Mega Event Tactics: Brazil’s Sex Industry During the World Cup 2014
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Searching for the “T” in LGBT Advocacy
Gays: a Prohibited Class in CARICOM?
Uganda’s Anti-Homosexuality Law and Our Cultural Wars
From Torment to Tolerance and Acceptance to the Everyday: The Course of LGBT Equality in the UK
Scotland’s Gay Rights Journey
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Over to you, Parliament – The Significance of the Australian High Court’s Judgment on Same-Sex Marriage
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What Next for LGBT Equality?
Introduction
By Dr Meghan Campbell and Karl Laird

Equality has been described as the most challenging right but it is also one of the key rights in transforming institutions and societies to ensure that all people are empowered to create and enjoy a meaningful life. Equality is a universally recognised right that is often entrenched in national constitutions and a foundational value of many national and international legal orders. While there may be broad agreement on the value of achieving equality, the posts collected in this chapter emphasise that there continues to be deep disagreement on how equality should be conceptualised and how national and international laws and policies can further this universal aim.

After commencing with a collection of posts that focus upon some of the overarching questions that inform the current ‘equality agenda’ – namely affirmative action, new approaches to implementing and monitoring equality outside of the court structure and the impacts of austerity measures – the chapter is then sub-grouped on traditional and emerging status based grounds of inequality: women and gender; race and ethnicity; disability; poverty; LGBTIQ; and indigenous and human rights.

Both the victories and continuing struggles for gender equality best exemplify the continued confusion on the substantive meaning of equality. The judiciary has been one site where gender equality is proving to remain elusive. Throughout the common-law world, and in many civil jurisdictions, the composition of the judiciary remains overwhelming male, notwithstanding the increasing number of women entering law school and practicing in the legal profession. Indeed, there still remains deep resistance to even recognising the gender imbalance in the judiciary. Kim Rubenstein forcefully responds to that critique, stating: ‘it is difficult to dispute that we already have a system of affirmative action in favour of men. Do men really merit this outcome or is the system, by unspoken assumption, looking after them?’ (‘Rethink needed as new Australian High Court Justice appointment seems to maintain gender imbalance’ p 223). With the urgency to have women on the bench and the failed past attempts to achieve this, Belgium just recently took an important step forward and passed legislation requiring a gender quota for the Constitutional Court (‘Belgian Parliament Introduces Sex Quota in Constitutional Court’ p 226).

However, when it comes to realising gender equality in relation to reproductive issues, the response has been decidedly mixed. On the positive side, the Convention on the Elimination of All Forms of Discrimination Against Women Committee held that ‘failing to provide maternity benefits is a direct form of gender based discrimination’ (‘Recognising Maternity Leave as a Human Rights Obligation’ p 232). This is an important recognition as it ensures that women are not financially punished for having children. In Northern Ireland, the country’s strict laws on abortion were challenged on the grounds that it discriminated against women living there who had to incur the cost of travelling to other parts of the UK where the procedure is legal and available. The High Court held that this increased difficulty faced by women in Northern Ireland did not amount to discrimination under Article 14 of the ECHR. Beth Grossman observes that ‘it seems fundamentally unfair that a reproductive right long established in and enjoyed by women in every other country of the United Kingdom be logistically and financially restricted for those in Northern Ireland on relatively technical legal grounds’ (‘The Uneasy Decision in A and B v Secretary of State’ p 241). Richard Martin explains that due to several other high profile cases, though, the Department of Justice in Northern Ireland has engaged in a public consultation on reforming the criminal law on abortion to consider allowing abortion in cases of a fatal fetal abnormality or where pregnancy is the result of rape (‘Northern Ireland’s Human Rights Commission Granted Leave for Judicial Review to Challenge the Country’s Near-Blanket Ban on Abortion’ p 242). While this does not guarantee increased access to reproductive services, including the voice and participation of Northern Irish women in the design of the law is crucial.

India has also seen some troubling developments in relation to gender equality and reproduction as, ‘women voluntarily opt for undergoing sterilisation as a trade-off for cash and welfare incentives. However, many women are trading off their lives’ (‘Revisiting Mass Sterilisation in India-Population Management or Menace?’ p 228). The experience of these women highlights the importance of addressing in tandem gender and socio-economic disadvantage. Notwithstanding women in Australia having enjoyed recognition and protection against pregnancy discrimination for decades, a recent survey revealed that ‘49 per cent of mothers... had experienced discrimination in the workplace.’ Disturbingly, only 13 per cent of those women who experienced discrimination sought legal advice (‘Pregnancy Discrimination in the Workplace’ p 231). In a landmark decision in Burwell v Hobby Lobby, the US Supreme Court decided that closely held corporations are not required to facilitate access to contraception on the basis of the corporation’s religious beliefs. Justice Ginsburg ‘points out that contraceptive coverage is essential to women’s health and reproductive freedom and the judgment jeopardises both of these interests’ (‘Burwell v Hobby Lobby’ p 236).

Contributions to this chapter also highlight the troubling issues of gender equality, amplified by online spaces in the digital age. Thiago Alves Pinto highlights that the same ‘problems of victim blaming, stalking and gender discrimination ‘are taking a new shape in space which allows for more anonymity, thus accountability’ (‘Gamergate and Gendered Hate Speech’ p 247). Ann Olivarius highlights the weakness of the current criminal and civil responses to revenge porn (‘Harassment Against Women Goes Online: The Problem of Revenge Porn’ p 248). Laura Hilly asks some essential questions in response to gender discrimination on the internet to ensure legal responses do not further reinforce the shaming of female sexuality and the stigmatisation of women who are not distressed or ‘have no desire to apologise for taking private photographs’ (‘UK Efforts to Criminalise Revenge Porn: Not a Scandal, but a Sex Crime’ p 249).
Similar to gender equality, this year has seen promising developments in the path towards full equality for the LGBT people, but also some distributing trends. Importantly, there has been some welcome attention paid to the rights of transgender persons in particular, who often seem to be marginalised in the LGB discourse. Such marginalisation is highlighted by the fact that the prominent UK LGB charity Stonewall does not advocate on behalf of transgender persons. As Peter Dunne points out, the LGB community has at best neglected the transgender community, at worst it has compromised gender identity rights to promote greater equality for gay men and lesbians (‘Searching for the “T” in LGBT Advocacy Peter Dunne by Peter Dunne’ p 276). Last year debates surrounding same-sex marriage dominated the LGBT dialogue in the United States in 2015 and the Supreme Court looks set to decide this issue once and for all as it hears oral argument in the case of Obergefell v Hodges as this publication goes to print (‘What next for LGBT equality?’ p 287). However, in many other countries marriage is an institution that gays and lesbians in many other countries could only ever dream of joining, given the prevalence of laws criminalising same-sex intercourse. Uganda’s recently enacted anti-homosexuality law is but one example of this (‘Uganda’s anti-homosexuality law and our cultural wars’ p 279). The fact that the Constitutional Court of Uganda invalidated the legislation demonstrates that gays and lesbians still require insulation from majoritarian forces in many jurisdictions around the world. That is not to say, though, that the judiciary will always expand the rights afforded to the LGBT community. This much is evident from the fact the Supreme Court of India re-criminalized homosexuality four years after it was de-criminalized by the Delhi High Court (‘Naz and Reclaiming Counter-Majoritarianis’ p 283).

As Jonathan Cooper discusses, gays and lesbian equality in the UK has advanced a great deal from when the Wolfenden Committee recommended the de-criminalisation of homosexuality in 1957 (‘From Torment to Tolerance and Acceptance to the Everyday: The Course of LGBT Equality in the UK by Jonathan Cooper’ p 280). This post demonstrates, however, that it is important not to become complacent and too self-congratulatory, given that many LGBT people around the world are still persecuted on a daily basis.

It worth touching briefly on the remaining status based grounds for equality. There has been some important decisions and legislation on racial equality. Helen Mountfield observes that the judgment in Moore & Coates v Secretary of State for Communities and Local Government (Equality & Human Rights Commission intervening) is important because it ‘counters the suggestion that singling out applications for planning permission by gypsies and travelers for scrutiny is not discriminatory because they are asking for something different from the settled community rather than symmetrical “equal treatment”’. (‘Recognising Travellers’ Needs: The Courts Begin to Move’ p 260). In both the USA and South Africa there have been crucial judgments in the development of raced based affirmative action. In Schuette v BAMN, Justice Kennedy dodged the ban on racial preference whereas Justice Sotomayor argued that the Michigan ban ‘was especially burdens minorities by requiring them to amend the state constitution in order to pursue a policy that is in their interest!’ (‘Schuette v BAMN: A Need to Rethink Equal Protection’ p 263). There was a similar split within the South African judiciary in South African Police Services v Solidarity obo Barnard on the standard of review for affirmative action cases. Andrew Wheelhouse reflects that although the push for a heightened standard review has been defeated, ‘it will be interesting to see if the dignity analysis is taken up in subsequent cases’ (‘A House Divided: Grappling with Affirmative Action in South Africa’ p 261). This year’s blog posts also highlight the importance of transforming the conceptualization of disability from a medical issue to a social issue that focuses on the existent social barriers (‘Mainstreaming Disability in Development: The Need for a Disability-Inclusive Post-2015 Development Agenda’ p 266).

It is this theme of wary advancement, simultaneously acknowledging successes as well as the need for vigilance on a number of issues, that emerges from an analysis of this year’s Blog posts on equality. Although progress been made and this ought to be celebrated, there is much more to be done before those who have historically been marginalized by society achieve the equality necessary to create and enjoy a meaningful life.

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The Equality Agenda in 2015: Part I – The Constitutional Issues

By Bob Hepple | 5th March 2015

This will be a year of political and constitutional turbulence for equality law. What changes can we expect after the general election? Professor Sir Bob Hepple QC examines some of the key issues and makes proposals for the priorities of an incoming government. This post reflects on the position of equality law and the protection of citizens in light of the increasingly precarious relationship between the UK and the European Court of Human Rights and the EU, as well as its devolved regions.

So far, the political parties have said little specific about their intentions in regard to equality law. The Conservatives’ threat to withdraw from the European Convention on Human Rights (ECHR), and their undertaking to hold a referendum on future membership of the EU, could fundamentally affect the constitutional basis of our equality law. One of the main purposes of the Equality Act is to make our domestic law consistent with Britain’s international and European treaty obligations. The courts interpret the Act so as to give effect to those obligations. David Cameron and his colleagues have announced the intention to “end the ability of the European Court of Human Rights to force the UK to change the law”, and to allow “only the most serious cases” to proceed. Dominic Grieve, the former Conservative Attorney-General, has said that this move would be “damaging for the UK and for human rights across Europe”, and warned that non-compliance with the European Convention on Human Rights would call into question the devolution settlements for Scotland, Wales and Northern Ireland, which all enshrined convention rights.

The Human Rights Act already preserves the sovereignty of parliament to refuse to change the law, although if parliament does so the UK may be in breach of its international obligations. Unless the UK withdraws from the Council of Europe and the EU altogether, victims of discrimination and other breaches of convention rights will still be able to go to the Strasbourg Court, putting us back to the pre-2000 position. There have been several discrimination cases where the ECHR has “led to pioneering decisions” for example on the rights of gay people and transsexuals, the right to manifest religious belief and dismissal on grounds of political opinion. If implemented, the proposals will create confusion and uncertainty in an already complex area of law. If a British Bill of Rights replaces the ECHR it is unclear what it will say about the principle of equality as a fundamental human right.

There appears to be no likelihood of Cameron succeeding in negotiating any changes to the EU Treaty which would remove or modify the principle of non-discrimination against EU nationals. If he makes this amendment a condition for continued membership of the EU, precipitating a “Yes” vote for withdrawal, the UK will lose one of the major pillars of domestic equality law. Without the EU, British law would not have the principle of equal pay for men and women for work of equal value, nor laws against discrimination because of age, sexual orientation and religion, nor equal treatment of part-time, fixed-term and agency workers. The case law of the Court of Justice of the EU over the past 40 years has vastly expanded the scope of our domestic law. Withdrawal from the EU would be a major setback for the advancement of equal rights in Britain.
Another constitutional issue which will loom large, is the devolution of powers to Scotland. The report of the Smith Commission (published on 27 November 2014) envisages that the Equality Act will remain a “reserved matter” (for the UK Parliament), but goes on to say that “the powers of the Scottish Parliament will include, but not be limited to, the introduction of gender quotas in respect of public bodies” and that “the Scottish Parliament can legislate in relation to socioeconomic rights in devolved areas”. It appears from paras. 63 and 64 of the report that there will be devolved legislative powers over the operation of tribunals, such as in respect of rules and fees, even though substantive discrimination law remains reserved. Scottish and Welsh Regulations on the enforcement of the public sector equality duty (PSED) already go further than those applicable to English public authorities. We face the not unwelcome prospect of “regulatory competition”, which may encourage England to follow the more progressive practices in the other home countries. However, significant differences between these countries could be confusing and burdensome for UK-wide companies.

