realisation in meeting its obligations in relation to such rights, particularly the development of a sound and reasonable plan directed towards full realisation of the rights in question. The Bahamian Commission notes its openness to a reference to such rights in the Constitution, provided that they are explicitly made legally unenforceable and recognised as imposing only a moral and political obligation on the State to use its resources for the welfare of citizens (Report, ¶¶15.84 and 15.88). This approach is insufficient. Particularly where resource insufficiency is a reality, constitutional rights adjudication can serve a crucial role in elucidating priorities, assessing the reasonableness of government action through judicial accountability and ultimately securing the socio-economic rights of citizens as the South African experience vividly demonstrates. With a population of just over 300,000 and a GDP per capita unmatched by any other Caribbean nation, it is arguable that budgetary allowances can be made, given the right priorities, for a start in this regard. Despite the perceived difficulties associated with a rights-based approach, the first step must be taken before the ultimate aim can be achieved. Room must be made for socio-economic rights on the reform agenda.

Kamille Adair Morgan is a 2012 Rhodes Scholar from Jamaica. She recently completed her BCL at the University of Oxford, and will begin studying toward her MPhil in Law this October.
Children’s Rights and the Inter-American Court of Human Rights
By James Beeton | 18 December 2013
On 4 December 2013, Dr Nicolás Espejo-Yaksic, Visiting Fellow at Kellogg College, UNICEF consultant in Latin America and Director of Research and Postgraduate Studies at Universidad Central de Chile, addressed an audience at Kellogg College in Oxford on the approach of the Inter-American Court of Human Rights to children’s rights.

Although children’s rights form the subject matter of international treaties, they are not always treated as subject to separate protection on a domestic and regional level. The European Convention on Human Rights, for example, does not make specific provision for children’s rights as a distinct category. By contrast, Article 19 of the American Convention on Human Rights specifically deals with the rights of the child: it provides that ‘Every minor child has the right to the measures of protection required by his condition as a minor on the part of his family, society, and the state.’ Dr Espejo-Yaksic’s aim was therefore to examine approaches to the Art. 19 right in a range of cases decided by the Inter-American Court of Human Rights and to establish how the Court’s decisions can fit into a larger picture of rights protection.

Dr Espejo-Yaksic began by putting forward a typology of children’s rights cases coming before the Court.

The first category is cases involving gross and systematic violations of human rights; these are primarily concerned with the legacy of dictatorial regimes in Latin America during the 70s and 80s and arise out of cases of forced disappearances and killings. The second category is cases of ‘structural violence’ – in these cases children suffer from structural (in the sense of institutional) practices of violence against specific groups. The third category is reflected in recent decisions where the Court has begun to develop doctrines similar to Art. 8 ECHR (right to respect for family life); in these cases the Court takes the chance to refer to legal considerations which are not based on its own cases in order to take a more activist approach to the issues before it.

With regard to the first category – gross and systematic rights violations – Dr Espejo-Yaksic explained that the Court has emphasised the state’s obligations both to ‘respect’ and ‘protect’ in the context of children’s rights. In addition to a negative obligation not to interfere with such rights (the obligation to respect), there is a positive duty on the state to ‘cure’ violations through appropriate use of the criminal justice system, reformation of institutional practices, education of state officers and financing of social programmes. This is a particularly striking illustration of Henry Shue’s claim that civil and political rights are by no means best understood as imposing purely negative obligations in contrast to their positive socio-economic siblings.

The focus then moved on to the second category – structural violence. This group of cases arose primarily out of a lack of specific criminal policy towards young offenders – a group who have become increasingly marginalised by a lack of social protection and exposure to poor conditions of detention. Such concerns also had to be played out against a backdrop of institutionalised attitudes of violence prevalent in the police forces of certain states towards young offenders. The Court emphasised that development of policies and rules relating specifically to young offenders was crucial in this respect.

The final category – recent cases involving children and the right to family life – has allowed the Court to take a more activist stance. An example is Atala Riffo and Daughters v Chile, which raised the issue of whether removal of children from the custody of their lesbian mother would be in their best interests. The Court decided that there was no specific conception of family life in the Convention and that in any case there must be concrete and specific reasons to restrict the right. The Court was able to consider a range of research about the effect of being raised by same-sex couples before judgment was given for the mother.

Dr Espejo-Yaksic ended with the thought that although a robust stance by the Court is broadly welcomed in the region there is no specific mechanism for implementing its rulings. Despite this, he noted that there is a fair level of compliance with the Court’s decisions by states keen to be seen as differentiating themselves from the rights-abusive regimes of the past. In the context of children’s rights, such an attitude is surely to be welcomed.

James Beeton is currently reading for the BCL at the University of Oxford.

A New Frontier? Human Rights and Public Finance
By Jaakko Kuusmanen | 1 December 2013
The link between human rights and states’ resource policies is currently a hot topic politically as well as academically. In the aftermath of the recent global economic and financial crises the implementation of economic and social rights in particular has faced a push-back from politicians advocating austerity budgets. Appeals to resource scarcity are commonly invoked as part of efforts to cut or limit increases in the funding of social and other rights related programs.

Most of the recent scholarly work done on the topic has focused on the role of courts in adjudicating cases where resource scarcity is appealed to as a justification by the state. ‘Human Rights and Public Finance: Budgets and the Promotion of Economic and Social Rights’ approaches the topic from a new angle. The book, which is edited by a team of leading scholars in the field (Azize Nolan (University of Nottingham), Rory O’Connell (University of Ulster) and Colin Harvey (Queen’s University Belfast)), focuses on the linkage between public finance and the realisation of economic and social rights. It expands the inquiry to the role of governmental bodies with the primary responsibility to give effect to social and economic rights: the elected and democratically accountable branches of government.

The book takes Article 2(1) of the International Covenant on Economic, Social, and Cultural Rights (ICESCR) – which requires states to deploy maximum available resources towards the realisation of the Covenant rights – as its starting point. The contributions in the book offer theoretical and practical accounts on what exactly is covered by the Article. The authors draw on experiences across the globe, and they tackle questions of macroeconomic policy, conceptual difficulties in international law, and issues of resource constraint. The book features work from a range of academics and practitioners carrying out work on human rights and budgets from different disciplinary perspectives. The first two sections of the book, on ‘Concepts’ and ‘Governance’, address key conceptual and issues arising in relation to human rights and public finance, in terms of both standards and governance structures. The third part and fourth parts of the book considers the use of human rights budget work both in shaping and evaluating budgetary decisions. In particular, there is a focus on budgeting from the perspective of equality, children’s welfare, and the right to housing.

States signatories to ICESCR have legal obligations of implementation that cannot be over looked in policy drafting. Social and economic rights are essential for human survival and flourishing, and identifying and clarifying what the obligations to work towards the full realisation of the Covenant rights entail vis-à-vis public finance is an urgent task that deserves close attention from scholars as well as practitioners. Given the fundamental importance of social and economic rights and the political rhetoric of ‘permanent austerity’ in many countries the collection is timely, and it provides an important contribution to the ongoing debates.

Dr Jaakko Kuusmanen is a Postdoctoral Research Fellow with the Oxford Martin School Programme on Human Rights for Future Generations.
The Role of Public Private Partnerships in Labour Rights Advancement
By Fabiana Di Lorenzo | 24 November 2013

Public private partnerships (PPPs) are a new form of institutional organisation by which public organisations, civil society and major companies pursue collaborative and voluntary strategies to achieve a common goal. Where in partnerships, organisations decide to undertake specific tasks, share risks, responsibilities, resources, competencies and benefits.

The cocoa partnerships in Ghana provide a clear example of some of the limitations of Public Private Partnerships (PPPs) in ensuring enhanced labour rights.

PPPs have become popular in projects aiming at advancing labour rights along business supply chains, particularly in countries where law enforcement remains weak. While many PPPs claim to value the government and its regulatory framework, it may be argued that corporations are preferring to partner with NGOs and delegating government to a minimalist role.

PPPs in the cocoa sector of Ghana provide a good example of this trend. Following Antislavery International reports of the dangerous conditions in which children worked in Western African cocoa farms, the cocoa and chocolate industries signed the Harkin-Engel Protocol, agreeing to take responsibility for addressing the worst forms of child labour in their supply chains. As result, the International Cocoa Initiative and small partnerships were created in order to bring together and partner trade unions, NGOs and businesses with the goal of sustaining ‘efforts to eliminate child labour and forced labour’ from cocoa supply chains.

In late 2000 research done by Tulane University and the 10 Campaign found that despite these efforts, the majority of children at risk of the worst forms of child labour remained untouched by the remediation initiatives of cocoa partnerships. They concluded that businesses should invest more money to tackle the problem of child labour in Ghana.

However what this conclusion overlooked was that the failure to reduce exploitative child labour was also linked to two major factors which arguably have greater impact than simply the amount of money that companies spend to address the issue. First, the weak role of the Ghanaian government in coordinating project activities on the ground led to overlapping and fragmentation of remedial projects, without any overarching and centrally located pressure upon the government to oversee and ensure the application human rights standards. Second, the majority of funding was diverted towards one specific supply chain (namely cocoa), ignoring the fact that child labour in Ghana exists across business sectors.

For ten years, cocoa partnerships were characterised by a strong relationship between NGOs and companies, while the government of Ghana struggled to coordinate the multitude of projects funded by business-NGOs partnerships. Partnership members involve the central Ghanaian Government by working with local districts and seeking their approval. However, if information is not correctly communicated to the relevant central coordination unit (in this case National Plan for the Elimination of the Worst Forms of Child Labour in Cocoa – NPECLC), consulting local district government will not necessarily help to coordinate all the activities taking place in the country. This may result in important information remaining at the district level and never reaching central government.

Through PPPs attention is diverted away from the role that governments should play in developing effective public policy, defending human rights and using tax revenues effectively. NGOs and businesses run the risk of rushing to find reactive solutions to fix problems such as child labour without taking the time to also look at the governance-related causes of this phenomenon.

When it comes to African countries in particular, campaigns tend to downplay the role that government can play in developing public policy to ensure effective law enforcement. Also, the role played by the loss in public revenues caused by excessive tax incentives for corporations, tax evasion and long-term tax exemptions is often not sufficiently analysed.

The creation of the Child Labor Cocoa Coordinating Group in 2010 marked a turning point by bringing the government of Ghana back to the decision-making table by giving it responsibility to oversee projects addressing child labour. It is yet to be seen how this new strategy will bring about in terms of long term child rights advancement.

Problem 2: Preference for particular supply chains

In addition, PPPs’ attention tends to be drawn toward one specific business sector because of the large economic potential at stake. Thus, issues which need addressing are identified on the basis of either campaign waves or business goals, diverting money away from projects based upon general public welfare needs. For example, in Ghana child labour is not an issue specific to the cocoa industry but rather plague a variety sectors. However, the greatest amount of financial resources goes to cocoa.

NGOs and businesses need to overcome their distrust in governments which is fueled by neoliberal theories. Fear of government failure cannot justify the massive number of business-NGOs partnerships which today neglect the role of government in dispensing public policy through effective taxation and protecting human rights.

Fabiana Di Lorenzo is a PhD student in Law at King’s College London and collaborates with EMG CSR.

The Mandela I Knew
By Bob Hepple | 14 December 2013

I hesitated when asked to say something on the sad occasion of the death of Nelson Mandela, because so many carpetbagging celebrities who had only a slight connection with him in the last 23 years of his long life have done so.

My connection with him, as one of his support team when he went underground in 1961 to prepare for the armed struggle, as his legal adviser in his 1962 trial for incitement to strike against the declaration of an all-white republic, and finally as one of his co-accused in the early stages of the 1963 Rivonia trial, are all covered in my book Young Man with a Red Tie: a memoir of Mandela and the Faded Revolution 1960-63 Johannesburg: Jacana Media, 2013).*

The point I want to make now is to contest the view of some people that Mandela ‘sold out’ the liberation movement to white interests. As his legal adviser in his 1962 trial he made the argument to strike against the declaration of an all-white republic, and not as the leader of the MK. The Mandela I knew created the ANC into a new organisation: the ANC-SACP. Mandela said to us: ‘Whenever I meet black South Africans they say to me: “We have had a great victory.” Whenever I meet white South Africans they say: “Nothing much has changed.” They are both wrong. We have made a great historical compromise. No one has won. We agreed to live together in a democratic state in which the rights of all our people, white and black are protected.’

The ideas of democracy and human rights, for which so many thousands had suffered, died, been imprisoned, or exiled, triumphed.
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Authors</th>
</tr>
</thead>
<tbody>
<tr>
<td>137</td>
<td>Conflict Minerals Disclosure and the Role of Corporations in the Protection of Human Rights</td>
<td>Katie Allan and Kate Mitchell</td>
</tr>
<tr>
<td>137</td>
<td>Kiobel v. Royal Dutch Petroleum and the Future of Corporate Accountability for Human Rights Violations Committed Abroad</td>
<td>Kate Mitchell</td>
</tr>
<tr>
<td>138</td>
<td>The Promise of Cash Transfers from Mineral Resource Wealth</td>
<td>Maniza Naqvi</td>
</tr>
<tr>
<td>138</td>
<td>Failure to Protect Future Generations Undermines Universality of Law</td>
<td>Karen Moir</td>
</tr>
<tr>
<td>139</td>
<td>Bringing Balance to the International Law with Long-Term Perspectives</td>
<td>Karen Moir</td>
</tr>
<tr>
<td>139</td>
<td>Cash Transfers from Mineral Resource Wealth: Evidence from Africa</td>
<td>Maniza Naqvi</td>
</tr>
</tbody>
</table>
Conflict Minerals Disclosure and the Role of Corporations in the Protection of Human Rights
By Katie Allan and Kate Mitchell | 24 October 2012

The US Securities and Exchange Commission (SEC) has taken a significant and tangible step in establishing corporate responsibility for human rights protection in conflict zones through the adoption of rules for disclosing the use of ‘conflict minerals’.

Introduction

The 1502 disclosure rules require companies using conflict minerals (tantalum, tin, gold or tungsten) to disclose, and file with the SEC, whether those minerals were sourced from the Democratic Republic of the Congo or an adjoining country. If minerals used by a company were sourced from these countries, the company must submit an audit report setting out the due diligence undertaken on the conflict minerals source and chain of custody. Both the 1502 and 1504 rules are one of many developments that have strengthened corporate responsibility to respect human rights. Other developments in 2012 include the International Finance Corporation’s Performance Standards being amended to incorporate corporate responsibility to respect human rights, and the US Supreme Court’s consideration of Kiobel v Royal Dutch Petroleum.

The Kiobel ruling removes a forum to hold corporations accountable for human rights abuses committed abroad

The decision of the Supreme Court was unanimous in rejecting the plaintiff’s case, although the reasoning varied between the judges. Chief Justice Roberts, with whom Scalia, Kennedy, Thomas and Alito JJ joined, held that the presumption against the law applying extraterritorially applied, and the plaintiffs had not rebutted that presumption. In their separate opinions, Justices Kennedy and Alito (the latter with whom Justice Thomas agreed) were careful to emphasise the decision was a narrow one.

The Kiobel ruling

The plaintiffs in Kiobel were Nigerian nationals from the Ogoniland area of the Niger Delta who resided in the United States. They alleged that the respondents (the Netherlands-based Royal Dutch Petroleum Company, British-based Shell and their joint Nigerian subsidiary) had aided and abetted based Royal Dutch Petroleum Company, British-based Shell and their joint Nigerian subsidiary) had aided and abetted in the commission of torture, executions and other atrocities in Ogoniland. The claim was brought under the ATS, a 1789 statute that gives US Federal Courts jurisdiction to hear claims over torts committed by aliens “in violation of the law of nations or a treaty of the United States”.