This post is based on Sir Hepple’s article in the Equal Opportunities Review (Issue 255, Feb. 2015) and presentation at the TUC/EOR Discrimination Law 2015 conference on 23 January 2015.

Professor Sir Bob Hepple QC is the immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

The Equality Agenda in 2015: Part II – Access to Justice
By Bob Hepple | 9th March 2015

In this post, Professor Sir Bob Hepple’s ‘Equality Agenda in 2015’ focuses on the impact of the recent introduction of employment tribunal fees. What might be done to reduce the cost of tribunals to the taxpayer while still ensuring access to justice?

2015 marks the 800th anniversary of Magna Carta, so it is not inappropriate to recall clause 40 (still on the statute book), which states: “To no one will we sell, to no one will we refuse or delay, right or justice.” The imposition of employment tribunal fees since 29 July 2013 has proved to be a devastating obstacle to access to justice contrary to the spirit of Magna Carta, denying justice to thousands of victims of discrimination who cannot afford the fees and have also been deprived of free legal advice and representation.

Evidence gathered by the Trade Union Congress (TUC), Citizens’ Advice in England and Scotland, the Law Society of Scotland and researchers at Bristol and Strathclyde universities show that people with genuine claims are being prevented from lodging them because of inability to pay. All types of discrimination claim, for which a fee of £1,200 is now payable by a single claimant, fell by around 80%, and sex discrimination claims by 91%, in the period April to June 2014 in comparison with the previous year. The latest statistics (July to September 2014) show a slight increase in sex discrimination claims but this is still more than 80% below pre-fees level.

Hopes that the courts would strike down the Fees Regulations have now been dashed on two occasions. In February 2014 in R (Unison) v Lord Chancellor (EHRC intervening) [2014] EWHC 218 (Admin), Moses LJ and Irwin J held that the level of fees did not breach EU principles of effectiveness or equivalence, nor was there a breach of the PSED. They concluded that the application was premature because there was insufficient evidence of the disparate impact on individuals of a protected class. A second application relied solely on a breach of the principle of effectiveness and of unjustified indirect discrimination. On 17 December 2014, this was dismissed by Elias LJ and Foskett J (Unison No.2, case CO/4440/2014). The Court indicated it could not evaluate the arguments without reliable evidence as to the impact on particular individuals; and, in any event, the Government’s aims in setting up the fees scheme were legitimate and proportionate.

The Government is currently reviewing its fees policy and it can be expected that if re-elected to office, the Conservative Party will maintain a fee-charging system, possibly with some modifications, for example through an expansion of the fees remission schemes. What reforms are possible that would simultaneously reduce the cost of tribunals to the taxpayer and ensure access to justice? The objective of reducing unmeritorious claims is already met by various rules on striking out, deposits and costs. Paradoxically, s.138 of the Equality Act (based on earlier legislation) was repealed in 2013. This helped to avoid unnecessary litigation by allowing a person who thought there may have been unlawful discrimination to send a questionnaire on a prescribed form to a potential respondent, and thus could avoid litigation where an innocent explanation was given. The deletion by the Deregulation Bill 2014–15 of the power of ETs under s.124 Equality Act to make wider recommendations has also removed an incentive for employers to take remedial action that would prevent future litigation. A Government that is serious about reducing litigation would restore ss.124 and 138.

Greater use of preliminary hearings is another way of reducing lengthy and expensive hearings. There has been a considerable
increase in the number of such hearings. No further fees are charged for these. The former President of Employment Tribunals, David Latham, has pointed out that these hearings can resolve many issues. It will be necessary for an incoming Government to evaluate the impact of the new system of early conciliation. In addition, the “arbitration alternative” under the auspices of Acas (introduced in 1998 for unfair dismissal but not utilised) should be re-examined, with a view to adapting it for discrimination cases. The advantages of such an alternative could be speed, informality, an investigative approach and cheapness – all aims of the original tribunal system.

This was based on Professor Sir Hepple’s article in the Equal Opportunities Review (Issue 255, Feb. 2015) and presentation at the TUC/EOR Discrimination Law 2015 conference.

Professor Sir Bob Hepple QC is immediate past chair of the Equal Rights Trust and one of architects of the Equality Act 2010.

The Equality Agenda in 2015: Part III – Advancing Equality
By Professor Sir Bob Hepple QC | 12 March 2015

In a climate of public spending cuts and with political priorities in areas such as the NHS, there are two important measures for advancing equality that would not involve major public expenditure.

1. Equality representatives (ERs)
If an incoming Government enacts only one new piece of equality legislation it should be to strengthen the role of equality representatives (ERs) at workplaces who would be involved in equality audits and in drawing up and enforcing employment and pay equity plans. One opportunity for this kind of engagement will arise when an employment tribunal has ordered a mandatory pay audit, under s.98 of the Enterprise and Regulatory Reform Act 2013, following an equal pay breach.
There is a ready-to-hand model in the Safety Committees and Safety Representatives Regulations 1977 and the Health and Safety (Consultation with Employees) Regulations 1996. A regulation for ERs could provide that if an employer recognises a union it must consult with union-appointed ERs on equality matters, and provide them with paid time-off and training. The regulations could go further than the health and safety regulations by requiring consultation with other representatives if there is no recognised union.

This needs to be supplemented by bringing into force s.78 Equality Act, which enables a Minister to make regulations requiring private and voluntary sector employers with at least 250 employees to publish information relating to differences in pay between their male and female employees. The Coalition Government did not implement this power, arguing that its voluntary “Think, Act, Report” (TAR) programme was a sufficient encouragement to employers to be transparent about pay for men and women. However, TAR has failed to deliver the promised target of getting private and voluntary sector employers to be more transparent.

2. Strengthening the public sector equality duty (PSED)

In the period of austerity in which the PSED has functioned since 2008, it has played an important role in delaying or stopping cuts in public services where it has been possible to show that the authorities failed to have “due regard” to the impact on one or more protected groups. The effective enforcement of the duty by judicial review (JR) will be seriously hampered if the Criminal Justice and Courts Bill 2014–15 is enacted in its present form (at the time of writing this is a matter of “ping-pong” between Lords and Commons).

The Bill would require the High Court or Upper Tribunal to refuse permission for JR or withhold a remedy if they think it “highly likely” that the outcome for the applicant would not have been substantially different had the conduct of the public authority not occurred. The Bill also establishes a presumption that interveners in a JR would, unless there are exceptional circumstances, have to pay the costs incurred by another party as a result of the intervention. This will have a deterrent effect on interventions by the cash-strapped EHRC and other organisations like the Trade Union Congress. The EHRC’s interventions, such as in the Bracking case [2014] EqLR 60, have had a major impact on the outcomes of JR. There are also provisions in the Bill on costs-capping orders, which risk restricting access to the courts. These changes to JR, if enacted before the election, should be reviewed by an incoming Government.

The next review of the PSED is due to take place in 2016. Among the issues that need to be considered are the extent of the duty. The present “due regard” standard means that the focus of JR applications has had to be on procedures – a “tick-box” approach – rather than substance. An incoming Government should remedy this by reformulating the duty so as to oblige public authorities to eliminate discrimination and to take proportionate steps towards the advancement of equality. This could encourage public bodies to institute real changes, which would be judged by the EHRC and the courts on the basis of the proportionality principle.

This is closely linked to the issue of engagement of stakeholders and ERs (above). The all-important function of the public duty is to involve stakeholders in formulating and implementing equality plans. The current regulations for England (unlike those for Scotland and Wales) do not require the authority to publish details of their engagement with stakeholders. They should oblige the authority to take reasonable steps to involve stakeholders.

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Rights Protection in 2014: A Review of the Indian Supreme Court

By Jayna Kothari | 29th January 2015

2014 was an interesting year for protection of fundamental rights by the Indian Supreme Court. We undertook an unprecedented rights review at the Centre for Law and Policy Research.

One of the strongest areas of protection in 2014 has been around equality on the basis of sex and gender. 2014 saw the Supreme Court decide two big cases where it overruled discrimination based on sex. One of them was National Legal Services Authority vs. Union of India and Ors. (“NALSA”) Writ Petition Civil No.604 of 2013 where the National Legal Services Authority initiated a public interest litigation to remedy the failure of state law and policy to recognize and protect transgendered persons. The Court established that the anti-discrimination provisions under Articles 14 to 16 included the right not to be discriminated against on the grounds of sexual orientation and gender, and that the word “sex” in Articles 15 and 16 of the constitution also included other self-identified gender identities. The Court held in NALSA that all the state’s laws and policies must let individuals to decide their own gender and record this as “male”, “female” or “third gender”.

Equal Opportunities Review (Issue 255, Feb. 2015)
Another important judgment on sex discrimination was Charu Khurana and Ors. v. Union of India and Ors. Writ Petition Civil. No.78 Of 2013. Here, a female Petitioner was refused membership as a make-up artist the Cine Costume Make-up Artists and Hair Dressers Association, whose rules only allowed men to be make-up artists. The Court held that the Petitioner could not be denied membership, as discrimination on grounds of gender was a clear violation of her right to equality and a denial of "her capacity to earn her livelihood which affects her individual dignity." Interestingly, the Court applied this requirement of non-discrimination on the Association, a private entity, and held that any clause in the bylaws of a trade union calling itself an Association cannot violate Articles 14 and 21. This opinion allows for the horizontal application of fundamental rights and breaks away from its earlier restrictive application in Zoroastrian Co-operative Housing Society Ltd Case No. Appeal (civil) 1551 of 2000.

Union of India vs. Atul Shukla Civil Appeals No. 4717-4719 of 2013 was significant as the first Supreme Court ruling on age discrimination. The Indian Constitution does not expressly prohibit discrimination based on 'age' under Articles 15 and 16. The case challenged the terms of service for officers in the Indian Air Force, prescribing different ages of retirement for different officers. The Court held that classification only on the basis of age resulting from a deliberate decision to create a younger workforce was a violation of Article 14 guaranteeing equality. Though the Court did not recognise age to be a prohibited ground of discrimination under Articles 15 and 16, this case will intensify the Court's scrutiny of age-related discrimination.

Finally there were some important decisions around the death penalty which, while not challenging the death penalty, laid down important law relating to procedural administration of death row and mercy petitions. In Shatrughan Chauhan & Anr. vs. Union of India and Ors 1 Writ Petition (Criminal) No. 55 Of 2013 the Court commuted the death sentences of 15 convicts whose mercy petitions had been rejected by the President on the ground of mental illness. The Court laid down guidelines for commutation and evaluated various supervening circumstances: prolonged delay in execution of a death sentence, insanity, mental illness/ schizophrenia of the convict. The Court stressed that no exhaustive guidelines or outer time limits could be prescribed for disposing mercy petitions and the analysis must proceed on a case-by-case basis, entailing that the court must step in when the delays were "unreasonable, unexplained and exorbitant. "More procedural protections came through in Mohd. Arif and Ors. v. The Registrar, Supreme Court of India and Ors Writ Petition (Criminal) 77 Of 2014. A Constitution Bench, by a 4:1 decision, held that judicial review of death penalty cases must be heard in open court by a bench of at least three judges rather than just by circulation, justifying that the right to life could be deprived only upon following a procedure that was 'just', 'fair' and 'reasonable'.

This Review throws up interesting conclusions. First, the year 2014 has shown that the Supreme Court is indeed a site for the campaign of sex equality. The progressive NALSA decision is in stark distinction to the 2013 Koushal judgment Civil Appeal No.10972 of 2013 where the Court refused to overrule the criminalization of homosexuality. Secondly, the Court is making positive developments in unexplored areas. For instance, the Court has held that the Constitution allows for the horizontal application of fundamental rights and rights of persons with mental disability on death rowpersons with mental disabilities in the context of the death penalty. What is disappointing is the lack of any strong decisions on social rights. Besides the landmark Pramati judgment Writ Petition (Civil) No. 416 of 2012 affirming the constitutionality of the Right of Children to Free and Compulsory Education Act 2009, we see no judgment on social rights like housing, health or livelihood.

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Public Consultation on the Overhaul of Hong Kong Anti-Discrimination Laws
By Sebastian Ko | 26th September 2014

On 7 October 2014, the Hong Kong Equal Opportunities Commission ("EOC") will conclude its inaugural review of the anti-discrimination legislation (the "Consultation") in the Special Administrative Region of China (the "SAR"). The Consultation represents an ambitious project to align domestic laws with Hong Kong’s constitutional guarantees of equality and obligations under international covenants and with contemporary social values. Simplification, modernisation and harmonisation of laws and mainstreaming of equality principles are the cornerstones of the Consultation.

Among other issues, the EOC has invited comments on the following issues:

• whether the existing anti-discrimination laws, namely, the Sex Discrimination Ordinance, the Disability Discrimination Ordinance ("DDO"), the Family Status Discrimination Ordinance and the Race Discrimination Ordinance ("RDO"), should be unified in one legislation;
• whether the grounds of protection should be expanded to include nationality, citizenship and residency; de facto relationships;
Current laws protect people from discrimination, harassment and victimisation on the grounds of their sex, pregnancy, marital status, disability, family status and race. The laws apply to the contexts of employment, education, retail consumption and government services. However, the EOC has identified numerous gaps and limitations in the existing anti-discrimination framework as well as discrepancies in the way the four Ordinances protect the relevant grounds. For example, the RDO does not cover government bodies, unlike the other three Ordinances. The law does not protect a person from sexual harassment by another in a common workplace, where there is no employment relationship between them. Indeed, the EOC’s public consultation document contains a long list of issues for legislative spring-cleaning.

The Consultation is motivated by the urgent need to ease certain social frictions that have flared in Hong Kong’s rapidly changing demographics. The expansion of the racial grounds is meant to address the growing prejudice experienced by new immigrants and visitors from Mainland China. Discrimination between ethnic Chinese Hong Kong-ers and ethnic Chinese Mainlanders, for example, is not unlawful in the RDO. The scope of the Consultation, however, excludes examination of the potential grounds of sexual orientation, gender identity, intersex status and age. It will be difficult for the Consultation to thoroughly address the reform of family and marital status protections in light of such exclusions. The EOC has indicated that it will consider reviewing these grounds in separate consultations.

The EOC seeks to modernise Hong Kong laws by drawing on international practices, and has made preliminary recommendations based on the laws of Australia and England and Wales. While these recommendations are sensible, whether the pending law reform will garner public support depends on how different interests are balanced by the defences, exemptions and procedural safeguards –relevant proposals have yet to be disclosed. Moreover, a major concern for Hong Kong-ers is that legal reform could lead to a Pyrrhic victory for “equality” when underlying tensions are left unresolved, if not aggravated. Anti-Mainlander sentiments have been attributed to ineffective immigration policies vis-à-vis Mainland arrivals, which Beijing has overriding influence over due to Hong Kong’s status as a SAR. This throws a unique spanner in the works for adopting suggestions based on foreign laws.

The outcome of the Consultation is expected to have enormous impact on equality and human rights protection in Hong Kong. The EOC will submit its findings to the Hong Kong government in mid-2015.

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Does Affirmative Action Create Unfair Advantage?
By Dimitrina Petrova | 18th June 2014

Affirmative action, also known as positive action, is a controversial issue in many contexts.

For example, Black economic empowerment and employment equity measures have come under attack in South Africa; racial criteria in university admissions in the USA have been contested in the courts; constitutional provisions in Malaysia favouring Bumiputra are said to have outlived their legitimacy and to be creating unfair privileges; and in Britain, the public sector equality duty is said to favour some disadvantaged groups at the expense of others.

As with many expressions that dwell in both political and legal quarters, have different meanings in different contexts and whose meanings have changed over time, “affirmative action” is controversial at two levels. At the more superficial level, disagreement is due to the ambiguity of the term: once a strict definition is adopted, disagreement about the meaning of words can disappear. At a deeper level, having agreed the meaning of words, people can then truly disagree about affirmative action because they have differing notions of fairness and justice, and thus different political attitudes, whether conscious or not.

But it is safe to assume that whatever our political values, we all oppose the creation of unfair advantage: this is our common ground. From here, we will try to identify principles and criteria for the legitimate use of affirmative action. EU law allows “special measures providing for specific advantages in order to make it easier for the underrepresented [group] to pursue a vocational activity or to prevent or compensate for disadvantages in professional careers”. But are those aims sufficient? It would be interesting to see if experts could agree an over-arching purposive principle, for example, that affirmative action is justified so long as it has significant positive results in advancing equality?

Provided we agree at this very general level, the question is how such a broad principle can be translated into specific policy guidance. When considering various “special measures”, such as quotas, reserved places, targets, preferences for a limited period, etc., how do we ensure that they are proportionate to the legitimate aim of advancing equality? Another tricky issue is how to define the ground for the preferential measure, so as to reflect the reality of inequalities? Is one characteristic, say ethnicity, or religion, taken alone, always appropriate? For example, if Suni Muslims are excluded from political participation, and their relative wealth or poverty does not matter, it may be justified to tie the positive measure to religion alone. But if poor Roma children in Eastern Europe face obstacles to accessing pre-school, and the same is true for poor non-Roma, would it be fair to base a positive measure on ethnic criteria? How much should the overlap between ethnicity and poverty matter for our affirmative action criteria? In other words, how does one ensure that justice for groups does not create injustice for individuals? Or is the lack of such a balance a part of the price?

The 2008 Declaration of Principles on Equality stated: “To be effective, the right to equality requires positive action. Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.” This principle, in my view, is a game changer. It reflects a departure from the notion of formal equality, i.e. identical treatment which could be complemented by the occasional exception, in the form of affirmative action (which is tolerated rather than due, and always open to attack by aggrieved individuals). With such a departure, the destination is a right to substantive equality which requires positive action. It transforms the latter from an exception to a necessary element within the content of the right to equality.

From this perspective, our work at The Equal Rights Trust has provided abundant evidence that the bigger problem around the
world today is not what is happening, but what is NOT happening: the scarcity of affirmative action. The damage done by the occasional abuse of positive action (in Malaysia, for example), is dwarfed by the damage done by the persisting abstention from positive action, which perpetuates and entrenches the power imbalance everywhere. If the growth of inequality is increasingly acknowledged as one of the biggest challenges of this century, affirmative action can no longer remain an afterthought.

Dr Dimitrina Petrova is the Executive Director of the Equal Rights Trust.

Everyday Utopias and Challenging Preconceptions
By Claire Overman | 10th May 2014

Davina Cooper’s “Everyday Utopias: The Conceptual Life of Promising Spaces” considers the contribution that “everyday utopias” – networks and spaces that perform regular daily life in a radically different fashion – make to transformative politics. They do this by demonstrating the viability of alternatives to dominant social structures: there is no clearer way to challenge basic presumptions of how things should work than by successfully showcasing alternatives.

Writing for the Hub, Dr. Cooper has discussed the advantages of such an approach through the sphere of equality rights for nudists. In particular, it forces us to consider the practical implications of provision for equality. She cites the example of urban spaces, designed for clothed individuals – dirty benches, tarmac roads and narrow pavements implicitly accommodate clothed, rather than naked, activity. Thus, thinking about equality in this more practical way allows us to abandon our attachment to the dominant social norm.

That this approach to considering equality is beneficial can be seen in the sphere of disability discrimination. An example is the conceptual shift in thinking about the causes of such discrimination. Certain statutory material adopts the “medical” definition of disability, which attributes the difficulty which a disabled individual may have in everyday life to that disability. For instance, Section 6 of the UK Equality Act 2010 states that a person is defined as having a disability if he or she has a physical or mental impairment, and that impairment has an adverse effect on day-to-day activities. Contrast this with the “social” definition of disability, which holds that an individual’s everyday difficulties stem not from the impairment itself, but from the fact that the world around them has been constructed for the able-bodied majority. Article 1 of the UN Convention on the Rights of Persons with Disabilities adopts this definition. It states that people with disabilities include those whose impairments, “in interaction with various barriers,” may hinder their effective participation in society. An individual in a wheelchair isn’t disadvantaged because of her wheelchair. She’s disadvantaged because, catering for the non-wheelchair-bound majority, steps rather than ramps are the preferred method of accessing buildings.

Another point made by Dr. Cooper in “Everyday Utopias” is that equality as a normative principle does not exist in a vacuum, but is instead inextricably linked with other norms. Her example of nudism is again illustrative. She notes that, even where it is permitted, it still operates within the confines of other norms: “organized associational nudism is replete with rules, conventions and etiquette…how to cook, deal with menstrual blood, manage sweat and other personal secretions…” The norm of equality in this example has to compete with other norms of acceptable standards of hygiene, amongst others.

Once this complexity of normative interaction is revealed, we can look at attempts to counter discrimination with a fresh perspective. Consider equal pay for men and women. One argument used to resist equal pay measures is that women will inevitably contribute less to the workforce. For instance, Posner’s argument from 1989 was that “the average woman expects to take more time out of the work force to raise children,” meaning that she will invest less in human capital than her male counterpart.

However, employing the broader view advocated above, we see that the hindrance to women’s effective participation in the workforce stems not from them being child-bearers, but from the fact that the norm is for women to take on the role of childcare. The case law in this area is promising in its willingness to look at the influence of such entrenched norms when considering equality provisions. In the case of Markin v Russia App. No. 30078/06, the European Court of Human Rights held that providing maternity leave to servicemen but not servicewomen “ha[d] the effect of perpetuating gender stereotypes and is disadvantageous both to women’s careers and to men’s family life.”

Dr. Cooper’s approach to considering equality law is therefore progressive, and appears to be part of a welcome trend of looking beyond the individual victim of discrimination and to society and its norms. In doing so, we are able to reconsider what, not long ago, were non-negotiables (that women would stay at home and care for children, for instance). It allows us to redefine the limits of equality law, by forcing us to reconsider what truly drives differences in treatment.

Claire is a former editor and communications manager of the Oxford Human Rights Hub. She will be commencing pupillage at One Brick Court in October 2015.
International Women's Day: Women and Girls Struggle for Equality in the Courts
By Blakeley Decktor | 8th March 2015

What better time than International Women’s Day to embolden citizens to exercise their power over the judicial process? The Gender Justice Uncovered Awards provide a vehicle for the public to be vigilant with the justice system by holding judges accountable for their decisions.

What started as a call from women to end workplace discrimination has grown into a global movement to address inequality, violence and discrimination against women and girls. Every 8th of March on International Women’s Day we ask political leaders to address these issues, but rarely do we make the same appeal to judges. What better time than International Women’s Day to embolden citizens to exercise their power over the judicial process? The Gender Justice Uncovered Awards provide a vehicle for the public to be vigilant with the justice system by holding judges accountable for their decisions.

I have written previously about Bludgeon nominees, judicial decisions where judges relied on stereotypes and prejudice failing to uphold the human rights of women and girls. This post highlights Gavel nominees: influential examples of the judicial process as a space for promoting human rights. Gavel awards praise the work of those committed judges who lay out a clear framework for advancement of human rights, creating a path for others to follow.

Some victories come at the expense of irreparable loss. In Spain courts failed to protect a seven-year-old girl when they allowed her father unsupervised visitation, despite his history of gender violence against women. Her mother Ángela implored the court to order supervised visits, filing over thirty complaints until tragically, on April 24, 2003, the girl’s father murdered her during a visit, unsupervised. Following a 12-year court battle, the CEDAW Committee condemned Spain in 2014 for relying on negative stereotypes to diminish the seriousness of domestic violence. The Committee called for training to eliminate such stereotypes and demanded the State always consider gender-based violence in child custody and visitation proceedings. Currently, Spain is charged with implementing the Committee’s recommendations, a phase where the political will to prioritize the elimination is essential to the process and which presents an opportunity for the State to demonstrate its commitment to combat this type of violence.

After fifteen years, a Colombian court held the military accountable after two active-duty soldiers raped a woman in 1999. When the woman first came forward, the Court denied the military’s responsibility holding that the soldiers’ conduct was not related to their military service. Only after a new court visibilized the systemic use of violence against women as a tactic of war, the representations of masculinity and femininity that armed groups instill in its members, and the ways women are targeted during conflict, could the court properly hold the Army responsible. It required the military mandate training and implement guidelines to prevent, investigate and punish violence against women.

The struggle for workplace equality continues in Argentina as an applicant was refused employment as a bus driver specifically because she was a woman. A decision in the case by an appeal court was first nominated for a Gavel Award in 2010 because it called for an end to gender-based discrimination. The case later reached the Supreme Court, which has affirmed women, indeed, have a right to choose their profession free from discrimination.