The plaintiffs argued that the act of the respondents in Nigeria “farfetched to believe” that the plaintiff’s claim vindicated a result of human rights abuses committed abroad.

Whether there is any “hospitable forum” that can provide access to a remedy for those alleged to have suffered at the hands of corporate actors investing abroad. Particularly when contrasted with the forums available for corporate actors to vindicate their property rights as investors (such as binding investor-state arbitration) the reality that there is no one less forum for individuals to vindicate their human rights affected by corporate investment is a cause for concern.

Kate Mitchell is an MPhil in Law Candidate at the University of Oxford.
The Promise of Cash Transfers from Mineral Resource Wealth
By Maniza Naqvi | 28 May 2013

It’s a place of darkness. People hail from tribes and clans. They are poor and live in basic shelters in remote villages, with no running water or electricity, and no access to clinics. They subsist on seasonal work, hunting and fishing. They resent that their part of the earth gets attention only when natural or manmade disasters strike. Then oil is found and they are blessed.

This description is not of one of the many countries we associate with poverty. It is not a “fragile state,” the term often used to refer to mineral-rich countries in Africa affected by the “curse of resources”: foreign meddling, conflict, war, corruption and autocratic dictators. This is Prudhoe Bay, Alaska, in the 1970s.

In 1975, the Alaska legislature debated: would it be morally acceptable for the generation whose presence in Alaska coincided with the oil boom to reap all the benefits? The majority thought Alaskans of the future should instead have a nest egg to share in a temporary windfall from the finite oil resource.

Accordingly, Alaska set up the Alaska Permanent Fund Corporation (APF). In 1987, the APF was worth US$11 billion, and by 1997 it was US$24 billion, exceeding total state oil and gas revenues. As of March 2013 it was US$45.5 billion. The APF proves that managed professionally, a national asset can grow beyond the finite resource.

Iran’s Citizen Income Scheme, along the lines of the APF, is currently the largest permanent fund, and provides cash transfers to all Iranians from its oil revenues. Per capita, $500 is transferred to over 75.3 million citizens costing about $45 billion a year. It will amount to 15 percent of national income, while Alaska’s average is 3-4 percent.

If ever there was a notion of a perfect nationalization then this would be it: to give people in a country its national wealth earnings while making sure that the earnings keep growing for future generations. Other examples of such funds include: The Future Generations Funds in Kuwait (here and here); Norway’s the Pula Fund in Botswana and Wyoming’s Permanent Wyoming Mineral Trust Fund.

In countries with aging demographics, pensions are the priority and these Funds allow citizens to save for the future. For young populations, the priority is to spend now while the Fund grows.

Where such wealth-based funds are not yet operating, cash transfers based on budget, revenues and aid, target the poorest citizens in 70 countries including 35 in Africa. These include Mexico’s Oportunidades; Brazil’s Bolsa Família; Argentina’s the Universal Child Allowance (AUH); Pakistan’s Benazir Income Support Program (BISP); Ethiopia’s Productive Safety Nets Program (PSNP) and even New York City’s Opportunities pilot. The widespread use of targeting, biometrics, national identification cards, unified registries, and mobile banking is making cash transfers easier, faster and cheaper.

Could Africa’s new mineral wealth be shared with all Africans through transfers? Could this become the way forward in mineral-rich countries where the majority of citizens remain poor, without access to good education and health services?

In Rents To Riches? Political Economy Of Natural Resource-Led Development (2011) the authors provide technical reasoning and solutions: “Where inter-temporal credibility is weak and political inclusiveness low, political economic elites are able to siphon resource rents away from developmentally oriented outcomes. The implications for engagement are clear: lengthening time horizons enhances the ability of governments to make credible commitments to future generations, and improving political inclusiveness supports the orientation of rent distribution toward the collective good.”

It is a tantalizing prospect. Picture this: even a small fraction of today’s mineral wealth targeted to the poor could end poverty in those countries not in decades from now—but in the next five years.

Maniza Naqvi is a Senior Social Protection Specialist at the World Bank working on safety nets in Malawi and Ethiopia.

Failure to Protect Future Generations Undermines Universality of Law
By Karen Moir | 2 July 2013

As environmentalists, development practitioners and concerned citizens accelerate their efforts to institutionalize concrete protections for future generations, international human rights law continues to lag behind.

The guiding principle of International Human Rights Law (IHRL) is universality, or the ‘recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family’. The Preambles of key instruments like the International Covenants on Civil and Political, and Economic, Social and Cultural Rights assert this, while the Charter of the United Nations opens by affirming the determination of the world to spare ‘succeeding generations’ of the horrors that ultimately led to the creation of the United Nations itself.

However, legal evidence drawn from around the globe demonstrates that the ability of states to impact the human rights of future generations (through, for example, the extractive sector) is not adequately reflected in the law today.

In order to ensure the universality of access to justice despite social realities that are far from static, IHRL is necessarily an ever-evolving web of living instruments. Since the appearance of international law, the beneficiaries have been able to depend on steady progress and continuous codification of what constitutes human rights. In the face of permanent and irreparable damage to the economic, social, cultural and environmental fabric that is necessary for the effective exercise of human rights, legal protections to current generations may fail to protect what could, philosophically speaking, be the largest cohort of humans ever to exist.

The arguments against integrating intergenerational justice into human rights frameworks are many, but the two most common simply do not hold up to scrutiny.

First is the issue of balancing rights between the here and now and the ambiguous ‘later’. Development practitioners in particular, are wont to worry that extending rights to future generations would somehow undermine those of the most vulnerable in the world today. Without spending to much time on the socio-cultural rights of identifiable individuals that necessarily have a temporal element (for example, the conservation, the development and the diffusion of science and culture’ ICESCR, Art.15(2)); it is sufficient to recall that the extension of human rights to women did not violate those of men, nor did the extension of human rights to ethnic and cultural groups violate those of majority groups. Human rights is by its very definition a balancing act, and the act of balancing rights can only be considered legitimate once all human beings are accounted for.

This leads us to the next most frequently encountered protest: how can the law account for future generations? The capacity to promote and protect human rights through representation is confirmed by the most widely ratified instrument of international human rights law: the Convention on the Rights of the Child. There are diverse approaches to representing the best interests of others in law; therefore, I am tempted to treat this complaint as more of an avoidance tactic than an actual obstacle. There is a response to every challenge: the Genocide convention may already establish group recognition, predictable causality is tackled by the precautionary principle in environmental law, and so on. Yet, future generations continue to fall outside the protections of international human rights law.

Nevertheless, advocates of sustainable development and international environmental law continue to pursue the cause. In New York on May 9th the United Nations Department of Economic and Social Affairs convened an Expert Panel on Intergenerational Solidarity. Next week the United Nations Environment Programme in collaboration with the World Future Council will host a Global Conference on Implementing Intergenerational Equity: ‘Bringing Future Perspectives to the Status Quo.’ I will co-chair this event to promote enhanced understanding of the concept of intergenerational equity and explore strategies for protecting the rights of future generations.

Karen Moir is a consultant who supports human rights and sustainable development across the United Nations. She is currently engaged with the United Nations Development Programme in New York, and explored the implications of limited legal protections for future generations at the University of Essex. Additional research on balancing rights across generations and the application of human rights law to protect them is forthcoming.
Resources, the Environment and Human Rights

Chapter nine

On July 4th and 5th I co-chaired a conference in Geneva that was hosted by the United Nations Environment Programme (UNEP) and the World Future Council (WFC), on implementing intergenerational equity. Over the course of two days, we confirmed a common conviction that something must be done to protect the wellbeing of future generations, as well as a shared commitment to act. Nevertheless, I am concerned.

Despite a core group of dedicated professionals, a laundry list of legal precedent, and the potential for catastrophic consequences, steps towards legal recognition for future generations have stalled over the last decade. As discussed by the Coordinator for Social Watch, this stagnation has coincided with an explosion of international legal protections for corporations engaged in various forms of business and trade. An increasingly apparent struggle between the two sets of priorities and stakeholders—largely defined by unequal access to resources and representation—may explain this distortion.

The impression that traditional legal language is perhaps better suited to preserve private property than to promote collective rights was considered a key factor that has facilitated alliances between corporate entities and national governments, and prevented past efforts to protect common heritage from gaining traction. Another reason for the growing divergences between trade and business law and approaches to intergenerational justice may be the primarily reactive relationship of international human rights law with violations, compared to anticipative bent of economics.

Perhaps the privilege accorded to business over future generations in law is further linked to a general assumption that measurable benefits for constituents of the former will exceed those of the latter. Considerable resources have gone into to demonstrating how protections for trade, investment and business can have a direct impact on the lives of people and communities; while IHRL has only begun to develop evidence that correlates strong human rights protections with improved life for the poorest.

As economic law seems to be loosing touch with the society it serves; integrating obligations towards future generations in IHLR can introduce the checks and balances needed to realize international law with its fundamental purposes of improving lives and promoting social progress. Dominant economic institutions overestimate the benefits of expanding GDP and the uncertainty about what future generations will need in order to justify mass exploitation of non-renewable resources and other practices that endanger human rights—economic discounting reliant on un-invented technology aside. Fortunately, the evolving system of economic, social and cultural rights offers two very helpful approaches to mapping rights for current and future generations: basic needs and progressive realization.

Applied research is now needed to convince those with the ultimate responsibility for implementing international law: national governments. In order to develop an accessible knowledge base about what extending the human rights framework to future generations would mean for people today, as well as tomorrow, I am proposing a partnership with any organisation that is willing to support the analysis of multidisciplinary data on the impact, implications and mechanisms of the inclusion of future generations as a recognized group in IHRL.

This will include developing an understanding of the implications of the extension of human rights protections to future generations, formulated in the context of sustainable development. Building on this basis, an exploration of socio-economic-intergenerational trade-offs—and what they mean for progressive realization of economic, social and cultural rights—will address concerns about balancing human rights between present and future generations.

Finally, the research series will examine the possibility of applying the Optional Protocol of the International Covenant on Economic, Social and Cultural Rights to protect the rights of future generations. Analysis of these three overlapping issues will equip advocates and states with the evidence necessary to integrate long-term perspectives into human rights-related legislative and policy decisions.

Karen Moir is a consultant who supports human rights and sustainable development across the United Nations.

Bringing Balance to the International Law with Long-Term Perspectives

Cash Transfers from Mineral Resource Wealth: Evidence from Africa

By Maniza Naye

This work will eventually lead to changes in legal frameworks that respect the rights of future generations. This, in turn, will have a direct impact on the wellbeing of the current generation and in shaping just and sustainable financial systems.

Mineral rich countries may have had the potential for even greater gains in human development outcomes if they had adopted different policies for how they used mineral revenues. Take, for example, the following mineral rich countries with a high poverty head count: Equatorial Guinea (76.8%), Gabon (32.7%) and Angola (40.5%) and very low human development indicators, yet they have equal or higher per capita GDPs than the BRIC countries: Brazil, Russia, India and China. The Human Development Indicators in all four mineral rich countries are very low. Clearly, the mineral revenues haven’t been distributed to all and have not improved life for the poorest.

Safety net benefits in terms of cash transfer programs targeted to the poor exist only in ten of 35 mineral rich countries in Africa. These cash transfers cover less than 10% of the population and generally fall around US$15 per month equalling about 20% of household consumption. In each of these cases, it is donor financing, not revenues from the mineral wealth that account for 65% to 100% of the cash benefits.

The governance measures remain at a very low level in many countries, which begs the question of whether there would have been larger gains in the absence of the resources. Mineral revenues dwarf current aid flows. Aid originates from citizens tax money in developed countries “donated as charity” and goodwill, masking the billions in outflows from these mineral revenue rich impoverished countries.

When seen through this prism of mineral wealth in stark comparison to the poverty in the same countries and the examples of Iran and Alaska, a different light is shed on the prescriptions at global forums. If there ever was a sweet spot for perfect nationalization and poverty eradication then it would be through direct dividend payments.

Maniza Naye is a Senior Social Protection Specialist at the World Bank working on safety nets in Malawi and Ethiopia.

By Marcelo Giugale, World Bank's Director of Economic Policy and Poverty Reduction Programs for Africa, makes the case with enthusiasm for direct cash payments from natural resource revenues to the citizens of a country: a mechanism by which citizens of a nation, share in its wealth earnings while making sure that the earnings keep growing for future generations. Iran and Alaska share mineral revenues with citizens through the Alaska Permanent Fund and the Iran Citizens Income Scheme. Why aren’t other countries, rich in mineral and hydro-carbon wealth on their way to doing the same?

It is time to transform the discussion on economic growth drivers and development aid by adding the distribution of mineral revenues into the equation.

Cash Transfers from Mineral Resource Wealth: Evidence from Africa

By Maniza Naye | 15 July 2013

Mineral rich countries may have had the potential for even greater gains in human development outcomes if they had adopted different policies for how they used mineral revenues. Take, for example, the following mineral rich countries with a high poverty head count: Equatorial Guinea (76.8%), Gabon (32.7%) and Angola (40.5%) and very low human development indicators, yet they have equal or higher per capita GDPs than the BRIC countries: Brazil, Russia, India and China. The Human Development Indicators in all four mineral rich countries are very low. Clearly, the mineral revenues haven’t been distributed to all and have not improved life for the poorest.

Safety net benefits in terms of cash transfer programs targeted to the poor exist only in ten of 35 mineral rich countries in Africa. These cash transfers cover less than 10% of the population and generally fall around US$15 per month equalling about 20% of household consumption. In each of these cases, it is donor financing, not revenues from the mineral wealth that account for 65% to 100% of the cash benefits.

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Maniza Naye is a Senior Social Protection Specialist at the World Bank working on safety nets in Malawi and Ethiopia.
142 Spot the Differences: How Broad Can Commercial Speech Be?  
By Ilias Trispiotis

142 Studying Human Rights, Law and Practice  
By Laurence Lustgarten

143 Internet Surveillance in English law  
By Ian Brown

143 Hacking, Blagging and Bribing? The Press After Leveson  
By Hugh Tomlinson QC

144 Animal Defenders International: Will Strasbourg Open the Door to Political Advertisements on TV?  
By Jacob Rowbottom

144 Animal Defenders International v UK: A Case of Fruitful Dialogue, or of Strasbourg Losing its Nerve?  
By Tom Lewis

144 Supreme Court of Canada Delivers Judgment in Hate Speech Case  
By Lauren Dancer

By John Laprise

145 Mobile Phone Evidence: Implications for Privacy in South African Law  
By John van der Berg

145 L’écran Noir: Shutting Down Hellenic Broadcasting Corporation (“ERT”)  
By Ilias Trispiotis

146 Freedom of Political Communication and Offensive Speech in Australia  
By Boxun Yin

146 Ten Thousand Miles from Wall Street: Muldoon v. Melbourne City Council  
By Ryan Goss
In July 2012, the European Court of Human Rights (ECHR) offered some food for thought in Mouvement Raëlien Suisse v Switzerland (app. no. 16354/06). In a heavily divided (9 to 8) judgment, the Grand Chamber held that denying authorisation to a religious group for a poster campaign did not violate the group’s freedom of expression. The case was unique as it introduced a new category of ‘quasi-commercial’ speech to determine to what extent national authorities are required to permit an association to disseminate its ideas by making certain public space available to it for that purpose.