In Botswana, where the penal code criminalizes consensual same-sex sexual conduct, the High Court ruled that the State must afford LGBT rights organization LEGABIBO state-registration. The High Court guaranteed that Constitutional protections apply to all individuals and affirmed that the criminal statute involving sexual conduct criminalizes behavior, not attraction. The Court praised the objectives of the organization for promoting good values such as self-reliance, non-discrimination, health, and education. Fortifying the importance of allowing debate and advocacy, the judge stated that in a democratic society asking for a law to be changed, such as the one criminalizing same sex activity, is not a crime or incompatible with peace, welfare and good order. The Court’s affirmation that the organization does not offend morality sets out a critical discourse in the face of sweeping criminalization of speech, assembly and other rights of perceived same-sex attraction around the world.

Judges continue to issue both positive and negative decisions related to gender equality. On International Women’s Day, we invite you to celebrate the visionaries working to create a better future free from violence and discrimination in order to demonstrate that courts have the power to defend the rights of women and girls. We celebrate on this day seeing there is more to do and knowing we have the power to act.

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Inspiring Change Through Law for International Women’s Day
By Laura Hilly 9th | March 2014

March 8th is International Women’s Day, formally observed by the United Nations in recognition of the fact that ‘securing peace and social progress and the full enjoyment of human rights and fundamental freedoms require the active participation, equality and development of women’ and to acknowledge ‘the contribution of women to strengthening the strengthening of international peace and security.’ The official theme for International Women’s Day 2014 is ‘Inspiring Change’.

While there is much more to be done in order to fully realise the human rights of women around the world, today we celebrate four cases that can inspire us all to continue to see law as a positive instrument for realising women’s human rights.

Women’s Inheritance Rights
Late last year we saw an encouraging decision from the Court of Appeal of Botswana drawing upon a ‘living’ interpretation of customary law to underscore the importance of gender equality and to protect women’s socio-economic rights. In Ramantele v Mmusi CACGB-104-12 the Court upheld Edith Mmusi’s and her sisters’ right to inherit their parents’ home, despite a claim from her male nephew that under Ngwasketse customary law the family home always passes to male heirs. As Tara Winberg wrote in an earlier post, ‘the Mmusi ruling has recognised and elevated the social reality of women’s inheritance over customary law stereotypes of exclusively male heirs.’

Sex-Workers’ Rights
The Canadian Supreme Court in the case of Canada (Attorney General) v Bedford struck down as unconstitutional provisions that criminalised certain activities associated with prostitution. The Court reasoned that such provisions violated the constitutional right to security of sex workers, who are predominately women. The criminal provisions prevented women from implementing safety measures such as hiring bodyguards, working indoors or properly screening potential clients and perform health checks. All of these prohibitions materially increased the risk of harm to sex workers. As Meghan Campbell argues, the reasoning of both the Supreme Court and the Ontario Court of Appeal in Bedford is welcomed because ‘rather than debate on the morality of prostitution or the importance of quiet and orderly neighbourhoods and streets, the [Court] squarely addresses how the law increases the risk of serious bodily harm to those who work in prostitution. Not only did it focus on the prostitute, but it allowed her interests to
**Positive obligations to protect women and girls from domestic violence**

The European Court of Human Rights has continued to develop a substantive equality approach to human rights. In Eremia and Others v Moldova [2013] ECHR 453 1 police and the social services had put pressure on Ms Eremia to drop the case against her abusive husband, and had made sexist and stereotypical remarks to her when she complained of ill-treatment. The ECtHR held that there had been a violation of Art 14, in conjunction with Art 3. The case is important for a number of reasons, not least that the Court recognizes the gender discriminatory aspects of domestic violence. It confirms the positive obligations upon governments to protect from domestic violence, and applies a test of ‘effectiveness’ in this regard. As Dimitrina Petrova highlights, ‘the Court stated that the authorities’ actions were not a simple failure or delay in dealing with the violence against Ms Eremia, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman. It was clear from the facts of the case that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Moldova and its discriminatory effect on women.’ Accordingly, although the state had put in place a legislative framework allowing measures against persons accused of family violence, and had taken steps to protect the applicants, these had not been effective. This case clearly signals a move by the ECtHR towards a substantive conception of equality that is prepared to recognise and address institutionalised prejudices.

**Education Rights in South Africa**

In his official message for International Women’s Day, UN Secretary General, Ban Ki-moon highlighted primary education for girls as one of the key areas to address on the journey towards gender equality. Recent litigation in South Africa, whereby the delay on behalf of the government in providing chairs and desks for learners in socio-economically deprived classrooms in the Eastern Cape was declared as a breach of their constitutionally enshrined right to education, is a welcome development. Education has the power to transform lives, particularly the lives of women and girls. We look forward to seeing more developments in this area over the next 12 months.

*Dr Laura Hilly is a Postdoctoral Fellow and Deputy Director of the Oxford Human Rights Hub.*

**The ‘Bludgeon’ Nominees in the Gender Justice Uncovered Awards 2015**

*By Blakeley Decktor | 12th February 2015*

Judges from all over the world should be held accountable for the discriminatory decisions they issue on matters related to gender equality, and for how these rulings affect the lives of women and girls. The ‘bludgeon’ category in the Gender Justice Uncovered Awards organized each year by Women’s Link Worldwide and the participation of people of all the world contribute to it.

The privilege of deciding an individual’s fate by interpreting and applying the law is one granted to judges by the people. With it comes the responsibility to protect human rights and not allow the law to compound discrimination. The people, who entrust judges to issue legal decisions, maintain the right to question these decisions, especially those that fail to protect gender equality or the rights of women and girls. Women’s Link Worldwide created the Gender Justice Uncovered Awards as a tool for people to monitor judicial decisions around the world and hold judges accountable for their decisions. Every year, we invite people from all over the world to nominate court decisions that promote gender equality for a Gavel Award, and those that set it back for a Bludgeon Award. A jury (this year: Junot Díaz, Claudia Paz y Paz Bailey and Manjula Pradeep) chooses the winners for gold, silver and bronze Gavels and Bludgeons and people from all over the world vote online for the Gavel and Bludgeon People’s Choice Awards. This article analyses some of the decisions nominated for a Bludgeon award in the 2015 Gender Justice Uncovered Awards.

In a decision by the United States Supreme Court allowing employers the choice to refuse to cover contraceptives for their employees, Hobby Lobby forces women to pay out-of-pocket in order to access contraceptive coverage. The decision defines corporations as people, awarding them freedom of religion protection at the expense of the thousands of employees who do not share their beliefs.

The Special Fast Track court of India grew out of a 2012 public outcry calling for better laws and strategies to prevent violence against women in India following the fatal gang rape of a Delhi woman. A Judge in this court specifically envisioned to advance the rights of women and girls found that forced sex within the context of marriage cannot be defined as rape. The Judge issued this decision in a case where the woman had been drugged, forced to sign marriage-related documents while intoxicated and later raped.

A court ruled to decrease the amount of compensation a woman recovered following a medical error that left the woman in severe pain and without the ability to carry out everyday tasks, sometimes as simple as walking or sitting. Employing stereotypical gender roles to justify its verdict, the Portuguese Court based her damages on her responsibilities as a wife and mother rather than compensating the woman for her significant losses of health and well-being of a woman as an individual.

In a decision refusing transgender people the ability to change gender markers on ID documents, the Constitutional Court of Peru,
further marginalized and put at risk transgender people by labelling them as having a “personality disorder”, “a mental disorder” and “a pathology.” The decision uses unscientific grounds to uphold the right and safety people enjoy every day possessing identification documents that match one’s gender.

The Gender Justice Uncovered Awards provides an accessible platform for people around the world to read, discuss, and think critically about how judges’ interpret and implement the law. This form of vigilance on the part of the public forces judges to be more critical of their own interpretation of the law and ideally more committed to their duty to comply with their obligations to implement human rights.

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Winning Decisions in the 2014 Gender Justice Uncovered Awards
By Tania Sordo Ruz | 6th July 2014

Judges from all over the world are held accountable for the decisions they issue and for how these rulings affect the lives of women and girls worldwide. This post considers the court decisions recognized by the jury and the public for advancing or setting back gender equality in the 2014 edition of the Gender Justice Uncovered Awards.

I have previously written on some of the decisions that did the most to help or harm gender equality, which had been nominated for the 2014 Gender Justice Uncovered Awards, presented by Women’s Link Worldwide.

On June 25 2014, the jury spoke, as did the public, who voted for the People’s Choice Awards, picking the decisions that did the most to advance or set back gender equality. Their votes helped raise awareness of the ability of the Awards to create dialogue between civil society and justice systems.

In its review of decisions in which judges used their legal authority to guarantee equality, the jury, made up of Yvonne Mokgoro from South Africa, Héctor Abad Faciolince from Colombia, and Kerry Kennedy from the United States, awarded the Bronze Gavel to the “Genocide of the Ixil Maya People” case from Guatemala. In this case, the court sentenced Efraín Ríos Montt to 80 years in prison for genocide and war crimes, including sex crimes and gender violence. The Silver Gavel went to the “Two-Finger Test” case from Bangladesh, in which the Supreme Court ordered several government agencies to justify the continued use of this invasive procedure performed on rape victims. In response, the Bangladeshi government formed a committee to create new guidelines, which if implemented would ban the practice.

And the 2014 Golden Gavel was won by the “160 Girls Case” from Kenya, in which a judge ordered the police to reopen its
investigation of a long list of cases of child rape and enforce applicable laws.

Turning to the worst court decisions for women’s and girls’ human rights, the jury awarded the Bronze Bludgeon to the “Tzotzil Girl Case” from Mexico, in which a 14-year-old indigenous Tzotzil girl was jailed and fined after she left her husband and returned to her family. The Silver Bludgeon went to the “Punished for Driving” case from Saudi Arabia, a ruling sentencing a woman to 150 lashes and 8 months in prison for driving a car and resisting arrest when she was stopped by local police. And finally, the 2014 Golden Bludgeon was taken by the “Gang Rape” case from India, where a Village Council sentenced a 20-year-old woman to be gang-raped as punishment for having a relationship with a man from another community.

The public got involved in the Awards too, casting its votes on the Women’s Link Worldwide web site, applauding the court rulings that upheld women’s and girls’ rights and denouncing sexist decisions that set back gender equality. The People’s Choice Gavel went to the “Double Orphan” case from Spain, a ruling in which a judge found that the daughter of a victim of gender violence was a total orphan after her father went to prison for murdering her mother. And the People’s Choice Bludgeon was taken by the “Yakiri Case” from Mexico, in which a young woman who was kidnapped, assaulted, and raped was imprisoned for aggravated murder for defending herself against the rapist who tried to murder her.

Every year, the Gender Justice Uncovered Awards show that judges worldwide need to be held accountable for their decisions. The Awards encourage dialogue about how these rulings uphold principles of equality or fail to do so. This year, 34 decisions were nominated for a Gavel and 31 for a Bludgeon, and many organizations and members of the public got involved too, helping raise awareness that gender justice has to become a worldwide reality.

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How can Judges be Held Accountable?
By Tania Sordo Ruz | 6th June 2014

Each year, operating as a channel of communication between society and legal systems, Women’s Link Worldwide organises the Gender Justice Uncovered Awards, demonstrating how justice with gender perspective must be a reality around the world. This post takes a look at some of the court decisions which have most positively and negatively affected gender rights.

In legal practice, it is not uncommon to find discriminatory court rulings that violate the rights of women and girls, leaving them with no protection when they need it the most. Unfortunately, these decisions occur all over the world. For example, in a case in the Montana District Court, in the United States of America, a 14-year old girl was raped by her teacher. Her aggressor was sentenced
to a mere 30 days in prison since the judge considered that the girl was acting “older than her chronological age” and was “as much in control of the situation” as the 49-year old teacher who raped her. Similarly, judges of the Constitutional Court of the Dominican Republic did not recognise the nationality of a Dominican mother-of-four, as she was the daughter of Haitian immigrants. Further, it demanded that the government do the same in all cases of Haitian descendants born in the Dominican Republic.

 Nevertheless, and more promisingly, judges also take courageous decisions and use the force of law to guarantee equality. For example, a woman in Zimbabwe fell pregnant after falling victim to an act of rape and, despite national law authorising it, was denied access to emergency contraception and later to an abortion. She was therefore forced to give birth. Despite all the pressure placed upon them, the judges of the country’s Supreme Court upheld the State’s responsibility for not having guaranteed the woman’s rights, demanding that she be compensated and that measures of nonrepetition be taken. Similarly, the right to property of women in polygamous marriages in Rwanda was safeguarded by judges of the Rwandan Supreme Court which confirmed that the principle of equitable distribution of property in cases of dissolution also apply to these unions, despite the fact that these marriages are not recognised by national law.

All of these cases are part of the Gender Justice Uncovered Awards (GJUA) organised by Women’s Link Worldwide (WLW), an international human rights non-profit organisation working to ensure that gender equality is a reality around the world.

As these cases confirm, judges give content to the principle of gender equality, therefore contributing to its progress or its regress. However, in this endeavour, how are judges held accountable for the decisions they take? The women in these stories have names, as well as a life that has changed, either for better or for worse, due to the judicial decisions taken in these cases. In this way, the GJUA propose a channel of communication between society and judiciary, rendering the court rulings and statements of judges around the world visible, as well as inviting people to debate about how these cases did or did not guarantee equality.

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**Rethink Needed as new Australian High Court Justice Appointment Seems to Maintain Gender Imbalance**

By Kim Rubenstein | 12th December 2014

The appointment of Geoffrey Nettle QC, as the replacement for Justice Susan Crennan on the High Court of Australia when she retires in February 2015 calls, yet again, for a radical rethinking of the way High Court judges are appointed. It provides further impetus to those who believe in equality of opportunity in Australia to call for a mandated commitment to at least 40 per cent composition of either gender at any time on the High Court of Australia.

Attorney-General George Brandis, in announcing the new appointment, made reference to the following attributes of the new appointment – his “brilliant career in the law” his combined degrees from the ANU and Melbourne University, and his Bachelor of Civil Law from Madgalen College, Oxford. There are a growing group of women judges on the Courts in Victoria, both sitting on the Supreme and Federal Courts who could have been announced in the same fashion – as having brilliant careers, of being Supreme Court prize winners and Rhodes Scholars and Law Review editors. Why was a man preferred over the woman who could have been extolled in the same, or arguably even more meritorious fashion?

At the moment it is (save for the one single woman) an entirely male conservative cabinet deciding who the “best” person is for the job. Indeed, our century-old experience of judicial selection has shown that when male politicians gaze at the available gene pool of potential High Court appointees, they see only reflections of themselves and what they understand as depictions of merit.

And while there are plenty of women now who would tick all the boxes required, we need to also acknowledge that other matters that are essential to the role of High Court justice include: reflection of the community, responsiveness to the community’s needs, life experiences reflecting those of the community. This is because law is not just a scientific tool used to determine answers – it is full of values, and values are developed through life experience.

This was starkly illustrated in the United States, where the Supreme Court heard argument on the constitutionality of state legislation prohibiting the burning of crosses. The hearing provoked a particularly passionate interjection by Justice Clarence Thomas, the only African-American on the Supreme Court. He spoke of the “reign of terror” struck by the Ku Klux Klan in the nearly 100 years before Virginia passed the challenged law. A burning cross is indeed highly symbolic, Justice Thomas said, but only of something that deserves no constitutional protection. A burning cross is “unlike any symbol in our society”, he said.

The New York Times reported that “during the brief minute or two that Justice Thomas spoke, about halfway through the hour-long argument session, the other justices gave him rapt attention. Afterwards, the court’s mood appeared to have changed. While the
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justices had earlier appeared somewhat doubtful of the Virginia statute’s constitutionality, they now seemed quite convinced that they could uphold it as consistent with the First Amendment”.

The court’s mood change reminds us of the significance and importance of the diversity of life experience on one’s view of the law and the way disputes are resolved. More importantly, it shows the need for a diversity of such experience to be available to the highest court of the land. In Australia, we must also ensure that the diversity of our community is reflected in the High Court of Australia and gender is one of the meritorious matters that must be considered in the appointment process.

There are those who will respond by saying paying attention to gender is an unnecessary exercise of affirmative action. In counterpoint, however, it is difficult to dispute that we already have a system of affirmative action in favour of men. The stacking of the numbers against women can be readily seen in the most cursory examination of the senior ranks of Australian society. Do men really merit this outcome or is the system, by unspoken assumption, looking after them?

This backdoor system of affirming men in the top posts is more insidious in its impact on society. It is a statement by this government to the daughters and granddaughters of the current men and women of Australia that even if they achieve all the traditional baubles of merit and have brilliant law careers, they will not be considered for the High Court of Australia. It undermines any hope of justice not only being done but being seen to be done.

Professor Kim Rubenstein is the director of the Centre for International and Public Law and a Public Policy Fellow at the Australian National University.

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Judicial Appointment of Women on the Decline in Canada and Australia

By Ravi Amarnath and Laura Hilly | 2nd March 2015

While many countries have superficially committed to the goal of gender equality with a lot of noisy chatter about women on boards and women’s participation in politics, it appears that the glass ceiling is hardening for female judicial applicants in Canada and Australia, at least in the Superior Courts.

In its latest round of judicial appointments in December 2014, Canada’s Conservative government appointed just eight out of 33 – or 24 percent – of vacant federal judiciary positions to female applicants. Counting the latest appointees, roughly 34 percent of all judges serving on Canada’s superior and appellate courts, as well as the Federal Court, Federal Court of Appeal and Tax Court of Canada, are female.

While the judicial appointments procedure in Canada involves a number of individuals, it remains largely a political process. Committees in each province and territory representing the bench, the bar, law enforcement and the general public interview prospective candidates for vacant positions. The final say on federal appointments, though, is vested with the Cabinet, who act on
Critics of the Canada’s current federal government allege that it has been at best indifferent, and at worst purposefully stagnant, in its pursuit of gender parity on the bench. It is difficult to validate these complaints, though, since the appointments process for judges is secretive.

Canada’s Office of the Commissioner for Federal Judicial Affairs Canada is responsible for the administration of the federal judicial appointments process. While applicants must indicate their gender when applying, these statistics are not made public.

However, a recent report validates the idea that Canada has regressed on achieving gender parity on the bench. In March 2013, Canada’s chief actuary estimated that gender parity would be achieved by 2035, 8 years later than forecasted in a previous report from March 2010.

The situation in federal courts and tribunals in Australia is no more encouraging. While the High Court of Australia has, until recently, proudly boasted gender parity in its composition (with three women justices out of seven) this number was reduced to two women out of seven with the recent retirement of Justice Susan Crennan and Justice Geoffrey Nettle announced as her replacement.

This reduction in numbers of women on the High Court of Australia is particularly concerning when viewed in light of the wider federal landscape. Despite women currently comprising 46 per cent of the practicing legal profession (counting both barristers and solicitors) at present, only 11 women out of the 46 members of the Federal Court of Australia are women (soon to be 11 out of 47 (23 percent) when Justice James Edelman commences his appointment on 20 April 2015). Since coming to the office in late 2013, the current Commonwealth Attorney-General, Senator George Brandis, has had 17 opportunities to make appointments to federal courts and tribunals. On only two occasions has he found a woman to be the ‘best person for the job’.

This also comes as Senator Brandis has decided to move away from the more structured process for federal appointments, established by the previous Labour government 2008, that included articulating publically available appointment criteria; advertising vacancies and calling for nominations; and establishing an Advisory Panel to make recommendation to the Attorney-General. Rather, he has reverted to the old process of ‘secret sounding’ with, as Professor Andrew Lynch describes, the ‘revival of smog-like opacity around federal judicial appointment processes.’

A recent independent report prepared by Karon Monaghan QC and Sir Geoffrey Bindman QC for the British Labour Party highlights that the pursuit of a diverse judiciary, including a gender diverse judiciary, is important not only to protect the public face and legitimacy of the institution, but to ensure that there is equal opportunity for the many women who enter the legal profession to excel on equal footing with their male colleagues.

It is also a matter that impacts upon the quality of justice that such institutions can afford. Monaghan and Bindman were firmly of the view that:

‘if we wish to see a judiciary that collectively produces socially sensitive and well-reasoned decisions of the highest quality – a judiciary which does the job the public expects of it – then it must be a diverse judiciary. A diverse judiciary will dispense better justice.’

Regressive rates in appointing women to the federal judiciary in Canada and Australia severely compromise this and must be cause for concern.

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Gender and the Judiciary: Bosnia and Herzegovina
By Majda Halilovic and Heather Huhtanen | 14th June 2014

It is sometimes assumed that if codified law is objective, neutral, and impartial, gender will have little or no influence on the implementation of the law.

Yet research, including the work accomplished by Project Implicit, has increasingly revealed the limits to which an individual is able to be impartial and objective regardless of their profession. This post summarizes research aimed at uncovering the influence of gender within the judiciary of Bosnia and Herzegovina.
In 2013 DCAF, a centre for security, development and the rule of law in Geneva, and the Atlantic Initiative, an NGO promoting Euro-Atlantic integration in Bosnia and Herzegovina (BiH), conducted research looking into the influence of gender within the judiciary of BiH. The views and opinions of approximately 161 judges, prosecutors, attorneys, and court associates were captured through an anonymous online questionnaire and in-person interviews. The research revealed the influence of gender, whether real or perceived, in both the social and professional relationships of court professionals, and on judicial practice and decision-making.

Questionnaire and interview data identified a number of ways in which gender-related attitudes or behaviors can impact the atmosphere of the judiciary and collegial relationships among and between members of the judiciary. For example, the online questionnaire found that 24% of respondents had either witnessed or personally experienced a member of the judiciary being called or referred to by a name other than their title or surname (i.e. honey, sweetie, young man, etc.) in the courtroom or courthouse. This data was reinforced by a number of anecdotes shared during interviews. One female attorney recounted being called ‘girl’ in court by a male attorney. Another female, a judge, recalled a male judge turning to her during a judicial panel proceeding and asking, “What did you want to say, beautiful?” Women represent approximately 60% of all judicial appointments in BiH. Perhaps not surprisingly, gender stereotypes were routinely used to explain this phenomenon. For example, one female judge framed the gender balance of judges in the following way:

“There are more women [in judicial positions] because this is a very hard job with a large case load and women are harder working and more responsible than men. Men tend to stay away from the position of judge because this job is no longer very valued and is not properly rewarded.”

In contrast, a number of male interviewees minimized the work and role of judge. One male judge suggested that the reason there are more women in judicial positions is because the job is, in fact, less strenuous than other jobs. A male prosecutor went so far as to link the gendered nature of power relations between women and men to the representation of women in the BiH judiciary. He postulated: “Maybe because women are subordinate at men at home, that is the reason they apply for the position of judge; in this position they are dominant at work, which compensates for their situation at home.” These responses provide examples of gender stereotyping by both women and men in the judiciary.

Women distinguish themselves as better suited for legal positions in relation to their ‘natural’ characteristic of being harder working and more responsible than men – and by contrast suggest that men are not hard working and responsible. Men characterize women as innately less capable (by characterizing the job itself as not difficult) or motivated by a desire for power and domination (in contrast to an interest in the law or justice).

Lynn Hecht Schafran, director of Legal Momentum’s National Judicial Education Program to Promote Equality for Women and Men in the Courts (NJEP) argues that this “stereotypical thinking about the nature and roles of women and men” is one of the most prominent ways in which gender bias influences court operations, procedures, and decision-making. And indeed, the sum of these reflections, from referring to a woman as a girl or ‘beautiful’, to believing that women are in judicial positions because the job is easy (men) or that women are in judicial positions because they are harder working and more responsible (women), actively contributes to an environment in which impartiality, or at the very least, the appearance of impartiality, are difficult to achieve.

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Belgian Parliament Introduces Sex Quota in Constitutional Court
By Adelaide Remiche | 21st April 2014

On the 4th of April 2014, the Belgian Parliament passed a Bill that introduced a sex quota in the composition of the Constitutional Court (CC). It requires the Court to be composed of at least a third of judges of each sex.

This requirement will however not enter into force immediately, but only once the Court is in fact composed of at least one third of female judges. In the meantime, a judge of the underrepresented sex shall be appointed every time that the two preceding appointments have not increased the number of judges of this underrepresented sex. For example, if women remain unrepresented on the Court (as they currently are, representing only around 16% of the Court), and the next two appointees are men, the third appointment will have to be a woman.

Introducing quotas in the composition of the CC of Belgium – a paradigmatic example of a State which has historically had to find compromises between various groups – is not in itself revolutionary. As a matter of fact, the composition of the CC has, from its
creation, required linguistic and “professional” quotas: six judges should be Dutch-speaking, three of whom should be former MPs, and six judges should be French-speaking, again, three of whom should be former MPs. Even this new introduction of sex-based quotas is not completely at odds with the previous spirit of the rules surrounding judicial appointments: the Act on the CC has stated since 2003 that ‘the Court shall be composed of judges of both sexes’. However, this previous requirement was a minimal one and did not guarantee the achievement of meaningful sex diversity: only four women – all former MPs – have been appointed to the Constitutional bench since its creation in 1984. Moreover, up until January 2014, the Court has never counted more than one woman at a time among the twelve judges sitting on the bench. Requiring at least one woman on the bench has led (until 01/2014) to the appointment of only one woman to the bench at any particular time. No more.