The applicant association, the ‘Raëlian movement’, is a religious group founded in 1976 with the aim of communicating and connecting with extraterrestrials. In March 2001, its Swiss branch requested authorisation to conduct a poster campaign in the city of Neuchâtel. The poster in question featured a title reading ‘The Message from Extraterrestrials’ while further down it contained the web address of the Raëlian movement. Although the poster contained nothing unlawful or shocking, the advertised website encapsulated ideas and links associated with ‘geniocracy’ (a political model based on individuals’ intelligence), human cloning, and ‘sensual meditation’ (possibly associated with paedophilia). According to both Neuchâtel’s authorities and the Swiss courts those ideas were likely to undermine public order, safety and morality. As a result, they denied authorisation for the campaign.

To determine whether the restriction was necessary, the majority of the ECHR underlined that freedom of expression does not entail an unlimited individual right to the extended use of public space, particularly in cases involving advertising. Rather, regulating use of public space falls within the margin of appreciation afforded to States. However, the breadth of that margin of appreciation varies depending on the type of speech at issue. It is noteworthy that while there is little scope to restrict political speech, States generally enjoy greater leeway to regulate other types of expression, especially those that may offend religious beliefs or morals. In this case, the main function of the poster was to draw attention to Raëlianism. Therefore, the majority found that its content was closer to commercial speech, which means that Swiss authorities did enjoy a wide margin of appreciation to consider whether it was necessary to ban the poster campaign to protect public order, health, morals, and the rights of others. Finally, apart from being necessary, the limitation was proportionate as it was limited to the display of posters. The Raëlian movement could continue to disseminate its ideas through its website, or other means.

As the dissenting opinions highlighted, it was paradoxical that the Raëlian movement was prohibited from displaying posters mainly on account of the content of its website but the website itself was not prohibited. More importantly though, freedom of expression requires public authorities to adhere to the principle of content-neutrality when deciding how to make public space available. Save for limited cases of speech posing a serious threat to public order, authorities should ensure equal rights of use to all speakers even in cases of advertising. For freedom of expression would be at risk if it could be restricted solely for the reason that the authorities oppose the ideas conveyed.

Ilia Trispiotis is a PhD candidate at the University College London (UCL) Faculty of Law and a visiting researcher at Harvard Law School.
Internet surveillance in English law
By Ian Brown | 22 June 2013

For the past fortnight, the media has been full of revelations about the surveillance powers of the US National Security Agency (NSA), a shadowy body responsible for communications intelligence for the US government. UK interest has focused on the recently revealed surveillance intelligence on British residents with its UK equivalent, Government Communications Headquarters (GCHQ). But we now know GCHQ has been engaging in similarly broad, global communications surveillance. What do we know of the legal framework that governs these newly-revealed activities?

The Regulation of Investigatory Powers Act, 2000 (RIPA) allows the Secretary of State to authorise the interception of the communications of a specified individual or individuals over a public telecommunications system. This may be requested by various government bodies such as domestic, foreign or defence intelligence agencies, the police, Her Majesty's Revenue and Customs and the Home Office. Typically, GCHQ conducts interception for ‘customers’ in other parts of government.

Such an authorisation need not specify an individual or premises if it relates to the interception of communications external to the UK (s 8(4)). This is understood to be the mechanism by which the government authorises GCHQ to undertake automated searches of communications that originate or terminate outside the British Isles. This could include the transmission of data from or to servers outside the UK – which includes traffic to the facilities of most of the large companies (such as Facebook, Google and Microsoft) implicated in the NSA’s PRISM programme.

The government’s current policy is to neither confirm nor deny the details of any GCHQ operational activities. The telecommunications expert for the Applicants in the European Court of Human Rights case Liberty v UK suggested that, under current legislation, it was possible for the government to authorise widespread interception on a framework in which this is done.

Section 12 of RIPA gives the Secretary of State the power to require that public telecommunications providers facilitate lawful interception of their network. This could include requirements such as those mandated by the European Telecommunications Standards Institute Lawful Intercept standards to install interception devices that provide specific functionality such as the ability to intercept communications in real-time and to hide the existence of other simultaneous wiretaps from each other’s intercepting agency. Furthermore, under s 94 of RIPA and s 5 of Police Public Telecommunication System Act 1982, the Secretary of State may give providers of public electronic communications networks “directions of a general character... in the interests of national security”, which may be protected against disclosure.

Access to “communications data” — subscriber information, records of calls made and received, e-mails sent and received, websites accessed, the location of mobile phones — is also regulated under RIPA. Senior officials in a range of government agencies, going well beyond intelligence and serious crime, may authorise access. ISPs are required to store some of this data for 6-12 months under the Data Retention Regulations, 2009.

Through the combination of several pieces of legislation (Section 10 of the Computer Misuse Act, s 52 of RIPA and s 5 of Police Public Telecommunication System Act Part III/Intelligence Service Act) government agencies are also able to remotely break into computer systems to access communications and other types of data on those systems.

GCHQ does not itself have the relationships with the largest Internet companies the NSA has used for its PRISM programme, since very few of them are located within the UK. But it clearly has the legal authority to conduct large-scale surveillance of communications entering or leaving the UK. The agency has reportedly already spent several hundred million pounds expanding its capabilities to intercept ISP networks in a “Mastering the Internet” programme, with claims of a total budget of over £1bn (1.5bn) to give analysts “complete visibility of UK Internet traffic, allowing them to decrypt traffic configure their deep packet inspection systems to intercept data – both communications data and the communication content – on demand.”

Some of that data may be encrypted, making surveillance much more difficult. But other external traffic is wide open to the interception and automated analysis that has caused such consternation to critics of the NSA’s newly revealed surveillance programmes. The Guardian has now revealed much more detail about how NSA traffic interception works in the UK regime, based on the lack of legal clarity required for interferences with Article 8 of the European Convention on Human Rights (respect for private and family life), are likely very soon.

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Hacking, Blagging and Bribery? The Press After Leveson
By Hugh Tomlinson | 25 February 2013

Hacking, blagging and bribery were, for many years, standard journalistic techniques in parts of the British press. Their exposure led to continuing police investigations, over 100 arrests, several criminal prosecutions and the Leveson inquiry. These criminal investigations have been intrusive, focusing on bullying, inaccuracy and a range of other abuses by the press.

In November 2012 Lord Justice Leveson condemned many years of press misconduct and recommended that in future the press should be regulated by a new independent voluntary body accompanied by statutory underpinning. In the three months since he reported the press have paid lip service to his recommendations whilst mobilising all their forces to undermine them.

Can we be confident that, after Leveson, the hacking, blagging, bribing and other abuses will stop? Do new regulations represent the right approach in principle and will they work in practice?

The press claims that its privileges derive from the fundamental right to free speech which, in a democracy, should not be interfered with by politicians. The press is, indeed, vital to the operation of democracy but press freedom is not the same as freedom of expression. The rights of media corporations are not the same as those of the individuals. The press only has freedom and privileges because these serve the needs of citizens to have informed public debate and public scrutiny of powerful institutions. And it should not be forgotten that the press is, itself, a powerful and opaque institution which also needs to be held to account.

The freedom of the press should be a freedom to engage in “public interest journalism” in accordance with proper standards. The public commercial interests of newspapers and magazines deserve no (more or less) protection than those of any other business.

Even when the press is exercising freedom of expression in the service of democracy this is not an absolute right. It is no more important or fundamental than a number of other rights which are engaged by press actions. In particular, the press often does things which impact adversely on the private lives of individuals. Sometimes this is necessary as part of the public interest functions of the press. Often it is not. Media regulation must accommodate these other rights which must be balanced with freedom of the press in individual cases. A regulator must provide a framework in which this is done.

The contribution of the press to democracy is fundamental and requires careful protection. In particular, in order to hold power to account and serve the needs of citizens the press must be free of political interference. Politicians should have no say in deciding where the boundaries of public interest journalism lie and whether standards have been adhered to. This must be done by a wholly independent body.

The Leveson recommendations meet this basic test of independence from political influence. The Report concludes to the press the great privilege of self-regulation. Under its recommendations the press themselves are to establish the regulator. But, crucially, this regulator must meet certain “minimum process standards”. These are standards of independence and effectiveness. The Board of the regulator would be independently appointed with a majority independent of the press. The regulator would include a Code Committee with power to make recommendations on the content of the Code of Standards but the ultimate responsibility for the content of the Code would reside with the Board. Government and politicians would have little if any role in the process. The “statutory underpinning” is limited to the establishment of a “recognition body” – which decides whether or not a self-regulatory body is acceptable. The regulator would have three “arms”: complaints, investigations and a fall-back position if the press do not cooperate.

Will this work in practice? If the tough and independent voluntary regulator is set up in accordance with the Leveson recommendations then, in my view, it has a good chance of success. The report contains detailed recommendations to require the self-regulator which, if implemented, would produce a culture change in the British press. For the first time, standards would be properly considered and enforced.

The question remains: will the Leveson recommendations ever be properly implemented? The system depends on press cooperation. The press must establish an effective independent self-regulator – for the first time they will have to surrender power to an independent body. And unfortunately the recommendations do not contain any “backstop” – there is no fall-back position if the press do not cooperate.

The long history of failed self-regulation demonstrates that the press will not establish an effective regulator unless they think that the alternative is worse. They must believe that unless they act regulation will be taken out of their hands. This means that, in order to promote press cooperation in the new system, politicians have to present a united front.

As a first step, Leveson required politicians to set up an independent statutory regulator. This was their first test – the first sign they could send to the press that cooperation was the least bad alternative. This is a test that the politicians seem to have failed. The Prime Minister’s refusal on the day of publication of the Report to cross his newly discovered fantasy “Rubicon” of “writing elements of press regulation into law of the land” has led to a stalemate. It has provided the press with an opportunity to nibble away at key Leveson minimum standards recommendations – to promote its apparent aim of producing a neutered and ineffective regulator.

The establishment of a recognition body is at, this moment, a matter of live and sharp political debate. Nobody believes that the alternative is worse. They must believe that unless they act regulation will be taken out of their hands. This means that, in order to promote press cooperation in the new system, politicians have to present a united front.

There is now trench warfare between, on the one hand, the press plus the most conservative part of the Conservative Party and, on the other, a majority of MPs and Peers supported by (according to consistent polling data) a majority of the general public. A press victory will be a defeat – one in which all that is left of new media and the internet, the national press still wields decisive political power. It would also demonstrate why press regulation is urgently needed. If the press can get to way despite having lost the arguments and the public then there will be nothing to prevent it from slipping back into the old ways. Unless there is an effective regulator along the lines that Lord Justice Leveson recommended, the hacking, blagging and bribing will be back.

Hugh Tomlinson QC is a barrister at Matrix Chambers specialising in media and information law.

Media, Privacy, Communication and Human Rights
Chapter ten
The case was taken to Strasbourg after the House of Lords upheld the ban in 2008

In that decision Lord Bingham explained the rationale for the ban, stating that 'it is highly desirable that the playing field of debate should be so far as practicable level' and warning that 'the low levels of spending on paid political advertising would mean “elections become little more than an auction”.'

The stated reason for the Communications Act ban is to protect democracy from distortion by preventing wealthy groups from buying airtime and flooding the airwaves with their own political messages. However, the prohibition is extremely broad, encompassing not just political adverts in the narrow sense but also 'social advocacy advertising' which includes any advert concerning matters of public controversy.'

ADI claimed a breach of Article 10 ECHR (which protects the right to freedom of expression, but permits restrictions as long as they pursue a legitimate aim, are 'prescribed by law' and are proportionate). Having lost before the domestic courts, ADI then applied to Strasbourg. All parties in the case accepted that some restrictions were legitimate; the main question was whether the Communication Act's broad prohibition was Article 10 compliant given that ADI itself poses no threat to democracy. The Court held that it was where there had been 'exacting and pertinent reviews' by both Parliament and courts, as in this case, the state should be afforded a margin of appreciation. The Court put 'considerable weight' on Parliament's conclusion that more nuanced alternatives (e.g. spending caps) could be subject to abuse and arbitrariness.

This is an interesting decision for several reasons. First, the judgement contradicts the Court's previous case law. In cases involving Switzerland and Norway, 'essentially identical' prohibitions were found to violate Article 10 precisely because the restrictions caught within their wide ambit groups who did not pose a threat. These precedents led the dissenting judges in the ADI case to accuse the majority of 'double standards': how could a general ban be necessary for UK's democratic society but not for Switzerland?

ADI might be portrayed as an example of successful dialogue, involving Switzerland and Norway, 'essentially identical' prohibitions were found to violate Article 10 precisely because the restrictions caught within their wide ambit groups who did not pose a threat. These precedents led the dissenting judges in the ADI case to accuse the majority of 'double standards': how could a general ban be necessary for UK's democratic society but not for Switzerland?

Second, it is not entirely clear why extensive Parliamentary standards: 'how could a general ban be necessary for UK's democratic society but not for Switzerland?'

Lurking behind the arguments is, of course, politics. Tensions between Scotland and the UK government are already high following a number of decisions (such as those concerning prisoner voting rights and the deportation of Abu Qatada). A Strasbourg ruling against the ban on political advertising is only likely to make matters worse. It remains to be seen whether the prospect of a further negative reaction will cause the Court to more be more receptive to the arguments advanced by the UK.

Personally, I hope that the Strasbourg Court changes its course and finds that the ban does not violate Article 10. For all its bluntness, the ban has been central to keeping the cost of politics down in this country. Critics of the ban argue that allowing more access would solve the problems posed by politics. However, as I argued several years ago in Ewing and Isachsenhorf's edited collection, partial controls on political advertising are to be effective or will pose new questions in themselves. If the Court upheld the ban, it would emphasize the importance of a fair political system in which the opinions of people are not based on spending power, but where in Baroness Hale's words 'each person has equal value.' While I hope the Court takes this path, I am very doubtful it will reach such a conclusion given its previous decisions.
The recent revelations about the surveillance activities of the US National Security Agency are an excellent example of one of the many ways that new technologies facing legal systems and human rights frameworks around the world: there is a fundamental difference between law-making, which tends to be a slow and deliberative process, and the speed of technological innovation.

The difference in the two decision cycles creates a legal gap where laws are frequently haphazardly adapted to cover the use of new technologies. This was the case in the early days of the Internet where property and trespass laws were used to prosecute cybercrimes. Here, the law had the potential to catch up because there was public awareness of the law’s shortcomings. However, this is frequently not the case in national security law where decisions and interpretations are hidden. In these cases, the law fails to address the implications of new technologies, which creates a space of “allegality.”

The original FISA law governing intelligence acquisition in the US was created in 1976, and is an artefact of its time. Its authors had no knowledge or understanding of the Internet, the web, or metadata. Over time some of the gaps created by these technologies have been haltingly addressed. But there are problems. For example, it is unclear whether using the Internet to access an animated pornography depicting children triggers existing laws on child pornography. Currently in the case of metadata, we find that modern public conceptions of what privacy means are different from what the aging law protects. Governments aggressively take advantage of loose legal language to expand to the outer letter of the law and human rights law, and the author of several works on criminal procedure, human rights law, and the author of several works on criminal law and procedure.

The screens continue to be blank and access to vital information and media pluralism is curtailed.

Despite the Government’s links to the Greek press, the European Commission denied that the closure was required by the programme of financial stability. Martin Schulz, the President of the European Parliament, tweeted that it is ‘beyond comprehension that a democratic country shuts down its public broadcaster and on top of that throws EU’. The Greek Government has promised that a streamlined ERT (provisionally called ‘NERIT’) will open as soon as possible. Nevertheless, on 17 June 2013 the Council of State, Greece’s supreme administrative court, quashed the Greek Government’s decision and ordered public TV and radio back on air. Since air time is not yet enforced, is very slow. However, it is at first blush in line with the President of the Greek Republic, all parties in the Greek Parliament save for the ultra-right fascist Golden Dawn, the President of the European Parliament, and the European Broadcasting Union who have been urging for immediate reopening of ERT during the past week. European human rights law may be taken to affirm the conviction that switching off public media in order to reduce public expenditure is a disproportionate measure.

Given the importance of media freedom for democratic legitimacy, the European Court of Human Rights (‘ECHR’) has consistently held that there must be a ‘pressing social need’ to restrict the freedom of press, which should be ‘convincingly established’ through ‘relevant and sufficient’ reasons. Notable cases include Goodwin v. United Kingdom (22 Eur. H.R. Rep. 123, § 40 (1998)); Fressoz and Roire v. France, (31 Eur. H.R. Rep. 2, at § 45 (1999)); and Financial Times Ltd. v. United Kingdom, (50 Eur. H.R. Rep. 46, at §§ 60-2 (2010)). By the same token, Nils Muzińceks, the Council of Europe Commissioner for Human Rights, stated Associated Press that shutting down ERT ‘deals a heavy blow to a fundamental pillar of democracy… [it also] sends a chilling signal to the media and stirs tensions in a country already suffering from a serious financial and social crisis’. According to his statement, even a temporary closure reduces media pluralism and curtails freedom of expression.

Furthermore, independent public service media are particularly important to safeguard freedom of information, pluralism and high quality educational and cultural programmes, which are usually absent from private media due to their relatively lower commercial success. On that account, following the government’s decision to shut down ERT, the European Parliament, the European Commission and the Organization for Security and Co-operation in Europe in the Field of Security and Co-operation in Europe have issued written statements pointing to the significance of public service broadcasting for democracy, pluralism, media freedom and the expression of cultural diversity. Hence, there is little doubt that shutting down ERT to cut down public expenditures is at odds with a cogent legal and political background. Media freedom is sufficiently important to hold States under a duty to realise and safeguard a pluralistic media environment including independent public broadcasting services. In turbulent times, protecting the right to access to information becomes even more pressing. That principle does not imply that the Greek government may be paradigmatically refrained from infringing rights. It refers that that reform, however radical, should at least take place with the media on air. Black screens cannot be necessary in a democratic society.

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Freedom of political communication and offensive speech in Australia

By Boxun Yin  | 25 March 2013

In Monis v The Queen [2013] HCA 4, the High Court of Australia considered the unique Australian doctrine of “implied freedom of political communication”. As Australia lacks a statutory or constitutional bill of rights, it is relatively rare for the High Court to be confronted with human rights questions. This was one of those occasions.

The appellants in Monis were alleged to have contravened s 471.12 of the Criminal Code (Cth) by posting letters to relatives of Australian soldiers killed in action in Afghanistan. These letters not only criticised the involvement of the Australian military in Afghanistan; they also referred to deceased soldiers “do not being (among other things) murderer/civilians, contaminated and having “the dirty body of a pig”.

Section 471.12 criminalises the use of “a postal or similar service ... in a way ... that reasonable persons would regard as being, in all the circumstances, ... offensive”. At issue was whether this section contravened the freedom of political communication implied into Australia’s Constitution by a line of cases commencing with ACTV v Commonwealth (1992) 177 CLR 106 on the basis that it is an indispensable incident of the system of representative government created by the Constitution. A law would contravene the implied freedom if (1) it effectively burdened freedom of communication about government or political matters; and (2) it was not reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government: Lange v ABC (1997) 189 CLR 520 as modified in Coleman v Power (2004) 220 CLR 1.

The Court split 3-3: the plurality of Crennan, Kiefel and Bell JJ held that s 471.12 was valid, while the minority of French CJ, Hayne and Heydon JJ (each of whom delivered separate judgments) held that it was invalid. Since the Court was evenly split, the decision of the court below – the Court of Criminal Appeal of New South Wales – was affirmed.

The critical matter which split the Court was what constituted a “legitimate end”.

The plurality characterised the end as the individual’s interest to be free from intrusion of seriously offensive material into his or her personal domain. They viewed this to be an aspect of individual liberty, an end compatible with the constitutionally prescribed system of representative government.

The dissenting judges, however, characterised the end as the prevention of the use of postal or similar services which reasonable persons would regard as offensive. Hayne J held that the end had to be identified by the ordinary processes of statutory construction. However, it was not clear why such a process led to such a narrow conclusion. He simply said that the end “must be framed in limited terms”. French CJ (Heydon J agreeing) was even more sparse on this point. He stated that broader considerations of promoting or protecting postal services, the integrity of the post and public confidence in the post “do not define in any meaningful way a legitimate end served by s 471.12”, before concluding simply that the purpose was “properly described” in the limited way set out above. By characterising the end so narrowly, the dissenting judges left little room for questions of legitimacy or proportionality to operate: the question of validity fell at the first hurdle.

The even split of the Court, along with the paucity of reasoning, means that Monis is highly unsatisfactory. In addition, Heydon J offers no explanation of the existence of the doctrine of freedom of political communication, declaring it to be “a noble and idealistic enterprise which has failed, is failing, and will go on failing”. In his retirement, along with theｅｒｅｎｉｎｇ of two new Justices – Gageler and Keane JJ – might well provide the opportunity to reconsider not only the limited questions of characterising the " legitimate end", but, potentially, the very existence of the doctrine itself.

Boxun Yin is currently reading for the BCL at St Hugh’s College, Oxford.

Ten Thousand Miles from Wall Street: Muldoon v Melbourne City Council

By Ryan Goss  | 4 October 2013

Melbourne is ten thousand miles from Wall Street. And yet, as a Federal Court of Australia decision demonstrated this week, the legal ramifications of the Occupy Wall Street movement are no less significant for the distance.

In Muldoon v Melbourne City Council [2013 FCA 994], North J of the Federal Court largely dismissed a number of applications made by protesters involved in the 'Occupy Melbourne' protests. Occupy Melbourne supporters occupied public gardens in Melbourne in 2011, as part of what North J described as 'a protest against economic inequality and the structures and operation of the present system of government'.

State and local laws provided that a permit was required for certain activities, including camping in public parks. Local and state officials were empowered to enforce these laws, and did so on a number of occasions in response to the actions of Occupy Melbourne protesters.

At the risk of simplifying the dispute, the key question was this: were these state and local laws, and attempts made to enforce them, contrary to the Constitution, or to the Victorian state human rights legislation? North J’s reasons for judgment run to almost 500 paragraphs and so an exhaustive analysis is not possible here. Instead, I focus on the freedom of expression issues.

For the legal community, North J’s reasons raise interesting questions about the future of the Lange questions and, particularly, the best way to bring greater clarity and certainty to the second question. There may also be interest in North J’s remarks that the ‘distinction between the implied freedom...and a personal right...is largely a theoretical distinction’.

More broadly, North J’s decision has met with criticism from those who regard it as highlighting ‘how few avenues we have left to express alternative opinions within Australia’ and ‘that fundamental human rights are not adequately protected’. Readers will have their own views on whether such comments are fair criticisms of North J’s extensive reasons.

Ryan Goss is Lecturer in Law at the Australian National University, Canberra.
Chapter 11
Criminal Justice and Human Rights
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author(s)</th>
</tr>
</thead>
<tbody>
<tr>
<td>149</td>
<td>Scoppola v Italy (No. 3): Getting Prisoner Voting Right?</td>
<td>Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>149</td>
<td>Scoppola v Italy (No. 3): A Step Backwards</td>
<td>Reuven (Ruvi) Ziegler</td>
</tr>
<tr>
<td>149</td>
<td>Prisoners' Voting Rights: The Gift That Keeps on Giving</td>
<td>Eirik Bjorge</td>
</tr>
<tr>
<td>150</td>
<td>Prisoner Voting and the Rule of Law: The Irony of Non-Compliance</td>
<td>John Hirst</td>
</tr>
<tr>
<td>150</td>
<td>James, Wells and Lee v UK: Indefinite Detention and Arbitrary Deprivations of Liberty</td>
<td>Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>151</td>
<td>Political Betrayal</td>
<td>Clive Stafford Smith</td>
</tr>
<tr>
<td>151</td>
<td>Death Penalty in India: What the Future Holds</td>
<td>Vininda Bhandari</td>
</tr>
<tr>
<td>151</td>
<td>Secret Executions in India: Another Reason to Rethink the Death Penalty</td>
<td>Chintan Chandrachud</td>
</tr>
<tr>
<td>152</td>
<td>Vinter v UK and Whether Life Should Mean Life</td>
<td>Claire Overman</td>
</tr>
<tr>
<td>152</td>
<td>Vinter v UK – Why The Majority Are Right To Find That Whole Life Orders Violate Article 3 ECHR - Draft</td>
<td>Natasha Holcroft-Emmess</td>
</tr>
<tr>
<td>153</td>
<td>The Crimes of Gambia's Criminal Justice System</td>
<td>admin</td>
</tr>
<tr>
<td>153</td>
<td>Rendering Abortion Unconstitutional? Article 28 of Zambia's New Draft Constitution</td>
<td>Yaliwe Clarke</td>
</tr>
<tr>
<td>153</td>
<td>Corporal Punishment in Namibia Revisited</td>
<td>Ilke Meissner</td>
</tr>
<tr>
<td>154</td>
<td>Mendoza v Argentina: Against the Life Imprisonment of Children</td>
<td>Nicolas Espejo-Yaksic</td>
</tr>
<tr>
<td>154</td>
<td>Bugmy v The Queen: Exploring the Significance of Indigenous Background in Sentencing</td>
<td>Dr Thalia Anthony</td>
</tr>
<tr>
<td>155</td>
<td>The Queen v D(R): Wearing a Veil During Proceedings in Crown Court</td>
<td>Carolyn Evans</td>
</tr>
<tr>
<td>155</td>
<td>R v D: an Imperfect, yet Promising, Approach to the Treatment of the Niqab in Court</td>
<td>Claire Overman</td>
</tr>
</tbody>
</table>
It then held [82] the UK legislation disenfranchising all persons sentenced to three-to-five years for the duration of their prison sentence. The GC maintained [106] that the Italian legislation is not disproportionate because it ‘is not applied…to all individuals sentenced to a term of imprisonment but only to those sentenced to a prison term of three years or more.’ However, Hirst (no. 2)’s ratio logically entails judicial involvement and rules out any form of blanket disenfranchisement: how else can ‘individual circumstances’ and ‘the nature and gravity of the offence properly be taken into account’?

In Hirst, the GC ‘read’ a proportionality requirement into the Convention on Human Rights (‘the right to free elections’). Article 3 of the (First) Additional Protocol to the European Convention on Human Rights (‘the right to free elections’) was more faithful to Hirst (no. 2)’s logic. Section Chamber judgment in Frodl (app. no. 20201/04) that the decision to disenfranchise prisoners ought, in Frodl v Austria (2011 [app. no. 20201/04]) the Chamber had held at [34] that an ‘essential element in’ establishing the proportionality of a deprivation of a prisoner’s right to vote is that the decision ought to be taken by a judge and accompanied by specific reasoning to explain why disenfranchisement is necessary. The majority in Scoppola, however, departed from certain prior developments elsewhere, including the strong resistance of the Supreme Court which seems to have gone to great lengths to accommodate the political, rather than the legal, consequences of the Court giving national parliaments the ability to override Strasbourg decisions. This suggestion, together with that of the Prime Minister, may seem like little more than what psychoanalysts call passages à l’acte — acts of precipitate violence which betray admissions of impotence and loss of direction. In fact, the government may relish this opportunity to shore up its base at the cost of European institutions — and of those whose rights are being breached.

If ‘suffrage is the pivotal right’, then it is only fitting that the issue of prisoners’ voting rights has become the turning point of the UK’s approach to the European Convention on Human Rights (ECHR). Scoppola v Italy (No. 3): Getting Prisoner Voting Right? By Natasha Holcroft-Emmes 13 August 2012

The last time a Strasbourg judgment provoked such a strong response by the UK government was probably the 1995 Grand Chamber ruling in the Murder on the Rock case. Downing Street then responded by disclosing that the ruling defined common sense and that the best response might be to leave the Convention altogether. Wiser counsels prevailed; the UK government reversed its stance and it is argued, to be taken by a sentencing judge who will be fully aware of the mitigating circumstances and intricacies it is therefore easier to predict the political, rather than the legal, consequences if the UK were to oppose the decision of the Court giving national parliaments the ability to override Strasbourg decisions. This suggestion, together with that of the Prime Minister, may seem like little more than what psychoanalysts call passages à l’acte — acts of precipitate violence which betray admissions of impotence and loss of direction. In fact, the government may relish this opportunity to shore up its base at the cost of European institutions — and of those whose rights are being breached.

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In Scoppola v Italy (No. 3) (app. no. 126/05), the Grand Chamber of the European Court of Human Rights once again engaged with the vexed issue of prisoners’ voting rights. It then held [82] the UK legislation disenfranchising all prisoners for the duration of their prison sentence to be ‘a blunt instrument’ that ‘applies automatically to such prisoners, irrespective of the length of their sentence and irrespective of the nature or gravity of their offence and their individual circumstances.’

In Frodl, the Chamber held that Austrian legislation disenfranchising all persons sentenced for more than five years over a year violates the right to vote. It interpreted the Hirst ratio to mean that ‘a blanket restriction is necessary’ in the case of ‘convicted prisoners’ and that ‘specific reasoning…be given in an individual decision explaining why in the circumstances of the specific case disenfranchisement was necessary.’ Consequently, and indeed logically, the Chamber maintained that individualised assessment can only be made by a judge [33].

In contrast, in Scoppola (no. 3) the GC upheld Italian legislation permanently disenfranchising all persons sentenced for more than five years’ incarceration and disenfranchising all persons sentenced to three-to-five years for the duration of their prison sentence. The GC maintained [106] that the Italian legislation is not disproportionate because it ‘is not applied…to all individuals sentenced to a term of imprisonment but only to those sentenced to a prison term of three years or more.’ However, Hirst (no. 2)’s ratio logically entails judicial involvement and rules out any form of blanket disenfranchisement: how else can ‘individual circumstances’ and ‘the nature and gravity of the offence properly be taken into account’?

It is hard to reconcile Scoppola (no. 3) with the GC’s rather consistent jurisprudence that ‘prisoners in general continue to enjoy all fundamental rights and freedoms guaranteed under the Convention save the right to liberty’ (applicable, a fortiori, to ex-prisoners affected by the Italian legislation), and that [34]‘departure from the principle of universal suffrage risks undermining the whole essence of the legislature thus elected and the laws it promulgates.’

One is thus left wondering whether the GC was affected by developments elsewhere, including the strong resistance of the Supreme Court which seems to have gone to great lengths to accommodate the political, rather than the legal, consequences of the Court giving national parliaments the ability to override Strasbourg decisions. This suggestion, together with that of the Prime Minister, may seem like little more than what psychoanalysts call passages à l’acte — acts of precipitate violence which betray admissions of impotence and loss of direction. In fact, the government may relish this opportunity to shore up its base at the cost of European institutions — and of those whose rights are being breached.