Such an underrepresentation of women has been constantly criticised by some MPs, who have lobbied for more than 10 years for more sex diversity on the bench. They have argued for diversity for three main reasons. First, it would reinforce the democratic character of the courts. Second, it would allow for a better protection of sex-specific interests. And finally, it would improve the quality of justice by bringing more flexibility and more creativity on the bench. Since 2003, various bills have been proposed to introduce sex-based quotas as a mean to achieve diversity.

Their promoters have relied on four different, but interrelated, arguments:

1. The introduction of sex quotas is a powerful stimulus for change that has proved to be useful, notably with regards to the gender composition of the Parliament.
2. There is some urgency to appoint more women on the constitutional bench.
3. Other less restrictive alternatives – such as requiring that at least one member of the Court should be a woman – have failed to bring about real sex diversity.
4. Quotas are not a radical measure since there are enough qualified women who could be appointed to the bench.

Ten years and eight bills later, the promoters of sex-based quotas have finally won, at least with regards to the composition of the CC.

This political debate is based on theoretical underpinnings that are worth discussing, including in academic circles. While such questions have been investigated in the common law context, they are still relatively unexplored within the civil law legal cultures. It is time for civil lawyers, and in particular French-speaking scholars, to start to engage seriously with these difficult but fascinating issues.

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According to the 2011 census, the population of India was recorded as 1.2 billion people. Such a situation calls for urgent measures to address family planning and to control of population growth. 

Like in most modern democracies, government agencies, burdened with welfare obligations take upon themselves the duty to ensure a controlled population figure. Following such a welfare model, the Indian government has been conducting sterilisation camps across the country and awarding cash incentives for the same. Female sterilisation is seen by some, including those writing government policy, as a viable medium to control population growth and is often preferred over the alternatives of using contraceptive pills, condoms or even male sterilisation. The coercive nature of such policy measures are presented by the government as not only acceptable, but as imperative. However, the tragic deaths of 12 women in one such sterilisation camp in the state of Chattisgarh and the hospitalisation of 60 more, unveiled a series of horrifying realities of the population control policies endorsed by the Indian government. The incident urges one to think and reflect upon the nature of population control measures. 

Why Women? 

A UN report on contraceptive patterns showed that India carried out 37% of the world’s female sterilisation and 1% of male sterilisation. The heavy contrast in the figures may be viewed as a reflection of the deep rooted patriarchy that is entrenched in the Indian society. Women’s sterilisations are seen as an easy method that would enable population control without obstructing the male virility. Human Rights Watch also noted that health workers were assigned targets for family planning services which, to a major extent, involved motivating people for female sterilisation. This remains prevalent today despite India asserting at the International Conference on Population and Developments in 1994 that there would be a target free approach to family planning. 

While female sterilisation is far more common than male sterilisation in India, the latter though procedures such as a vasectomy, is safer, simpler, about half the cost of female sterilisation, and are probably more effective.

Health Care Precautions 

Women voluntarily opt for undergoing sterilisation as a trade off for cash and welfare incentives. However, the shocking incident of November 2014 saw many women trading off their lives. Appallingly, this isn’t a one off incident. Between 2009 and 2012 the government paid compensation for 568 deaths resulting from sterilisation. A total of 1,434 people died from such procedures in India between 2003 and 2012. In the present state of affairs, journalists reported on the abysmal conditions of the instruments used for surgery and the lack of proper pre and post operative care. Contaminated drugs used in the camps were also identified as probable causes of the tragedy. 

Needless to say, the approach taken up by the Indian government needs to be revised:
The selective nature of targeting women to undergo sterilisation is fundamentally flawed and warrants attention. Both sexes must be equally engaged in the process. More male participation in effective contraceptive selection is needed. Thus, awareness and counselling on contraceptive choice needs to be increased.

Contraceptive alternatives need to be made easily accessible and people must be motivated to use them.

Lastly, consent for sterilisation processes must be sought only after informing the individual about the implications of surgery and also of the availability of other (more transient) alternatives.

Policy makers must carefully scrutinise such discriminatory policy decisions through the lens of equality and welfare. The question that needs to be inspected upon by our collective consciousness is whether such policy initiatives should be encouraged when the state machinery lacks the facilities to safely implement them?

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The Rhodes Project: Celebrating Many Versions of What Women Can Be
By Susan Rudy | 25th November 2014

Earlier in 2014, the Rhodes Project marked its 10th anniversary with a celebration at the home of its founder, Dr Ann Olivarius. In 2004, Olivarius, a member of the second class of women Rhodes Scholars, embarked on a project to better understand the lives and experiences of her fellow female scholars. Since its inception, the Rhodes Project has conducted interviews with over 125 Rhodes women and developed into a dynamic research centre.

The history of the Rhodes Scholarship has primarily been illustrated using the stories of men: figures like Bill Clinton, J. William Fulbright and Bob Hawke loom large, and little heed is paid to the women who have received the scholarship In his 2008 history of the Rhodes Scholarship, Legacy, Philip Ziegler dedicates a single paragraph to discussing the achievements of Rhodes women – he asserts that they are generally less impressive, but doesn’t seek to explain why.

The Rhodes Project was founded to correct this imbalance by investigating the lives of women Rhodes Scholars. Over 1,200 women have earned Rhodes scholarships, and the Rhodes Project has collected a rich set of data regarding their lives and careers. Rhodes women are a unique category of high achievers, and many have enjoyed successful careers in countless fields of work, including politics, finance, business and academia, often while sustaining long-term partnerships and raising children. Their experiences can illuminate our understanding of contemporary women’s lives more broadly, at work and at home.

Research at the Rhodes Project has examined Rhodes women’s experiences at Oxford and after, how they progress in their careers and manifest leadership, and how they contend with the challenges of balancing their professional with their personal lives. We have also considered what they have to say about whether they had or need role models, and if they do, where they look for them. With Dr Kate Blackmon of the Saïd Business School I have addressed academic conferences and published a number of briefings and working papers on these topics and we are now co-authoring a book on the gender gap in leadership, forthcoming with Oxford University Press.

What we have learned is that leadership involves much more than assuming a senior role. It is deeply connected to issues of identity. Whether or not young women Rhodes Scholars fulfil their potential for leadership has everything to do with how they see themselves – and how others see them – at crucial points in their lives. In the life stories told by Rhodes women, a recurring theme is the difference between how they wanted to behave as leaders and their awareness of the expectations that others had of them as women. In the words of one Scholar:

When I was a prosecutor I had a male supervisor, most of them were male, who said to me my rating would be higher if I was a man because men can be aggressive in the courtroom, but women need to be little bluebirds of happiness. Now if anyone knows me, a little bluebird of happiness has never been in my job description [group laughter]. And I was doing more trials than every man [at the firm], I was winning trial after trial, but I wasn’t a little bluebird of happiness and therefore my rating was lower.

This Scholar had held a high-level position on a national security committee and was an experienced trial lawyer, but she was expected to be little, birdlike, and happy – just because she was a woman. Another participant said:

Women think that if you’re dutiful and you’re a good girl you will be rewarded. And you know what? That is just not true [group laughter]. And the truth is, I don’t think there’s any over-arching conspiracy. I think the way the world works is if you want something you have to ask for it, whether it’s clients, or business, or money. The fact is you have to assert yourself.

The Rhodes Project aims not just to celebrate women Rhodes Scholars: we also hope to offer alternative versions of what it means to be a woman. Young women today still suffer from a dearth of desirable role models and we believe that women Rhodes scholars
– with their diverse backgrounds and broad range of experiences – represent a vibrant resource. With this in mind, the Rhodes Project created a Profile Series, where we make some of the Scholars’ wisdom and life lessons available to the public. Most recently, we are working with current women Rhodes Scholars, engaging them on issues relating to our research and providing a space for them to discuss the topics that arise. Through our research and our outreach, we hope not only to support the community of Rhodes women, but also to shed light on gender inequality and work towards a fairer world for women.

Professor Susan Rudy is Director of the Rhodes Project and a Visiting Scholar at Said Business School.

Menopausal Women Fear Discrimination in the Workplace
By Natalie Cargill | 30th October 2014

According to new research, women of menopausal age fear age-based discrimination in the workplace and face a total lack of menopause-specific support from employers. Interdisciplinary research resulting from a collaboration amongst academics from Monash, La Trobe, and Yale Universities has found that many women were reluctant to speak with their managers about menopausal symptoms for the fear of being stereotyped as “old”.

The report found that menopause is a “silent issue” for most organisations, and older women represent a group whose working lives, experiences and aspirations are poorly understood by employers, national governments and academic researchers alike.

The study recommended that policy makers:

• Develop the business case approach to older women in the workplace surrounding resilience, knowledge and collegial labour as a significant factor in organisational success;
• Develop later-life work policies that take into account how changing personal circumstances and opportunities may reconfigure (which may be both challenging and positively related to career development) women’s employment perspectives;
• Promote career models that recognise and foster second or third career stage development;
• Provide resources for organisations to use that will facilitate and support, rather than ‘manage’, menopause, such as information sheets and examples of best practice;
• Consider the visibility of different working bodies and the subliminal messages that visual communication, figureheads and initiatives targeting particular groups (e.g. only images of young female workers or older females workings who ‘look’ young) may send.
The right to freedom from discrimination is internationally recognised as a human right, and older women are often the subjects of compounded forms of discrimination within and outside of the workplace. As one participant in the study said, “I think it should be a time of recognition of a different age of a woman but I think it’s more a disappearing of women […] I have had thoughts that maybe I would be less able to be employed because of my age. […] I think that generally menopausal women are invisible” [Kirsty, 51].

The latest report of the UN’s Working Group on discrimination against women was the first to recognise the scarcity of attention that has been paid to the negative impacts of the business sector on women’s enjoyment of human rights. The report noted that women’s “quality of life in older age derives from the culmination of the earlier phases in their life cycle and bears their imprint”, and accordingly the treatment of older women “can be regarded as a litmus test for the quality of women’s economic and social life”.

To pass this litmus test, an inclusive workplace sensitive to the needs of older women is essential. Menopause is a significant life event that affects all women, and as workforces become older and more gender-representative, women’s health issues need to be increasingly mainstreamed in anti-discrimination and health and safety legislation.

However, as the interdisciplinary study shows, there is a long way to go, and progress will depend on a multi-stakeholder approach encompassing health and safety legislation, anti-discrimination policies, human resources management, government intervention, and international standards-setting bodies.

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Pregnancy Discrimination in the Australian Workplace
By Dominique Allen | 24th June 2014

As part of its national review into pregnancy discrimination in the workplace, the Australian Human Rights Commission (AHRC) released data from a national phone survey measuring discrimination in the workplace related to pregnancy, parental leave and return to work following parental leave. The figures are staggering.

49% of mothers reported that they had experienced discrimination in the workplace. 27% experienced discrimination during pregnancy, 32% when they requested parental leave and 35% said they experienced discrimination when they returned to work.

Just as alarming is the type of discrimination experienced during pregnancy – 37% were threatened with dismissal, were dismissed or their contract was not renewed, and 49% were discriminated against in relation to pay, conditions and duties. More than a quarter of fathers and partners who exercised their legislative entitlement to 2 weeks paid parental leave reported experiencing discrimination either during the period of leave or when they returned to work.

These figures are even more alarming considering that federal law has prohibited pregnancy discrimination in the workplace since 1983.

Pregnancy discrimination is also unlawful under state and territory laws, so is workplace discrimination based on family or carer’s responsibilities. Since 2009, pregnancy discrimination has been unlawful under federal industrial relations legislation. Male and female employees who are the primary caregiver for a child are entitled to 12 months’ unpaid leave and can request an additional 12 months and flexible working conditions when they return to work. They’re also protected from adverse action, such as threatened dismissal, for exercising these rights.

Yet this data clearly shows that workplace discrimination remains a problem and that employees aren’t turning to the law for a solution. Although 75% of women took action in response to the discrimination, only 13% sought legal advice and only 10% made a complaint to a government agency. 25% looked for another job and 24% resigned.

Given that it is challenging enough to utilise anti-discrimination laws (for reasons such as the burden of proof on the employee, low damages claims and high legal costs), it is not surprising that women who are pregnant or returning to work with a young family are choosing not to pursue legal action.