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In Scoppola v Italy (No. 3) (app. no. 126/05), the Grand Chamber deferred so far to the 6th have what we need to prompt ‘Kantian combinations’ to state that the ruling ‘more or less gutted’ Hirst. Scoppola makes it clear that though a blanket ban on prisoners’ voting is disproportionate, it is not ‘necessary to have individual not judicial case-by-case determination. As Sir Nicholas Bratza, the outgoing President of the Court, explains in a recent article, prisoners are ‘voters with a particular voter’s right to vote is that the decision ought to be taken by a judge and accompanied by specific reasoning to explain why disenfranchisement is necessary. The majority in Scoppola, however, departed from certain prior developments elsewhere, including the strong resistance of the Supreme Court which seems to have gone to great lengths to accommodate the political, rather than the legal, consequences of the Court giving national parliaments the ability to override Strasbourg decisions. This suggestion, together with that of the Prime Minister, may seem like little more than what psychoanalysts call passages à l’acte — acts of precipitate violence which betray admissions of impotence and loss of direction. In fact, the government may relish this opportunity to shore up its base at the cost of European institutions — and of those whose rights are being breached.

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Prisoner Voting and the Rule of Law: The Irony of Non-Compliance
By John Hirst | 20 March 2013

Prisoners’ voting rights remain a vexed issue in the United Kingdom. Following the European Court of Human Rights (ECtHR) decision in Hirst v UK (No 2) (app. no. 74025/01), the United Kingdom was given until 22 November 2012 to repeal its blanket ban on prisoner voting. The UK failed to comply, resulting in a reprimand from the ECtHR, but no sanctions. In this post, John Hirst, the applicant in Hirst (No 2), comments on the failure to comply with the ECtHR’s order.

Under the IPP scheme, introduced by s225 of the Criminal Justice Act 2003, those convicted of a second serious violent or sexual offence were mandatorily sentenced to serve imprisonment for a (usually short) tariff period and thenceforth to be detained indefinitely for public protection. A Parole Board would assess their suitability for release, based partly on evidence of their rehabilitation under parole courses. The applicants complained that some of the requisite courses were not made available to them, even after the expiration of their tariff periods. Thus they had no real prospect of parole and remained indefinitely detained.

The House of Lords noted that the operation of the IPP scheme had caused severe problems for the UK prison system. The statutory assumption of the risk of commission of a further offence and mandatory imposition of an IPP sentence led to severe overcrowding. The Lords vehemently criticized the ‘deplorable’ systemic failure of the Secretary of State to put in place the rehabilitative resources necessary to enable IPP prisoners to progress their sentences. However, they stopped short of holding that IPP prisoners were unlawfully detained. It was held that the purpose of such sentences was public protection, not rehabilitation. The Parole Board could still perform its review function. Therefore, in their view, the applicants’ indeterminate imprisonment could not be considered arbitrary.

The European Court, by contrast, unanimously held that the applicants had been subjected to an arbitrary deprivation of liberty. There was a sufficient causal connection between the original sentence and the continuing deprivation of liberty; the deprivation was in compliance with domestic law; and the domestic law had subsequently been changed by legislation to address some of the problems highlighted by the House of Lords (in particular, imposition of an IPP sentence was no longer mandatory). However, the European Court was not content simply to conclude that the purpose of such sentences was exclusively for public protection. The Court recognized that it was a premise of the IPP sentencing scheme that rehabilitation resources would be made available. The government’s failure to do so, with the consequence that the applicants would remain indefinitely detained without prospect of progressing their sentences, meant that the deprivation of liberty was arbitrary.

Reiterating the fundamental importance of the liberty interest involved, especially regarding the indeterminacy of IPP sentences, it is argued that the European Court’s analysis with greater focus on the provision of the kind of available resources with which to progress towards release provides a better foundation for protecting prisoners’ rights. Although provision of rehabilitation courses may be inconvenient for domestic authorities, it is submitted that they are necessary to ensure that those subject to indefinite detention are provided with the means through which to regain their liberty. The UK’s deficiency in this regard signifies a lack of concern for such people. It is hoped that for the 6000+ still indefinitely detained, the finding of unconstitutionality will generate a commitment to remedying the arbitrary deprivation of their liberty.

Natascha Holcroft-Emmess is currently studying for the LPC. She recently completed the BCL with distinction and is a frequent contributor to the Oxford Human Rights Hub Blog.

Political Betrayal
By Clive Stafford Smith | 27 November 2012

I am writing this article in the airport waiting room in Guantánamo Bay, after a week visiting prisoners on this forsaken military base, and prior to returning to the UK for an evening at Wadham College. Back in Oxford, we will discuss the tragic execution of Edward Earl Johnson, a kid I represented all those years ago, gassed to death by Mississippi chamber in 1987. Edward’s final two weeks were captured on a BBC documentary, Fourteen Days in May, and every so often I revisit his execution to remind me of the futility of the act, and the duty I have to ensure that his death was not entirely in vain.

There are links across the years and the waves between Parchman Penitentiary in 1967 and Guantánamo Bay in 2013: one is the danger of untrammelled power, where the United States brings its guns (or, in Edward’s case, its Zyclon B) to bear on an essentially defenceless individual. Another is the politics of fear, where politicians inspire citizens to hate either the young African-American man who is presumed to be a murderer, or the Muslim man who is assumed to be a terrorist.

Edward was tarred as a killer, given a sub-mediocre defence lawyer, convicted by biased (primarily white) jurors, held for eight years in a prison far away from anyone who cared about him, and denied a meaningful appeal, all so he could be and sacrificed on the judicial altar to assuage the gods of violence. Shaker Aamer, who I saw two days ago, has been held without charges for eleven years in a prison far away from anything, detained as proof that “something is being done” in the American ‘War on Terror.’

The ultimate senselessness of these two prisons is the same: not only do they fail to deliver the promised solution, but they ultimately contribute to the original problem. Executing Edward, who was indubitably innocent, left the true killers to perpetuate their mayhem; the enormous effort Mississippi focused on killing him prevented many other, worthwhile projects from taking shape. Detaining Shaker is an even greater betrayal: like Edward, he cannot be a recidivist because he never did anything in the first place. But now our society accepts the idea that he should face indefinite detention to prevent him from committing a hypothetical future crime. The hypocrisy with which we have jettisoned our principles has provoked many others to turn to extremism in Shaker’s stead.

The ultimate sin of the politicians who birthed the twin projects of death row and Guantánamo is their failure to understand their own duty. It is not the job of the politician to predict and prevent a single, identified future crime from taking place – a real life version of Minority Report. Rather, it is the role of the politician to reduce the overall level of society’s violence. Thus, if a populist project like the ‘War on Terror’ will actually raise the totality of violence, by provoking those who were hitherto unprompted, then it is a folly.

Who can doubt that the policies of Bush, Blair and now Obama have failed this basic test? Who can doubt that the reservoir of goodwill that existed on September 12, 2001, had disappeared by 2003, submerged in Guantánamo Bay, Abu Ghraib, renditions, torture and the Iraq War? Who can doubt that the drone war in Wazistán is the latest example of this madness: hellfire missiles may have killed the occasional militant, but they have inspired 93 percent of all Pakistanis to view America as the ‘enemy’.

It is pointless merely to condemn; the question is what you are going to do about it. That, I hope, will be the subject of our discussion at Wadham College.

Clive Stafford Smith is the Director of Reprieve.

James, Wells and Lee v UK: Indefinite Detention and Arbitrary Deprivations of Liberty
By Natascha Holcroft-Emmess | 27 November 2012

More than 6000 UK prisoners are currently subject to indefinite detention without means of progressing towards parole. In James, Wells and Lee v UK (app. no. 28195/09) the European Court of Human Rights held that prisoners serving indeterminate sentences of imprisonment for public protection (IPP) were arbitrarily deprived of their liberty in violation of Article 5(1) ECtHR.

3500 prisoners detainted under the imprisonment for public protection scheme have served their time but do not have a release date.
Death Penalty in India: What the Future Holds
By Vrinda Bhandari | 20 February 2013

Constitutionally speaking, the death penalty in India is limited to the ‘rarest of the rare’ cases and should be implemented in a time frame which is not “unjust, unfair and unreasonable”. Over the last two decades, hangings had become somewhat of a rarity. Since 2004, an informal moratorium seemed to have come into existence. In part, this was influenced by the Supreme Court’s admissions that it had failed to evolve a uniform and clear cut sentencing policy in respect of capital punishment and that the death penalty was subjective, arbitrary, influenced by the personal predilection of the judges and in danger of becoming a media spectacle. The recent execution of the two “terrorists”, Ajmal Kasab and Md. Afzal Guru, in complete secrecy, demonstrates that this no longer holds true.

Secret Executions in India: Another Reason to Rethink the Death Penalty
By Chintan Chandrachud | 3 December 2013

Secret executions of death row prisoners are increasingly becoming the order of the day in India. At least three (two successful, one failed) have been attempted in the last few months.

Although the Central Government has not spoken in one voice about the reasons underpinning the use of these covert tactics, news reports have given rise to a few dominant theories.

To begin with, secret executions are intended to keep a lid, at least until the execution takes place, on expected repercussions and protests, and avoid the sensational media coverage that could be associated with executions of high profile prisoners. But most significantly, they foreclose the opportunity of moving a court seeking a stay order on the execution, as was done in Barela’s case.

Nussbaum argues that concerns of fair implementation render the death penalty unacceptable in India. The disquieting series of secret executions highlights one such concern. Although the Supreme Court bench granted a stay on Barela’s execution, it rhetorically asked about whether it was carving out a separate ‘post-mercy [petition] rejection jurisdiction’. This question lies at the crux of a complex problem: is it possible to maintain a criminal justice system that avoids delays and at the same time, accords procedural fairness to defendants facing the gallows?

The government’s attempt to carry out secret executions is part of an ongoing cat-and-mouse-game between the government and the prisoner, which trivialises the gravity of imposing a sentence of death. In the South African Constitutional Court’s landmark decision abolishing the death penalty (S v Makwanyane) [1995] ZACC 3, Justice Chaskalson concluded that to design a system of capital punishment that avoids arbitrariness and delays (that themselves cause cruelty and inhumanity) is exceedingly difficult. Justice Blackmun of the US Supreme Court also recognised that any effort to eliminate arbitrariness while preserving fairness in administering the death penalty was ‘doomed to failure’, and predicted that the death penalty would be declared unconstitutional by the Court in the future (Collins v Collins).

The government’s new policy of secret executions, which seeks to bypass ‘post-mercy petition’ judicial review, provides another opportunity for one of the world’s most arrear-ridden constitutional courts to introspect about the death penalty. The time has come to acknowledge the limitations of the Indian judicial process and disavow a form of punishment that is uniquely degrading in its irrevocability.

Chintan Chandrachud is a PhD Candidate at Sidney Sussex College, University of Cambridge and is an Editor of the Oxford Human Rights Hub Blog.

Das’s story is another one of extreme.

He was sentenced to death in 1999, with his mercy petition being rejected only in 2011. No date could be fixed for the execution however, since no hangman was available in his home State of Assam. The Prison Superintendent indicated that he would find a hangman from another State, but so far no action has been taken and Das sits on death row, awaiting the Supreme Court’s decision on his petition.

It is ironic that delays which have characterized the clemency process in India now also affect the courts. Having reserved its judgment on 19th April 2012 on whether prolonged delays in execution are violative of Article 21 of the Indian Constitution and the Trivendrum guidelines, the Supreme Court is yet to answer the issue. Clearly this is not the last we have heard of this matter.

Vrinda Bhandari is a BCL candidate at Magdalen College, University of Oxford.
The Grand Chamber of the European Court of Human Rights has ruled, in the case of Vinter and Others v United Kingdom (app. no. 66069/09), that whole life orders of imprisonment violate Article 3 of the European Convention on Human Rights, which prohibits inhuman and degrading treatment and torture.

The Court noted that there was clear support in European and international law for the principle that all prisoners, including those serving life sentences, must be offered the possibility of release. In its assessment, the Court emphasised at paragraph 104 of its judgment in Vinter that the continuing authority of detention after a very long time must not obscure the positive requirement of humane treatment implicit in Article 3 ECHR.

As the Court pointed out at paragraph 12, the effect of such an order is that a prisoner cannot be released other than at the discretion of the Secretary of State, which would only occur on “compassionate grounds,” for instance, where a prisoner is terminally ill or seriously incapacitated.

In the present case, the applicants were convicted of murder and sentenced to the whole life tariff. Under UK law, where a mandatory life sentence is imposed, the Criminal Justice Act 2003 provides for “different starting points” for the minimum tariff which must be served by a prisoner before his or her sentence may be reviewed. If the offence is of “exceptional seriousness” and the case is one where serious harm to public safety is expected, there may be a serious risk to the public if the offender is released too soon. Under the current law, there is a prospect of parole, but the possibility of parole, even for those serving whole life orders, is an important rehabilitative purpose of imprisonment. In James, the Court in Vinter noted that there is now clear support in European and ECtHR jurisprudence for the principle that all prisoners, even those serving whole life orders, must be permitted a substantive opportunity, in law and fact, to have the justification for incarceration examined by a court.

For this reason, sufficiently independent review of detention must be established. Release might eventually be granted, or clearly would not if that would endanger the public, but the point is that even those serving whole life orders must be permitted the possibility of pleading for parole.

Whole life sentences of imprisonment, without the possibility of parole, are a poor guarantee of proportionate punishment and run counter to respect for human dignity.

Firstly, the ECtHR has at last granted official recognition that UK law does not in reality satisfy the requirement of de facto reducibility of sentences, established in Kafkova v Cyprus (app. no. 21968/04). Reducibility requires that prisoners shall be given an opportunity, in law and fact, to have the justification for their continued detention reviewed after a certain amount of time has passed. The UK Court of Appeal in R v Bieber [2008] EWCA Crim 1601 at [46] suggested that a rearticulation of this might eventually be necessary. The Secretary of State’s discretionary power to release on compassionate grounds (terminal illness or severe physical incapacity) under s36(1) Crimes (Sentences) Act 1997 is so narrowly constructed that anyone falling under it cannot hope to have any quality of life on the outside. Thus there is in fact no meaningful possibility of release. This state of affairs cannot be compatible with the requirement of humane treatment implicit in Article 3 ECHR.

Secondly, there has been an international shift in focus relating to the justification for incarceration. Although punishment still plays a legitimate part, there is increasing emphasis on the important rehabilitative purposes for imprisonment. In James, Wells and Lee v UK (app. no. 25119/09), the ECtHR established an obligation on States to show commitment to realising the rehabilitative aim of detention in their prison laws and practices. The Court in Vinter noted that there is now clear support in international law for the principle that all prisoners, even those serving whole life sentences, should be offered the prospect of release if rehabilitation can be achieved. For this to be possible, a review of the continued justification for detention must be available, and this is what the Court ordered in Vinter.

Thirdly, an important development in UK law suggests that the current state of affairs is unsatisfactory. In Anderson 2003 [1] Cr App R 32 the UK House of Lords required that control over the length of a person’s detention be entrusted to an independent and impartial tribunal rather than a member of the executive. The current law, under which release is at the discretion of the Secretary of State, is obviously out of line with this development.

The Home Secretary, as a member of the government, is susceptible to populist pressure in a way that judicial authorities are not. But a particular criminal’s notorious notoriety is not a good criterion on which to judge the justification for their continued detention. For this reason, sufficiently independent review of detention is required.
The Crimes of Gambia’s Criminal Justice System
By admin | 6 May 2013

Last Autumn, the world witnessed a fleeting frenzy when The Gambia’s eccentric President Jammeh resumed executions for prisoners condemned to death. These executions, the country’s first in 27 years — were soon halted amidst international protest, but not before nine lives had been lost. Media reports decried the popular vacation spot, revealing for a moment its more troubled reputation and harrowing human rights record. Months later, however, West Africa’s “Little Gem” remains a celebrated holiday destination, with scant attention to Gambia’s darker side, and the nine prisoners who lost their lives only six months ago.