But that presumes they’re aware of their rights. Under federal industrial relations legislation, employers must give all new employees an information sheet outlining their minimum entitlements. There’s no reason information about unlawful discrimination couldn’t be distributed at the same time. The AHRC’s report and recommendations are due next month. It should recommend a national government funded advertising campaign to make employees aware of their rights and employers aware of their responsibilities. Governments do so for workplace safety, so why not for workplace discrimination?

Australia has used education as the primary means of encouraging compliance with anti-discrimination laws but education alone
is not enough. Modern regulatory theory says businesses are more likely to comply if there is a threat that action can and will be taken against them if they don’t.

This is the model the industrial relations regulator, the Fair Work Ombudsman (FWO), has used since it was established in 2009. As well as having education campaigns, such as its 2012-13 campaign targeting working parents, the FWO can investigate complaints about workplace discrimination and take action to enforce the law. It can reach enforceable undertakings in which an employer will agree to change policies and practices and the FWO will agree not to take further court action. By March 2014, the FWO had entered into 7 enforceable undertakings in discrimination matters. 3 were instances of pregnancy discrimination. The FWO can litigate on behalf of employees and seek the imposition of a civil penalty against the employer of up to $10,200 for individuals and $51,000 for a corporation. As at March 2014, 5 of the 7 discrimination matters the FWO had litigated were about pregnancy discrimination and in each the employer was ordered to pay a civil penalty.

There is no reason a stronger enforcement model like this couldn’t be adopted for the federal anti-discrimination Acts.

The previous federal government took the first step by asking the AHRC to gather the evidence about the degree to which discrimination remains a problem for parents in the workplace. The Abbott government must take the next step and give the AHRC the power and resources to do something to address this problem.

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**Recognising Maternity Leave as a Human Rights Obligation**

Meghan Campbell | 15th September 2014

Paid maternity leave is routinely argued as necessary to achieve gender equality in the workplace. Article 11(2)(b) of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) requires States "to introduce maternity leave with pay or comparable social benefits." The six individuals in Elisabeth de Blok et al v The Netherlands (CEDAW/C/57/D/36/2012) argued the State violated this obligation by not providing maternity leave to self-employed women.

In 2004 The Netherlands passed legislation which disqualified previously eligible self-employed women from receiving public maternity benefits. These self-employed women were forced to take out private insurance to cover their loss of income during maternity leave. There were two problems with the private insurance model: (i) the policies “applied a two-year exclusion period for new subscribers during which no maternity benefits could be paid” and (ii) the premiums under the private schemes were cost prohibitive such that the claimants could not afford to take out insurance. For one of the claimants the monthly premium was equal to her income (para 2.14). In 2008, The Netherlands re-instated public funds to cover maternity leave for self-employed women but there were no transition provisions. The six claimants gave birth in the time before the re-instatement and before the end of the two
year exclusionary period for private insurance, so even if they could afford it they would have been barred.

The claimants argued CEDAW obligated The Netherlands to ensure “that all women who perform paid work are entitled to a period of paid leave” and this included women who were self-employed (para 3.6). The State countered that CEDAW only required them to take ‘appropriate measures’ which they interpreted as only requiring “a best-efforts obligation and does not lay down clear rules on how to pursue” maternity leave (para 4.10). They argued the margin of appreciation in CEDAW does not specify the forms or associated conditions with maternity leave. This means The Netherlands can restrict paid maternity leave to women in formal employment and “can introduce a public scheme or leave it to the private sector.” (para 4.13).

The Committee correctly rejects the State’s arguments. It adopts an expansive or living tree interpretation of Article 11(2)(b) which covers self-employed women (para 8.4). This is important for the evolution of CEDAW as it ensures Article 11 is interpreted to protect new and different kinds of employment relationship. The Committee concludes that failing to provide maternity benefits is a direct form of gender based discrimination and violates CEDAW (para 8.9). It is recommended that the State compensate the six complaints and other women who are in a similar position.

This is an important development in women’s human rights. The Committee firmly establishes that State’s have a legal obligation to provide women with maternity leave. This case is also an important contribution to the jurisprudence of the Committee, as they reject an interpretation that treats the obligations in CEDAW as policy directives. The substantive provisions require more than best efforts. There are human rights obligations that can be monitored and evaluated against standards of gender equality.

At the same time, however, the Committee misses out an opportunity to fully flesh out the obligation to provide maternity leave. This case raises a challenging question: does Article 11(2)(b) allow the State to use the private sector to provide maternity leave? This is a pressing question because public services are important in meeting women’ needs and there is a growing trend towards privatization. The Committee does not explicitly prohibit using private insurance to provide maternity leave. If the State has put in place “an adequate alternative maternity leave scheme to cover loss of income” it will have satisfied its CEDAW obligation (para 8.9). The decision could have done more to explain what counts as adequate. The evidence before the Committee was that private insurance was too expensive. This could be due to many factors such as gender job segregation, the low valuation of women’s work and the continuing gender pay gap. Women may not have the economic resources to purchase private insurance. The Committee could have reminded States that they need to be more attentive to women’s disadvantage when crafting policies on maternity leave. Moreover, Article 2(e) requires the State to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise. The Committee should have clarified this means the State could be obligated to place caps on private premiums or provide subsidies to low income self-employed women so they are protected from loss of income.

While the Committee could have done more to develop CEDAW, this decision is commendable because it ensures women are not financially punished for having children, which is an essential step to ensuring gender equality.

Dr Meghan Campbell is the Weston Junior Research Fellow at New College and a Deputy Director of the Oxford Human Rights Hub.

Improving the Law for Pregnant Women and Working Parents
By Dominique Allen | 6th October 2014

Earlier in 2014 I wrote about the preliminary data that the Australian Human Rights Commission (“AHRC”) had published which showed the high levels of workplace discrimination encountered by women who are pregnant, on parental leave and returning to work, and fathers and partners who take parental leave. This is despite the fact that Australian law has prohibited such discrimination for over 30 years, and men and women have statutory entitlements to unpaid parental leave and flexible working conditions when they return to work. They’re also protected from adverse action, such as threatened dismissal, for exercising these rights.

The AHRC has now published its final report which draws upon two national telephone surveys and consultations in every capital city and major regional areas with individuals who experienced discrimination, employers and industry groups, and representatives from community organisations, unions, health organisations and academics. It also received 447 written submissions. It is noted that the data captures the participants’ perceptions; what they experienced may or may not be held to constitute discrimination if a claim proceeded to court.

Data collected from the telephone surveys provides a snapshot of the characteristics of women who are experiencing discrimination:

- 58% of mothers who identified as Aboriginal or Torres Strait Islander reported experiencing discrimination on at least one
occasion;
• During pregnancy, one in two women aged between 18 and 24 reported experiencing discrimination compared to one in four of all other women;
• Mothers who are the sole income earner are more likely to experience discrimination than those who are not;
• Single mothers are more likely to experience discrimination during pregnancy than mothers who are in a relationship;
• Women who worked for large organisations (ie over 100 employees) were more likely to experience discrimination when they requested or took parental leave of returned to work following leave.

Many of the review's recommendations for how to address this persistent problem relate to strengthening the existing law. The review recommends implementing recommendations made by a Senate Committee in 2008 to change the Sex Discrimination Act 1984 (Cth) to define ‘family responsibilities’ as including caring responsibilities, prohibiting indirect discrimination based on family responsibilities (only direct discrimination is currently prohibited) and giving the Sex Discrimination Commissioner power to launch own motion investigations.

It recommends strengthening s 65 of the Fair Work Act 2009 (Cth) which gives employees the right request flexible working conditions if they have child who is of school age or younger but allows the employer to refuse the request on ‘reasonable business grounds’. The refusal is not reviewable and evidence received by the review suggested that employers are grappling with what is meant by flexible working conditions and how to institute them in certain workplaces.

Australian law is reactive rather than proactive in how it addresses discrimination. The review recommends introducing two positive duties – one would require an employer “to take all reasonable and appropriate measures… to provide a workplace free of pregnancy/return to work discrimination” and a second would require an employer to reasonably accommodate the needs of employees who are pregnant or who have family or caring responsibilities except where those adjustments would cause unreasonable hardship.

The review also highlighted that employers are confused about the operation of federal, state and territory workplace laws. For example, they are unsure of how to meet their obligations under workplace health and safety laws while also ensuring that they don’t discriminate against a pregnant employee, such as by forcing her to change jobs unnecessarily.

The underlying message of the review is that we not only need effective law, we need to ensure employees are aware of their rights and that employers understand their obligations and comply with them. It was encouraging that immediately after the AHRC released the report, the federal government committed to giving it $150,000 to prepare a practical resource for employers and employees about their rights and obligations within one year. This resource needs to be disseminated widely and early to be effective.

Pregnant women are bombarded with information about their health during pregnancy yet expectant and new parents do not receive any information about the rights at work, nor are the physiological and economic harms caused by discrimination acknowledged. Information about an employee’s rights should be made available in a GP’s surgery, obstetrician’s rooms, birthing centres and maternity hospitals, along with information about government assistance for child care and government funded paid parental leave.

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The Family Agenda: Promoting Traditional Values in the Human Rights Council
By Frances Raday | 8th January 2015

On 23 June 2014, the Human Rights Council decided, through its Resolution 26/11, to convene a panel discussion on the protection of the family, “reaffirming that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State […]”. The sponsors of the resolution expressed their cardinal motive as being the protection of the family so that it can fully assume its responsibilities within the community. The resolution was passed by 26 votes to 14, with 6 abstentions.

The concept note for the work of the panel emphasized the role families play in development, expounding on the role of the family in “fostering social development, its strong force for social cohesion and integration, and … its primary responsibility for the nurturing, guidance, and protection of children”. It envisages “designing, implementing and promoting family-friendly policies and services, such as…campaigns to sensitize public opinion on equal sharing of employment and family responsibilities between women and men,… as well as developing the capacity to monitor the impact of social and economic decisions and actions on the well-being of families, on the status of women within families, and on the ability of families to meet the basic needs of their members.” It emphasised the structural problems of care responsibilities and the need not only to redistribute them between
women and men, as required by CEDAW, but also between family and state, by provision of a protection floor for care services, which is a welcome departure and is in accordance with the recommendation of the Expert Group to the Council on 16 June 2014.

However, the resolution and the concept note raise grave concerns as they fail to reiterate women’s right to equality in the family, referring rather to women’s status within families. The author of this note, as Chair-Rapporteur of the Expert Group on Discrimination against Women, sent a letter to the President of the Council requesting his intervention, pointing out these documents produced a retrogression in women’s human right to equality in the family, guaranteed under the 1948 Universal Declaration of Human Rights (UDHR), the 1966 International Convention on Civil and Political Rights (ICCPR) and the 1980 Convention on the Elimination of All forms of Discrimination against Women (CEDAW) requires Article 16.

Silence in the Human Rights Council on the right of women to equality in the family is not innocuous. It is a denial of the crucial 20th century gain of women’s right to equality within families, which had constituted a dramatic departure from the prior cultural and religious norm of the patriarchal family. Indeed, many of the countries supporting the Resolution had made reservations to CEDAW’s Article 16, denying women the right to equality in the family on grounds of religion, and had also spearheaded the previous Resolutions of the Human Rights Council calling for restoration of traditional values in the interpretation of human rights. Opposition by some other states to the Resolution focused on the failure to recognize the diversity of families rather than on equality for women. In the key messages from a Human Rights Council panel discussion on 15 September 2014, an important human rights move was made in acceptance that diversity of families should be respected and that violence within the family should be countered. However, the right of women to equality in the family was still not mentioned.

In a statement on the 30th September 2014, the Special Procedures mandate holders took note of the developments in the Human Rights Council on the “protection of the family” and expressed concern regarding the fact that there had been no reference to women’s and girl’s right to equality within the family. The statement called on the Human Rights Council to ensure that in all future resolutions, concept notes and reports on the issue of the family, the right to equality between women and men, as well as between girls and boys, within the family must be explicitly included as a fundamental human right.

As stated in the Human Rights Council resolution, the family is indeed the “fundamental group unit of society”. Hence, it is for this very reason that the progress of women and girls depends on the recognition in law and practice of their right to equality with men in every aspect of family life. Furthermore, women’s contribution to the economic and social lives of their families and communities is a foundation stone of families’ role in development and development is only sustainable on a basis of their equality with men within the family.

Professor Frances Raday was previously an expert member of CEDAW, is Rapporteur-Chair of the UN Human Rights Council Working Group on Discrimination Against Women. She is Honorary Professor, University College London, and Doctor Honoris, University of Copenhagen.
At the beginning of July 2014 the Supreme Court of the United States delivered judgment in the eagerly anticipated case of Burwell v Hobby Lobby 573 U.S. ___ (2014), involving a challenge to a provision of the Patient Protection and Affordable Care Act (known colloquially as ‘Obamacare’). This provision requires nonexempt group health insurance plans (such as that of Hobby Lobby) to include access to all FDA-approved contraceptive methods and sterilization procedures.