Jammeh’s moratorium may have calmed the temporary global outcry, but this country’s criminal justice system remains deeply problematic. Whilst death row inmates may wonder when, if ever, the next round of executions may resume, human rights groups should still examine the conditions of indefinite detention at Mile Two State Central Prison where they are held, without ignoring just how easy it is to end up there.

From confirmed cases of arbitrary detention to evidence of forced confessions, capital punishment can hardly avoid being a controversial tool beyond the primary debate. However, one issue that has received little attention is the accusation that the Gambian government employs corrupt ‘mercenary judges’.

Finally acknowledged by the US Department of State Human Rights reports, these foreign judges oversee ‘sensitive’ cases and are ‘particularly subject to executive pressure’. Senior members of the judiciary are imported from other Commonwealth countries and focus their attention on Chapter VII of Gambia’s criminal code. By broadly defining treatment and sedition, the Gambian legal system has managed to place anyone from missionaries to journalists behind bars under the pretence of treason, a charge that carries the death penalty.

Most commonly targeted, however, are members of security institutions. Consistently at odds with the state structures intended to keep the country safe and intact, the executive has imported a new body of women's organisations, have discussed this matter in their own national consultations with women about the content of the draft constitution. Recurring themes in previous Zambian constitution review processes included: devolution of the powers of the president; electoral procedures; affirmative action for women; and citizenship. Despite the fact that national statistics reveal that up to 50% of all gynaecological admissions in Zambia result from abortion complications, women’s reproductive right to safety abortion has never before been a matter of constitutional concern. Controversies about abortion that arose in recent district, provincial and national constitutional hearings speak to a troubling prevalence of patriarchal attitudes towards women’s legal right to safe reproductive health services in general, and abortion in particular. At the heart of legal contention on this matter is the fact that Zambia’s existing laws legalise abortion. The Termination of Pregnancy (TOP) Act No. 26 of 1972 (Chapter 304 of the Laws of Zambia) makes it possible for Zambian women to abort. The Penal Code allows termination of pregnancy in the event a female child is impregnated as a result of raped or defilement. But by stating that “...life begins at conception” Article 28 of the draft constitution pitches these Acts against the ‘unborn child’s’ right to life as stipulated in the current and draft constitution’s Bill of Rights. If passed, the draft constitution could render the TOP Act and Penal Code unconstitutional. This would have huge implications for Zambian women and girls who would not be able to legally seek abortion.

The question of the morality of abortion from the perspective of ‘Christian values’ enshrined in Article 2 of the draft constitution has made it hard for Zambians to support the idea that women have the right to decide whether to keep an unwanted pregnancy. Many Zambians have found it difficult to argue for the removal of this right, inhuman or degrading treatment or want to be seen to publicly rebuff Christian interpretations of the sanctity of life as stated in the Bible. On the other hand, women’s rights organisations are adamant that the draft constitution be passed as it is, Zambian women’s and girls’ chances of suffering from unsafe abortions would increase and severely compromise their right to safe reproductive health services.

Yes, Lichty Clarke is a lecturer and researcher at the University of Cape Town. Her research interests are feminism, peace and security in African contexts. Within this constitutional context it was found in Ex Parte: Attorney-General, In Re Corporal punishment by Organs of State that corporal punishment inflicted at government schools is contrary to the provisions of the Constitution. Mahomed A.JA however explicitly refrained from expressing an opinion on disciplinary chastisement pursuant to a delegation by a parent’s guardian. It is pointless. In this context corporal punishment at private schools has become the centre of re-opened debate.

Contrary to the position in 1991, when the above-named judgment was delivered, The Education Act 16 of 2001 clearly prohibits corporal punishment – whether at state or private schools. No provision is made for parental delegation. Yet, even when only seeking recourses in the Constitution, a private school is a legal person, to whom the respect for others’ human dignity is clearly applicable. Within the context of the fundamental right to education, as delineated in Article 20, all persons have the right to establish private schools, but such schools must maintain standards which are not inferior to the standards maintained in schools funded by the state. Standards of disciplining at schools are evidently capable of falling within the ambit of this provision. Furthermore, Article 24(3) of the Education Act classifies human dignity as a fundamental right in terms of which the Constitution permits no derogation or suspension. The right not to be subjected to cruel or inhuman punishment is hence a right which is not susceptible to waiver – not even by a parent. The extensive limitations enquiry followed by the South African Constitutional Court when it was called upon to decide a similar issue in Christian Education South Africa v Minister of Education [2000] ZACC 11 is therefore not necessitated. It is thus as Berkers CJ finds: “once one has arrived at the conclusion that corporal punishment per se is imposing the dignity of the recipient...it does not on principle matter to what extent [it] is made subject to restrictions and limiting parameters...[because] the actual execution thereof can never be fully controlled”.

In the proceedings this year on disciplinary chastisement administered at private schools, the relevant teachers were in fact found guilty of assault by the Magistrates Court. This ruling is to be welcomed in the light of the clear demands made by the Namibian Constitution, in particular regarding the respect for human rights. It is unfortunate however, that the Magistrates Court was not the appropriate forum to properly canvass the central human rights facets of this debate.

The Namibian Constitution, supported by relevant educational legislation has come a long way in creating certainty on the issue of disciplinary chastisement. Yet, the question remains one embedded in the norms and values of a particular society. It is precisely such divergent sentiments on appropriate and just forms of punishment for disciplinary purposes that still lend validity to Berkers’s statement 22 years down the line. Yes, Lichty Meissner is a law student at Stellenbosch University, currently in her 4th year of the BAccLLB programme.
Criminal Justice and Human Rights
Chapter eleven

Mendoza v Argentina: Against the life imprisonment of children
By Nicolás Espejo-Yaksic | 23 July 2013

In Mendoza v Argentina (14 May 2013, series C no 260), the Inter-American Court of Human Rights (ICHR) has determined that life sentences against children constitute a breach of the American Convention on Human Rights (ACHRR).

In an historic decision that follows recent developments in children’s rights from Inter-American Human Rights Law, the ICHR found the Government of Argentina guilty of human rights violations for imposing sentences of “perpetual deprivation of freedom” against five people for crimes they committed during childhood. The ICHR also found the State internationally responsible because the criminal procedure codes applied did not allow a comprehensive review of criminal judgments by a higher court, for the lack of adequate medical care to one of the children referred to above, for having inflicted torture against two of the victims without investigating the facts properly, as well as for failing to properly investigate the death of one of those while in state custody.

Based on the principle of the best interest of the child (Art. 19 of the ACHR in relation to Article 3 of the United Nations Convention on the Rights of the Child), the ICHR held that the life imprisonment sentences, by their nature, do not comply with the purpose of social reintegration of children. On the contrary, for the ICHR, life sentences against children imply their maximum exclusion from society, operating in a purely retributive sense and cancelling all expectations of rehabilitation. As a consequence, life sentences against children are not proportionate to the purpose of criminal punishment of children (Arts. 7.5, 19 and 1.1. of ACHR).

Additionally, the ICHR held that the disproportional character of these types of sentences had provoked a high psychological impact on the victims and constituted cruel, inhuman and degrading treatment (Arts. 5.1, 5.2, 19 and 1.1. of the ACHR).

The ICHR also determined that the lack of access to medical treatment, as well as the existence of a serious criminal investigation of the death of one of the victims and the physical torture suffered by the others, amounted to a violation of the right to personal integrity (Arts. 5.1 and 5.2) and the right to have access to an effective judicial remedy (Arts. 8.1 and 25.1) set forth in the ACHR, as well as the rights recognised by the Inter-American Convention Against Torture. In the opinion of the ICHR, the psychological impact of the life imprisonment of the victims also severely affected the right to personal integrity of their family members, which amounted to a violation of Article 5.2 of the ACHR.

Finally, the ICHR determined that Argentinian law did not allow a comprehensive review of criminal judgments by a higher court, including the re-examination of the facts and the evidence discussed in the first instance (Art. 8.2 of the ACHR).

The High Court decision whether the seriousness of the offence should overshadow mitigating circumstances relating to the offender’s background is of crucial importance in addressing increased Indigenous imprisonment. Indeed, if courts are to hand down sentences that will restore and rehabilitate Indigenous offenders, greater emphasis needs to be placed on exploring community circumstances, how the offender may be better reintegrated; and Indigenous communities strengthened. Bugmy is an example of an offender who was calling on the system to provide rehabilitation services, but only found institutional sanctuary in the prison. By failing to give substantial weight to Indigenous circumstances, the courts will continue to fall back on an imprisonment response when deterrence and community protection could be better served through non-custodial sentencing options and more appropriate community-based remedial services.

The decision of the ICHR in Mendoza et al. v. Argentina is of utmost importance.

The grave violations of the human rights of the victims in this case, including the irrevocable imposition of life sentences against children, are not exceptional. As the Inter-American Commission on Human Rights has established, in the Americas young offenders are usually subjected to criminal proceedings that lack the basic guarantees of due process. At the same time, young offenders are massively deprived of their liberty under inhuman and degrading conditions, including torture, without access to an effective system oriented toward their social rehabilitation.

The ICHR determined that Argentinian law did not allow a comprehensive review of criminal judgments by a higher court, including the re-examination of the facts and the evidence discussed in the first instance (Art. 8.2 of the ACHR).

Bugmy v The Queen: Exploring the Significance of Indigenous Background in Sentencing
By Thalía Anthony | 19 September 2013

Bugmy v The Queen [2012] NSWCCA 223 provides the High Court of Australia with its first opportunity in thirty years to rule on the significance of Indigenous background in sentencing. The over-representation of Indigenous offenders in Australian prisons has doubled in the last twenty years: in the early 1990s Indigenous offenders represented 14 per cent of the prison population, today they represent 28 per cent. In this case the High Court will consider the role of criminal sentencing in the dramatic over-representation of Indigenous Australians in prisons, and how sentencing can be structured to promote deterrence outside of prisons.

In 2011, Bugmy pleaded guilty to two counts of assaulting a Corrective Services Officer, which attracts a maximum penalty of five years’ imprisonment, and one count of causing grievous bodily harm with intent which attracts up to 25 years’ imprisonment. The appeal before the High Court focused upon an argument that the court below, the New South Wales Court of Criminal Appeal, erred in holding that the weight attributed to the Fernando principles lessen by virtue of the offender’s lengthy criminal history, the objective seriousness of his offences and the need for deterrence.

At the time of the 2011 offence, Bugmy, a 29-year-old Indigenous man from Wilcannia in north-western New South Wales, was on remand for assaulting police, resisting arrest, escaping from police custody, intimidating police and causing malicious damage by fire. He was exposed to violence and alcohol abuse as a child and by the age of 12 had started using cannabis and alcohol. Bugmy only attended formal education up to year 7 (13 years old) and therefore had poor literacy and numeracy skills. He has a history of head injuries and suffered from auditory hallucinations and psychotic symptoms of a schizophrenic type. Since the age of 13 Bugmy had committed numerous offences of break, enter and steal; assault; resist police and damage to property; and had served long terms of imprisonment for these offences. He had never attended a detoxification or rehabilitation facility. Bugmy sought assistance to treat his alcohol abuse on numerous occasions, without success. He has negative attitudes towards authority figures, particularly the police. These attitudes were described in court by an expert witness as attributable to family ‘cultural issues’. Expert evidence also pointed to Bugmy’s need to undergo extended counselling for his issues with drug and alcohol abuse and regular psychiatric review in view of his reported ‘voices’.

In the application for special leave to the High Court, Bugmy’s counsel submitted that the New South Wales Court of Criminal Appeal erred in concluding that the seriousness of Bugmy’s offence minimised the weight that could be put on his history of social deprivation and Indigenous background when sentencing. It was also argued that this error was compounded by comments that a defendant’s substantial offending history diminished the significance of Indigenous factors — a finding that could not be supported by evidence discussed in the first instance (Art. 8.2 of the ACHR).
In The Queen v D (R), the judge wrote a thoughtful and detailed set of reasons for his decision which drew heavily on the European Convention on Human Rights framework.

The issue is not a simple one. Trial practices in common law countries (and, indeed, in many other systems) rely at least in part on testing the credibility of different witnesses through their demeanour. There is some evidence that people are not as good at judging the truthfulness of witnesses as they believe themselves to be, and are particularly likely to make errors in cross-cultural contexts. However, the notion of a fair trial at least requires that witnesses generally be treated in the same manner and subject to the same scrutiny.

At the same time, people have a right to religious freedom including women who chose to wear religious clothing that covers the face. HHJ Murphy was rightly concerned to ensure that it was clear that his judgment was not based on stereotypes of Muslim women who wear the veil and that his decision should not be read as a criticism of women for covering their faces for religious reasons. He accepted that D was sincere in her belief that this was a requirement of her Muslim faith. He stated clearly that ‘the niqaab is worn by Muslim women who cover their faces for religious reasons. He accepted that D was sincere in her belief that this was a requirement of her religious belief.

HHU Murphy looked to the Equal Treatment Bench Book for guidance on the matter but found very little assistance there either. As pointed out in the Proceeding in Crown Court, reaction to cross-examination, then a trial is unfair.

The defendant relied on Article 9(1) of the European Convention on Human Rights, which states that ‘everyone has the right…to manifest his religion or belief.’ However, it was noted that this right is not unlimited, but rather expressly subject to the restriction in Article 9(2). Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’ In this case, the Judge noted that weighing against the defendant’s right to manifest her religion was not only the other party’s own Convention right (the right to a fair trial under Article 6), but also the court’s interest in ensuring that the principles underlying the judicial process (the rule of law, the principle of open justice, and the principle of an adversarial trial) were respected. The Judge stated that allowing the defendant to impose her religious right on the court amounted to a deprivation of its ability to control its own procedure.

ICLR blog, this reasoning would lead to the conclusion that a trial wouldn’t be fair if one of the jurors was blind. On this point, there is an interesting comparison with the employment context. In both, there has been a readiness to assume that certain issues are non-negotiable (that a defendant must be seen in order for a trial to be fair; that an employee must wear the required uniform and work the required hours on the required days). If the issue of the place of religious rights is approached with this mindset, then it is inevitable that such requirements will be curtailed rather than accommodated. What is required is that courts question the necessity of, for instance, a Monday to Friday working pattern (preventing Muslims from fulfilling their obligations to attend prayers: see Ahmad v United Kingdom 4 E.H.R.R. 128), or a particular dress code in court. If such debate is had, then the courts may be more ready to accommodate religious requirements, rather than too readily resort to the restriction in Article 9(2).

One positive feature of the case must nevertheless be mentioned. The Judge took great care to dispel the idea that the removal of the niqab was motivated by a desire to protect women from the patriarchal impositions of the Muslim faith. He stated clearly that ‘the niqab is worn by women who do not deserve to be demeaned by superficial and uninformed criticisms of their choice.’ The exclusion of such arguments, founded on misguided views not only of the religion itself but also of the supposed vulnerability of the women who subscribe to it, serves as a promising starting point for more reasoned consideration of the accommodation of religious rights within society.

Criminal Justice and Human Rights
Chapter eleven

The Queen v D(R): Wearing a Veil During Proceedings in Crown Court
By Carolyn Evans | 1 October 2013

In a recent Crown Court case The Queen v. D(R) [2013] EW Misc 13 (CC), His Honour Judge Murphy had to rule on whether a defendant charged with witness intimidation should be allowed to keep her face covered during trial in compliance with her religious belief. The defendant (D) in this case was a Muslim woman who wore a niqab that covered her face.

HHU Murphy anticipates that this issue will soon find itself in the higher courts and he is likely correct. Such courts could do worse than to take this decision as an excellent, nuanced starting point.

Professor Carolyn Evans is Dean of Melbourne Law School.

R v D: an Imperfect, yet Promising, Approach to the Treatment of the Niqab in Court
By Claire Overman | 2 October 2013

Debate has recently been ignited in the UK about whether Muslim veils can be accommodated in court, stemming from Judge Peter Murphy’s decision in R v. D [2013] EW Misc 13 (CC) in her post on this blog, Prof Carolyn Evans provides a thorough overview of the judgment. In summary, the defendant, a Muslim woman, had been charged with witness intimidation. The question to be answered was the extent to which she was permitted to wear the niqab, the black veil which covers the entire face except the eyes, during her trial. The Judge held that a defendant’s right to be heard would be required to remove her niqab when giving evidence in a criminal trial, in order for the jury to observe her reactions during cross-examination.

The defendant relied on Article 9(1) of the European Convention on Human Rights, which states that ‘everyone has the right…to manifest his religion or belief.’ However, it was noted that this right is not unlimited, but rather expressly subject to the restriction in Article 9(2). Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.’ In this case, the Judge noted that weighing against the defendant’s right to manifest her religion was not only the other party’s own Convention right (the right to a fair trial under Article 6), but also the court’s interest in ensuring that the principles underlying the judicial process (the rule of law, the principle of open justice, and the principle of an adversarial trial) were respected. The Judge stated that allowing the defendant to impose her religious right on the court amounted to a deprivation of its ability to control its own procedure.

These countervailing interests (the other party’s right to a fair trial and the safeguarding of the judicial procedure) are in principle acceptable reasons for limiting the defendant’s right to wear her niqab, particularly since the right is expressly subject to restrictions in Article 9(2). For instance, it was more than likely that the defendant would be required to remove it, in a private room and before a female court officer, for identification purposes, to ensure that it was indeed the defendant standing trial. However, the necessity of these restrictions must be explored thoroughly by the court. For example, the Judge reasons that the removal of the defendant’s niqab is required in order for there to be a fair trial, because if a juror and judge cannot see the defendant’s reaction to cross-examination, then a trial is unfair. But there is no consideration of precisely why a trial is unfair if a defendant’s face cannot be seen. As pointed out in the
Chapter 12
Religion and Human Rights
<table>
<thead>
<tr>
<th>Page</th>
<th>Title</th>
<th>Author</th>
</tr>
</thead>
<tbody>
<tr>
<td>158</td>
<td>Eweida, Chaplin, Ladele and McFarlane v the United Kingdom: A Primer</td>
<td>Julie Maher</td>
</tr>
<tr>
<td>158</td>
<td>Religious Rights in the Balance: Eweida and Others v UK</td>
<td>Julie Maher</td>
</tr>
<tr>
<td>159</td>
<td>Eweida and Others v United Kingdom: The Use and Abuse of the Margin of Appreciation</td>
<td>Claire Overman</td>
</tr>
<tr>
<td>159</td>
<td>Proportionality Analysis after Eweida and Others v UK: Examining the Connections between Articles</td>
<td>Julie Maher</td>
</tr>
<tr>
<td>160</td>
<td>Corporate Gods: Can a Company Claim Protection for Religious Beliefs?</td>
<td>Karl Laird</td>
</tr>
<tr>
<td>160</td>
<td>R (Hodkin): A Signal to Rethink Religious Worship</td>
<td>Ilias Trispitiis</td>
</tr>
<tr>
<td>161</td>
<td>Between a Crocodile and a Snake: Racism and Religious Intolerance in Burma</td>
<td>Benedict Rogers</td>
</tr>
<tr>
<td>161</td>
<td>Religious Freedom: A 21st Century Paradigm</td>
<td>Brian J Grimm</td>
</tr>
<tr>
<td>162</td>
<td>Taking Conscience Seriously</td>
<td>Ronan McCrea</td>
</tr>
<tr>
<td>162</td>
<td>Malaysia’s Dangerous Path Towards “Allah”</td>
<td>Ayesha Malik</td>
</tr>
</tbody>
</table>
The applicants argue that the work-based detriment suffered because of their requests to manifest their religious beliefs at work breached Articles 9 and 14 of the Convention. From a factual perspective there are two distinct categories of cases at issue: those dealing with the wearing of religious symbols at work (involving Ms Eweida and Ms Chaplin), and those dealing with the refusal of employees the carry out certain duties required by their employer that they felt would condone homosexuality (involving Ms Ladele and Mr McFarlane).

The claimants have adopted two distinct lines of argument.

Counsel for Ms Eweida, Ms Chaplin, and Mr McFarlane have challenged the UK courts' interpretation of the limits of Article 9. In particular they contend that the definition of 'religious manifestation' adopted in the Court of Appeal's Eweida judgment erroneously requires that a religiously motivated act be doctrinally required by the faith in question before the act can be considered a religious manifestation. They contend that this interpretation is unduly restrictive and out of sync with more permissive Strasbourg judgements such as Jakobski v Poland and Bayatyan v Armenia.

The Article 9 route is a difficult one. Even if the applicants convince the ECtHR that wearing Christian symbols and refusing to indirectly condone homosexuality should be considered religious manifestations within the terms of Article 9, a significant hurdle still awaits them in the form of the 'free contract doctrine'. Those seeking to enforce Article 9 rights in the workplace consistently come up against the doctrine's core contention: freedom of religion is guaranteed by the right to exercise it. In challenging the doctrine the applicants are hoping for a sea change in the Court's interpretation of Article 9.

In contrast, counsel for Ms Ladele present their claim solely in terms of religious discrimination, citing Article 14 and stressing that their argument is not reliant on a violation of Article 9 being established. Where an interference with Article 14 has been found, the margin of appreciation determines the scrutiny of the justifications offered by the Government. The absence of consensus on workplace religious manifestations would appear to favour the Government. However, a markedly different approach to justification of differential treatment exists where the discrimination involves certain suspect grounds. The recent comments of Judges Bratza, Hirvelä, and Nicolaou in Redfearn imply that religious discrimination is now considered to be a suspect ground requiring strong and weighty justification. The Court's case law on gender, racial and sexual orientation discrimination illustrates the immense potential of Article 14 where a ground is judged to attract such strict scrutiny.

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In essence, the Chamber has recognised that there is a weight to be attached to the rights of religious persons engaged in the secular public sphere, and that a balance must be struck.

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In the workplace, this confirmation of the appropriateness of a two-step interference and justification analysis in such Article 9 cases, alongside the tangible finding of an interference in Ms Eweida's case, is a significant development.

Another important point was the Court's rejection of the Government's contention that no interference occurred because the practices in question were neither mandatory requirements of the religion, nor acts of worship that formed part of the practice of religion or belief in a generally recognised form. The Chamber stated that the latter quality is an example of the type of acts which may be considered manifestations of religion, but 'the manifestation of religion is not limited to such acts': [82].

The Chamber's analysis of the specific facts of these cases and its scrutiny of the employers' 'various reasons for refusing to accommodate their employees' religious manifestations is itself highly positive. It is certainly a marked contrast with earlier cases such as Kombinen, which give little attention to the ease with which employees might have been accommodated. In addition the 'general and neutral' nature of the uniform provisions restricting Ms Eweida's religious manifestation was no answer to the fact of interference.
Eweida and Others v United Kingdom: The Use and Abuse of the Margin of Appreciation
By Claire Overman | 20 January 2013

Julie Maher’s post on the judgment handed down by the ECtHR in Eweida and Others v United Kingdom [2013] IRLR 231 outlines the reasons which the Court gave for deciding that, while disciplinary action for wearing a crucifix necklace at a job with British Airways was disproportionate, in the context of a hospital worker it was not. Moreover, the Court also held that it was not disproportionate to discipline employees of public authorities and private companies for refusing to accommodate same-sex couples.

Whilst the decisions themselves are commendable, one interesting feature of the case is the Court’s reliance on the margin of appreciation as conclusus of the balance between competing rights, without substantive investigation into what these competing rights actually were. For instance, in Ms Ladele’s case, the Court at paragraph 106 deferred to the national authorities’ margin of appreciation, despite explicit recognition that “the consequences for the applicant were serious,” and that “it cannot be said that, when she entered into her contract of employment, the applicant specifically waived her right to manifest her religious belief.” The party dissenting opinion of Judges Čučin and De Gaetano picks up on this. For instance, it notes that, in the case of Ms Ladele, her belief was a “concrete right to conscientious objection, which is one of the most fundamental rights inherent in the human person,” and that “she never attempted to impose her beliefs on others.”

Such a failure to engage with factual specificities of cases, whilst relying on an undefined “margin of appreciation,” undermines the credibility of the Court. This is most apparent when one compares the cases of Ms Eweida and Ms Chaplin. In both cases, the act of wearing a crucifix necklace was identical, yet in the case of a British Airways employee, disciplinary action was disproportionate, whilst in the hospital context it was not. The court distinguishes between the two cases by stating, at paragraph 99, that “the reason for asking [Ms Chaplin] to remove the cross … was inherently of a greater magnitude than that which applied in respect of Ms Eweida.” But this use of “inherent” magnitudes of countervailing interests is simply opaque. If health and safety is to be considered of greater importance than a company’s interest in its professional appearance, then the reasons for this must be explored. Whilst this conclusion is admittedly intuitively correct, for a Court whose legitimacy is under increasing threat, this won’t do.

A possible solution is hinted at in paragraph 94, where the Court refers to the fact that “there was no evidence that the clothing … had any negative impact on British Airways’ brand … wearing of other, previously authorised, items of religious clothing … had any negative impact on British Airways’ brand or image.” The Court should demand evidential justification from States when faced with claims that countervailing interests are in play. The European Court of Human Rights (ECtHR) rarely viewed State actions towards religious citizens as constituting an interference with Article 9. It was only in 1993 that the ECtHR heard its first substantive claim on Article 9 in Kokkinakis v. Greece. Moreover, the ECtHR and the European Commission on Human Rights developed various interpretative doctrines that limited the range of circumstances that could amount to an interference with Article 9. These approaches, detailed elsewhere on this blog, had the combined effect of leaving comparatively few occasions where the Court actually examined the justifications offered by contracting States for restricting the religious manifestations of individual citizens.

However, after the ECtHR’s Eweida and others v UK decision in January, the position of Strasbourg has changed considerably. In Eweida, the ECtHR found that English courts had failed to strike a ‘fair balance’ in protecting Article 9: they had given too much weight to an employer’s concerns about its corporate image and not enough weight to the employee’s interest in expressing her religious convictions by wearing a religious symbol, in her case a cross. It suffices to say that in the current context of Article 9, proportionality analysis is now key.

Eweida was an important turning point in Article 9 jurisprudence, with the Strasbourg Court recognising that an individual’s desire to express their religious belief publicly, beyond the context of church and home, could outweigh the secular interests of an employer. The case stands as an important recognition of the need to attribute a basic weight to individuals’ desires to manifest their religion. A central issue in future cases will be how courts should define and attribute weight to the ‘harm’ produced when expressions of controversial or contestable religious beliefs are suppressed. Going forward, how can courts make sure they strike a ‘fair balance’ between the competing interests in Article 9 claims?

The ECtHR’s and domestic courts’ experience in balancing the right of individuals to express controversial and offensive opinions (rights protected in Article 10 of the ECHR) might well prove a useful touchstone in determining these vexed questions. Viewing religiously motivated acts as ‘expressive acts’ may help courts to appreciate the value of manifesting as opposed to merely holding, a religious belief, as well as the harm that occurs when such expression is forbidden or penalised.

Likewise, Article 10 case law demonstrates how courts can assess the relative merits of protecting the expression of viewpoints that they themselves cannot endorse, drawing on free speech rationales to justify why views that are offensive, insulting, or shocking should still be tolerated. It is arguable that the rationales underlying Article 10 protection of controversial expressions apply to religious expression to varying extents, particularly those rationales that rest on society’s respect for values such as autonomy and pluralism.

The interrelation of Articles 9 and 10 may come into more immediate focus when the Grand Chamber hears the case of SAS v France (App No. 43835/11), a challenge to the 2010 French law that restricts the wearing of the ‘full face veil’ in public spaces. On the same day the judgement in Eweida was finalised, the Chamber of the ECOHR announced that it was relinquishing its jurisdiction and SAS would go directly to the Grand Chamber.

One of the lines of argument pursued by the applicant in SAS is that her wearing of the burqa is an expression of cultural identity and that the 2010 law consequently violates her Article 10 rights. This line of argument has the potential to be surprisingly effective; if the symbol is cultural, not religious, then it should not trouble secular constitutional traditions in countries such as France and Turkey. However, whilst SAS certainly presents a prime opportunity for the Grand Chamber to significantly revise its religious dress case law, the key question is whether the Court will wish to venture further into the politically charged debates surrounding the relationship between the church, state, and human rights.

Julie Maher is a DPhil candidate at Balliol College, University of Oxford.

Using and Abuse of the Margin of Appreciation
By Julie Maher | 21 June 2013

Until recently, questions regarding the theory and practice of the proportionality analysis in relation to the application of Article 9 of the ECHR to individuals were largely redundant. The European Court of Human Rights (ECtHR) rarely viewed State actions towards religious citizens as constituting an interference with Article 9. It was only in 1993 that the ECtHR heard its first substantive claim on Article 9 in Kokkinakis v. Greece. Moreover, the ECtHR and the European Commission on Human Rights developed various interpretative doctrines that limited the range of circumstances that could amount to an interference with Article 9. These approaches, detailed elsewhere on this blog, had the combined effect of leaving comparatively few occasions where the Court actually examined the justifications offered by contracting States for restricting the religious manifestations of individual citizens.

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A central issue in future cases will be how courts should define and attribute weight to the ‘harm’ produced when expressions of controversial or contestable religious beliefs are suppressed. Going forward, how can courts make sure they strike a ‘fair balance’ between the competing interests in Article 9 claims?

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Does a profit making company owned and operated by people with strong religious beliefs fully share their right to the protection of those religious beliefs? This was the issue that the Court of Appeal for the Seventh Circuit was required to give a preliminary ruling on in Korte v Sebelius 735 F.3d 654 (2013).

Cyril and Jane Korte own Korte & Luitjohan Contractors, a secular, for profit enterprise, that employs approximately 90 full time employees. About 70 of the company’s employees belong to a union which sponsors their health insurance plan. K & L Contractors provides a group health insurance plan for the remaining 20 non-union employees. The Kortes are Roman Catholic and seek to manage their company in a manner consistent with their Catholic faith, including its teachings regarding the sanctity of human life, abortion, contraception and sterilization. In August, the Kortes discovered that the company’s current health insurance plan includes coverage for contraception and they sought to terminate this coverage and substitute it for a health plan that conforms to the requirements of their religious beliefs.

One of the features of the Patient Protection and Affordable Care Act (known colloquially as “ObamaCare”) is that nonexempt group health insurance plans (such as that of K & L Contractors) must include all FDA approved contraceptive methods and sterilization procedures.

This includes oral contraceptives, such as the morning after pill. This mandate takes effect on Tuesday 1st January 2013. The Kortes sought injunctive relief in the District Court against the enforcement of the contraceptive mandate, alleging that it violated the Religious Freedom Restoration Act (RFRA) and the First and Fifth Amendments. After losing in the District Court, only the claim under the RFRA was pursued in the Court of Appeals. In a 2 to 1 decision, the injunction was granted.

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 the majority held that the Kortes established that they had some likelihood of success on the merits.

What is of especial interest is the majority’s rejection of the Government’s argument that no rights under the RFRA were implicated at all, given the company’s status as a secular, for profit enterprise. It was held that such an argument ignored the fact that the Kortes were also plaintiffs and that they owned 88% of the company. Much emphasis was placed on the facts that K & L Contractors is a family run business managed in accordance with the Kortes’ religious beliefs. Utilising the Citizens United Case as precedent, it was held that the fact that the Kortes operate their business in a corporate form was not dispositive of their claim. This seems to suggest that the company itself has rights under the RFRA, irrespective of its secular nature. This is an issue that Justice Sotomayor recently confirmed the Supreme Court has yet to address.

Whether the Seventh Circuit will uphold its initial ruling in the full hearing in the New Year remains to be seen. The case is interesting as the finding of the majority of the Court of Appeals can be contrasted with the position under Article 10 of the ECHR, which has been held to be a right that by its very nature is only exercisable by natural persons in contrast to other rights such as those enshrined in Article 10. Should the Court find for the Kortes on the merits, this would represent a significant expansion of the rights that secular, for profit enterprises can invoke under US law.

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R (Hodkin): A Signal to Rethink Religious Worship

By Ilias Trispiotis | 20 January 2013

In R (on the application of Hodkin) v Registrar General of Births, Deaths and Marriages [2012] EWHC 3635 the High Court acknowledged that a broader definition of worship should be part of the future judicial agenda. That could be a positive step, especially vis-à-vis non-theistic religions.

Nonetheless, the European Court of Human Rights (ECHR) has held in Kimlya v Russia (App. No.: 78636/01) that there is no consensus in Europe on whether Scientology is a religion. Nevertheless, it is significant that both the ECHR and the UN Human Rights Committee – paragraph 4 of the UN General Comment 22 is indicative – have consistently favored a generous interpretation of worship not confined to institutional forms of religious manifestation or traditional beliefs.

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Nonetheless, the judgment acknowledged that the Court of Appeal might need to reconsider its approach to religious worship in the future.

The High Court gave two main reasons for that. First, it is difficult to separate worship from religion. The issue should be treated as a whole since the reasons why a service does not constitute worship are interrelated with the reasons why a belief system is not a religion. Second, the Segerdal approach seems inadequate with regard to non-theistic beliefs. For it involves a definition of worship which revolves around ceremonies or formal acts revering a supernatural or divine power or principle. That might place an inappropriate limitation on the scope of religion in modern legislation.

Notably the European Court of Human Rights (ECHR) has held in Kimlya v Russia (App. No.: 78636/01) that there is no consensus in Europe on whether Scientology is a religion. Nevertheless, it is significant that both the ECHR and the UN Human Rights Committee – paragraph 4 of the UN General Comment 22 is indicative – have consistently favored a generous interpretation of worship not confined to institutional forms of religious manifestation or traditional beliefs.

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and violence are brought to justice. Humanitarian aid must and those responsible for fomenting or perpetrating hatred Thein Sein to ensure that the culture of impunity ends, Action must be taken. Pressure must be increased on Sein's reforms, cannot afford to let that happen. community, which has staked so much on President Thein cancellation, delayed or won by the military-backed Union position is undermined; the 2015 elections are either weeks. The suspected aim of instigating old prejudices last year's violence in Arakan was coordinated by elements No one has clear evidence, but it is widely believed that pouring across the Bangladesh border stems from years Rohingya are largely based on misinformation; the Anti-Rohingya hatred has now turned into wider anti- desiring the crisis as 'ethnic cleansing' involving 'crimes displaced. Human Rights Watch released a report this week, Rohingya refugees in camps in Bangladesh, but in recent years, Bangladesh has turned many away. When I visited the camps in 2008, a refugee told me: 'The Burmese say we are Bengali, go back to Bangladesh, the Bangladeshis say we are Burmese, go back to Burma. We are trapped between a crocodile and a snake. Where do we go?' The Rohingya are a stateless people. Last summer, the marginalisation and persecution of the Rohingyas reached unprecedented intensity when violence in June and October, led many to flee deep into Bangladesh. The Rohingya are largely based on misinformation; the widespread belief that they are illegal immigrants pouring across the Bangladesh border stems from years of propaganda by the regime. Campaigns of such violence and persecution are now being orchestrated. No one has clear evidence, but it is widely believed that last year's violence in Arakan was coordinated by elements within the regime and the army, to derail democratic reforms. So, too, is the wider anti-Muslim violence seen in recent weeks. The suspected aim of instigating old prejudices and stoking religious hatred is that Aung San Suu Kyi's position is undermined; the 2015 elections are either cancelled, delayed or won by the military-backed Union Solidarity and Development Party (USDP); or the military takes direct power. The people of Burma, and the international community, which has staked so much on President Thein Sein’s reforms, cannot afford to let that happen. Action must be taken. Pressure must be increased on Thein Sein to ensure that the culture of impunity ends, and those responsible for fomenting or perpetuating hatred and violence are brought to justice. Humanitarian aid must be provided for the displaced victims, with unhindered access. A serious review of the 1982 Citizenship Law is imperative, as are amendments to align it with international standards. Significant investment in inter-religious and inter- ethnic dialogue and reconciliation, anti-racism awareness programmes, public education and other initiatives to tackle intolerance must be made, and the extreme Burman Buddhist nationalist ideology should be rejected by a recognition of Burma’s ethnic and religious diversity, and the development of a political system that safeguards equal rights for all. Benedict Rogers is East Asia Team Leader with Christian Solidarity Worldwide, an organisation working for religious freedom through advocacy and human rights, in the pursuit of justice. He is the author of Burma: A Nation at the Crossroads. Religious Freedom: A 21st Century Paradigm By Brian J. Grim | 7 December 2013 The Pew Research Center’s studies on global restrictions on religion have played a role in shifting discussion from the 20th century paradigm of religious freedom, which focused primarily on the types of government restrictions seen in communist countries, to a 21st century paradigm that recognizes that the actions of societal groups can affect religious freedom as much as, and perhaps even more than, government actions. The findings of the studies show that 40% of the world’s countries have high restrictions on religion, and because several of these countries are very populous, this amounts to three-quarters of the world’s population. These findings are based on a comprehensive analysis of 198 countries and territories. Annually since 2006, the Pew Research Center (“Pew Research”) has carefully studied the laws and constitutions of each of these countries as well as human rights reports from major international sources. Based on these sources, Pew Research staff count and categorize each government restriction on religion and each reported social hostility involving religion. Examples of government restrictions include: - restrictions on the wearing of religious symbols, which exist in more than a quarter of all countries. For instance, the European Court of Human Rights recently found that British law does not adequately protect an employee’s right to display religious symbols in the workplace. - prison sentences for religious believers in response to actions motivated by their faith, which occur in nearly a third of all countries. In Burma, for example, Buddhist monks continue to languish in prison for their promotion of human rights and democracy. Examples of social hostilities involving religion include: - sectarian violence, which occurs in 17% of countries worldwide. In Iraq, for instance, even though the civil war ended years ago, acts of sectarian violence continue to occur almost daily. - religion-related terrorists, who are active in more than a third of countries worldwide, including in France, where a Rabbi and Jewish children were gunned down in a brazen act of terror in March 2012. Pew Research studies divide the world into five major regions – the Americas, sub-Saharan Africa, Europe, Asia-Pacific, and Middle East-North Africa – to examine broad geographic patterns. In each region, religious restrictions and social hostilities increased over the course of the five-year study. But restrictions rose most substantially in the Middle East-North Africa region – including through 2011, when the political uprisings known as the ‘Arab Spring’ occurred. What contributes to these high and rising religious restrictions and hostilities in the Middle East and North Africa? The study finds that, on average, each type of government restriction is associated with increased social hostility. And among the twenty types of government restrictions analysed, high government favouritism of one religion at the expense of others has the strongest association with social hostilities involving religion. How does the Middle East and North Africa compare with the rest of the world on this measure? About eight times the share of countries in the region have high or very high government favouritism of religion compared with the rest of the world. Therefore, it’s not surprising that social hostilities involving religion are high in the region. Likewise, social hostilities involving religion are associated with higher government restrictions. The study finds that among the thirteen types of social hostilities studied, sectarian violence between religious groups has the strongest association with government restrictions on religion. Again, how does the Middle East and North Africa stack up against the rest of the world on this measure? Sectarian violence is four times more prevalent among the countries in this region than it is elsewhere in the world. Therefore, it’s not surprising that government restrictions are high in these regions. Yet, the news is not all negative because this new way of looking at religious freedom is stimulating discussion and action among groups such as the United Nations, the European Parliament and the U.S. Congress. Our study found that in 2011 alone, 76% of countries had government or societal initiatives to reduce religious restrictions or hostilities. For example, the 2013 United Nations Alliance of Civilizations annual meeting featured the Award for Intercultural Innovation, which aimed to identify the most innovative grassroots projects that encourage intercultural exchange – including interfaith dialogue – around the world. Pew Research finds that interfaith dialogue is the most common way the human rights community seeks to bring about better relations among members of different religions. Dr. Brian J. Grim is Director of Cross-National Data and Senior Researcher in religion and world affairs at the Pew Research Center’s Forum on Religion & Public Life in Washington, D.C. He is also a visiting research associate and the co-principal investigator for the international religious demography project at Boston University’s Institute on Culture, Religion and World Affairs (CURA), where he co-edits the World Religion Database. He is author of The Weekly Number, a collection of statistics, updated every Monday, that highlight important findings or trends in global restrictions on religion. Brian is also on the Advisory Council for the new Cambridge Institute on Religion & Global Affairs (CIRGA), a multidisciplinary research center based at Clare College, Cambridge University, that addresses the nexus of religion and global affairs.
Taking Conscience Seriously
By Ronan McCrea | 26 November 2013

Ladele, one of four claims brought in Eweida and Others v UK [2013] IRLR 231, exemplifies an important public debate: has the embrace of gay equality by the liberal state become oppressive towards free conscience rights?

However, the nature of the belief is not really relevant. What was curtailed in Ms Ladele’s case was the action of refusing to provide a service on a discriminatory ground. Beliefs were not being regulated. Either the undermining of dignity inherent in discriminatory acts is sufficient to restrict conscience or it is not. If the dignity of racial minorities is important why is the dignity of sexual minorities less important? One does not treat conscience seriously by granting conscience exemptions in relation to relatively popular beliefs but not in relation to unpopular beliefs.

Anti-discrimination law and protection of freedom of conscience delineates the scope that we all have to hold beliefs and live according to them, and the kind of conduct from discrimination that we can all expect. It does no more. It does not involve a declaration that the discriminator is an evil person, just that they, like everyone, are not entitled to refuse services on particular grounds. Similarly, the boundaries that apply to the conscience of all are also applicable to religious individuals and institutions. We all have consciences which should all be treated with equal concern and respect by the State. The essence of free conscience is that it is the conscience itself rather than the content of our beliefs that is protected.

Dr Ronan McCrea is a Senior Lecturer in Law at UCL. This post draws on a presentation given to the Labour Law Discussion Group, University of Oxford on 18 November 2013.

The inclusion of sexual orientation as a protected characteristic affects beliefs that a significant number of Christians hold.

Free conscience deserves to be treated seriously. It is not beyond doubt that, once provision of a good or service to individuals is assured, the damage to dignity inherent in acts of discrimination is sufficient to warrant overriding individual conscience. But if we are to take conscience seriously then we protect the right to conscience not the right to particular, relatively popular forms of conscience. It is important for both sides to acknowledge the difficult consequences of the positions they espouse. Those who come down on the side of anti-discrimination have to swallow hard and say “My position means that a sincere individual will have to choose between their job and their beliefs, even where accommodating those beliefs would not result in the deprivation of service”. Those on the side of conscience must swallow hard and say “If it is conscience that we are respecting, it cannot only be popular and palatable conscience and my position means that we must accommodate the racist and the bigoted too”.

Ms Ladele’s claim was based on both religious freedom, and that the failure to exempt her from the anti-discrimination policy was itself discriminatory. In the end however, the decision came down to the familiar clash between the right to follow one’s beliefs and the need to prevent discrimination. Since anti-discrimination laws were first introduced, the debate has always been about the balancing of individual freedom with freedom from discrimination. The only difference now is that the inclusion of sexual orientation as a protected category means that this paradigm is being applied to beliefs that a significant numbers of Christians hold.

Change has been rapid in this area and conservative views to beliefs that a significant numbers of Christians hold. Since anti-discrimination laws were first introduced, the debate has always been about the balancing of individual freedom with freedom from discrimination. The only difference now is that the inclusion of sexual orientation as a protected category means that this paradigm is being applied to beliefs that a significant number of Christians hold. Ms Ladele’s lawyers argued that a balance had to be struck. They accepted that it was necessary to ensure that gay couples were able to access registration facilities but said that, once they could do so, to require all registrars not to discriminate so as to prevent the harm to human dignity inherent in acts of discrimination was disproportionate. This is where they failed to take conscience seriously. One can make the argument that dignity is not sufficiently important to outweigh conscience and that therefore discriminatory acts should not be prevented once the relevant service is provided. But that requires accepting the consequences of one’s position. Ms Ladele’s lawyers argued that her employer was not required to facilitate a racist registrar because such beliefs are not worthy of respect in a democratic society.

The appeal, which was led by the Attorney General of Malaysia on behalf of the Malaysian Government, emanated from a 2009 decision of the High Court wherein The Herald had called for a judicial review of the power of the Home Minister to place conditions on the use of the word “Allah” and its terms “Azan” (meaning the call for prayer) and “Masjid” (an Urdu term used to denote a mosque), ruling that such terms were peculiar to Islam. The apex court went so far as to hold that these terms formed part of Islam’s intellectual property and that the State could prevent their usage by other religious communities.

In choosing a path that echoes Pakistan’s deepening sectarian tension, the Malaysian court’s decision signals the increasing dilution of its multicultural society. A state sanctioned affirmative action programme according special rights to ethnic Malays has already been in place since the ‘70s that has led to the marginalization of Malaysia’s minorities. Pertinently, by definition, Islam’s term “Allah” means that a term that is not Islam’s birthright from the country’s Christians, raises vexed questions with respect to what it entails for Ahmadis in Malaysia, who have routinely had their mosques and buildings raided and their villages ransacked. A council-erected sign outside one of its buildings reads, “Gadians are not Muslims.”

This rising global trend of impudence and intolerance on the part of militant Islam is not a phenomenon. It is a trend. It is a trend that finds its home not in terrorist hotbeds but in malignant political and religious ideologies. The world’s preoccupation with militant Islam has brushed to the periphery the pervasiveness of such ideologies that are becoming increasingly rampant in countries such as Pakistan, Indonesia and Malaysia. These ideologies are pursuing a dangerous path towards a divinity winged with paradox. They can learn from Pakistan’s example that has spiraled into national anarchy at the hands of the oxymoron of a nation masquerading as protecting public discord and the interests of Islam bears an uncanny resemblance to Pakistan’s treatment of religious minorities, notably the Ahmadiyya Muslim Community (a minority Muslim sect (also referred to as Qadianis) deemed heretical by mainstream Muslims).

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