The owners of Hobby Lobby objected to their company being required to facilitate access to four of the FDA-approved methods of contraception. They argued that their Christian beliefs dictated that life begins at conception and four of the contraceptive methods took effect after that point. They therefore challenged the contraceptive mandate on the basis that it violated the Religious Freedom Restoration Act (‘RFRA’).

The RFRA prohibits the Federal Government from imposing a “substantial burden on a person’s exercise of religion even if the burden results from a rule of general applicability” unless the Government demonstrates that the burden (1) is in furtherance of a compelling governmental interest; and (2) it is the least restrictive means of furthering that compelling interest. This is a test of strict scrutiny and in a 5:4 decision the Supreme Court held that it is one the contraceptive mandate failed to pass.

Delivering the judgment of the court, Justice Alito assumed that facilitating access to contraception was a compelling governmental interest but that the means the Government chose to further it were not the least restrictive available. The reason for this is that the Act itself provides an alternative way of ensuring access to contraception. Rather than making the employer pay for the coverage through its group health insurance plan, the insurance company can be made to shoulder the burden. In order for this to occur, however, the company must submit a form. While at first glance this might seem unproblematic, the issue, as the Government pointed out in its brief, is that the company can simply choose not to submit the form. If the company decides not to submit the form it is no longer under an obligation to provide contraception and neither is the insurance provider. It is plausible to assume that a company will not wish to facilitate access to contraception it finds objectionable by submitting a form, just as it would not wish to do so by paying for it.

The prior question for the court was whether Hobby Lobby and other for-profit entities could invoke the RFRA. It was held that they could on the basis that Congress had intended the statute to provide broad protection for religious liberty. Justice Alito did, however, seek to narrow the scope of the judgment to only ‘closely held corporations’. In future, therefore, only ‘closely held corporations’ may object to laws on the basis that they infringe their rights under the RFRA. So what is a ‘closely held corporation’? This is a corporation that has more than 50% of the value of its outstanding stock owned by 5 or fewer individuals and is not a personal service corporation. A recent study demonstrated that such corporations employ 52% of the American workforce. This leads one to wonder just how narrow the judgment really is.
In her dissent Justice Ginsburg (joined by Justice Sotomayor) objected to the notion that corporations could invoke the RFRA at all. All the court’s liberal justices joined the portion of Justice Ginsburg’s dissent in which she observes that there might be other laws that for-profit organizations object to and which they will now be able to challenge, in particular anti-discrimination provisions. Just as importantly, Justice Ginsburg points out that contraceptive coverage is essential to women’s health and reproductive freedom and that the judgment jeopardizes both of these interests.

Although Justice Alito sought to allay these concerns by emphasizing that the scope of the judgment is limited to closely held corporations, he does not point out that Hobby Lobby itself employs around 21,000 people. Whilst the passage of time may ultimately vindicate Justice Alito’s assertion that corporations are unlikely to bring religious freedom claims, this should not obscure the immediate impact this judgment has on Hobby Lobby’s female employees. The White House Press Secretary was surely accurate when he stated that, ‘women should make personal health care decisions for themselves, rather than their bosses deciding for them.’

Karl Laird is a Lecturer in Law at St Edmund’s Hall, Oxford and a former Managing Editor of the Oxford Human Rights Hub Blog.

**Breaking the Cycle of Gender Inequality**

*By Meghan Campbell | 17th June 2014*

The UN Human Rights Council Working Group on Discrimination Against Women in Law and Practice (the WG) is to be commended for its in-depth report on discrimination against women in economic and social life.

The purpose of the report is two-fold: to identify persistent areas of gender discrimination and to share good practices in the advancement of women’s empowerment and equality in economic and social life. The report pays particular attention to how economic crises have affected women’s economic and social rights. The WG achieves these aims due in part because of the meticulous and thorough research that has gone into the report. Further, the depth of consultation has resulted in a careful examination not only entrenched aspects of economic and social discrimination, the gender pay gap and unpaid care work, but has opened up new facets, such as the role of corporations in perpetuating gendered disadvantage.

One of the over-arching findings of the report is that anti-discrimination legislative frameworks and guarantees on gender equality are important but alone they are not sufficient. The WG concludes that countries must focus on de facto equality and “it is essential to adopt a transformative agenda that eliminates the cultural and structural barriers to women’s equal opportunity.” However, the report spends very little time openly discussing what a transformative agenda or framework entails. Without specifying precisely what is meant by de facto or transformative equality the WG lapses back into the language of equality of results, criticized as a limited model of equality in relation to gender. While throughout the report the WG provides numerous examples of good practices that transform gender relations, without articulating a transformative framework it is challenging to translate these into new and different contexts of discrimination.

The analysis and recommendations of the WG are nuanced and sophisticated. The report follows the discrimination women experience throughout their life-cycle. For example, in times of economic crisis girls “are more vulnerable to being pulled out of school.” As a good practice countries needs to protect families from economic shocks and incentivize families to keep girls in school.

The report conceptualises gender discrimination against adult women are under two primary headings: labour force, both formal and informal, and care work. The WG addresses the classic sticky areas of gender inequality in the labour market: for example, the gender wage gap and the informal labour market. It strongly advocates for mandatory gender quotas on government companies and publicly listed companies, which, if adopted, have great potential to transform gendered power structures in the formal labour market. The other main source of discrimination against adult women is in relation to unpaid care work. The WG advocates a three ‘R’ approach: countries need to recognize the value of care work and include it in the gross national product, to reduce care work by increasing public services and they need to ensure an equal redistribution of care work between men and women.

The WG is innovative in paying attention to the role of corporations in perpetuating gender inequality. It notes “corporate governance has produced a dramatic increase in resources and income inequalities, with harsh implications for women.” These corporations rely on women home and sweat shop workers, who work under harsh and exploitative conditions. In general the connection between gender and corporate social responsibility is under-developed and the WG calls upon civil society organisations and women workers to unite and become agents of change.

Finally, the WG analyses how older women experience discrimination in economic and social life. Pension schemes are often connected to continuous employment in the labour market which negatively impacts women because of “the structural factors in their labour market and care work.” Good practices to empower older women include “continuing pension contribution during maternity and childcare leaves, unisex calculation of benefits.” The report concludes with an assessment of the impact of violence
on equality in economic and social life and recommends prohibiting sexual harassment at the work place and education.

The WG report is a comprehensive assessment of how women in the 21st century experience discrimination in economic and social life. Its compendium of best practices is a powerful tool and resource for academics, lawyers, NGOs and government policy makers to use when thinking of creative ways to eliminate discrimination against women.

Dr Meghan Campbell is the Weston Junior Research Fellow at New College and a Deputy Director of the Oxford Human Rights Hub.

Thematic Report – Economic and Social Life with a Focus on Economic Crisis

By Frances Raday | 16th June 2014

The UN Human Rights Council Working Group on Discrimination against Women in Law and in Practice presented a thematic report on women’s economic and social life with a focus on economic crisis to the Human Rights Council on 16th June 2014. This post is a redacted version of the statement to the Council by Frances Raday, Rapporteur-Chair of the Working Group.

International human rights law guarantees a substantive and immediate right to equality for women in economic and social life and imposes an obligation of due diligence to prevent discrimination by private persons or entities.

Although most state constitutions guarantee equality and many have anti-discrimination legislation regarding employment and education, nevertheless, in some states, discriminatory legislation persists, particularly under personal law systems, denying women economic and social equality. While constitutional guarantees and anti-discrimination legislation are vital, they are not enough to produce equal opportunity for women in practice, in the face of negative stereotyping, multiple discrimination, gender-based violence and feminization of unpaid care responsibilities. To achieve de facto equality, it is essential to adopt a transformative agenda to eliminate cultural and structural barriers.

Although barriers to girls’ school attendance persist in some cultures, the education gap has been greatly reduced and disparities between girls and boys eliminated – even reversed – in some countries. However, gains in education have not consistently translated into equal economic opportunity or results.

Discrimination against women, especially in pregnancy and motherhood, exists globally. In employment, wage gaps persist, with
job segregation and women clustered in service sector jobs with inferior working conditions. Greater accountability for employment discrimination is needed. Women are disparately concentrated in informal work, particularly in low-income countries. Especially vulnerable are domestic workers and migrants. To secure decent work for women, it is necessary to reduce or reconstruct informal work.

In the business sector, the contribution of gender diversity to enhancing economic performance and increasing sustainability has been documented. Nevertheless, there is a severe gender gap in top economic leadership at both the international and national levels. Good practice includes mandating gender quotas for corporate boards and for procurement contracts.

In the emerging area of corporate responsibility, disparate harm to women resulting from business and trade policies has been largely invisible. Corporate governance has produced a dramatic increase in resource and income inequalities, with harsh implications for women, who are lower on the value chain. Moves to export processing zones, reliance on homework and sweatshops and land dispossession are a locus for violation of human rights, and most victims are women. The Group recommends gender-mainstreaming the principles of corporate responsibility, as regards participation and redress.

The fact that care functions are performed largely by women creates a major structural barrier to women’s equal economic opportunity. Failure to properly integrate the biological function of reproduction and the gendered function of unpaid caring into macro-economic policy perpetuates this barrier.

States must overcome the barriers to women's economic opportunities resulting from feminisation of care functions to facilitate choice by women and men in allocating care duties in order to reconcile work and family. The Group commends good practices for recognition, reduction and redistribution of unpaid care work, by provision of paid care leave equally for fathers and mothers; subsidised childcare services, tax deduction for care expenses; improving environmental infrastructures to reduce care burdens; and synchronizing school and working hours. The Group endorses the call by UN Women to subsidise affordable childcare as a social protection floor.

Women’s poverty and quality of life in older age derives from a culmination of stereotyping; precarious employment; informal labour; unpaid caring; interrupted careers and reduced labour force participation; and provides a litmus test reflecting women’s economic situation throughout their life cycle. Good practices to reduce poverty of older women include non-contributory social pensions and reduction of contributory pension gender gaps by compensatory measures for childcare or joint annuities for spouses. Gender-based violence is an obstacle to women’s equal economic opportunity, including domestic violence, violence and harassment in workplaces, schools, public services, the street and cyberspace. Good practice prohibits sexual violence or harassment in the all these arenas.

In economic crisis, particularly under austerity measures, there is disparate impact on women, increasing their precarious employment and unpaid care work. Economic crisis accentuates existing structural economic disadvantages for women and may provide an opportunity to tackle entrenched patterns of gender inequality. Gender-sensitive strategies have been applied successfully in some countries to avoid labour market exclusion, loss of social protection floors and reduction of social services.

The right to gender equality must both be mainstreamed into all post-2015 development goals and remain a stand-alone goal to incorporate transformative structural change required for women’s de facto equality and empowerment. This requires inclusion of women in leadership in economic decision making; gender sensitive analysis of the principles of corporate responsibility; enhanced accountability for employment discrimination; reduction and reconstruction of women’s informal work, particularly migrant and domestic work; a carefully engineered social protection floor for care services; and special measures for older women. The Working Group flags in particular the need to recognise the disparate impact of austerity measures on women and to adopt gender sensitive strategies that avoid labour market exclusion, loss of social protection floors and reduction of social services.

**Professor Frances Raday was previously an expert member of CEDAW, is Rapporteur-Chair of the UN Human Rights Council Working Group on Discrimination Against Women. She is Honorary Professor, University College London, and Doctor Honoris, University of Copenhagen.**

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**Girls with Books, Better Laws, Pave the Way Ahead**
**By Jeni Klugman | 14th May 2014**

“The extremists are afraid of books and pens. The power of education frightens them,” Pakistan’s teenage activist Malala Yousafzai said in her speech at the United Nations. “They are afraid of women. The power of the voice of women frightens them.”

Supporting evidence, unfortunately, is everywhere.

In Nigeria just last month, the extremist *Boko Haram* group deliberately kidnapped more than 270 schoolgirls preparing for exams.
– possibly selling them into “marriage” as part of a campaign to purge the country of “impure” Islam. Once again, as UN Secretary General Ban Ki-Moon said of Malala after the Taliban nearly killed her for her activism on behalf of girls’ education, a brazen attack has shown what frightens extremists most: a girl with a book.

But while the attack on Malala and kidnapping in Nigeria rightly sparked an international outcry, women and girls from Pakistan to Papua New Guinea, Tunisia to Turkmenistan, endure pervasive violence, inequality, and bias that go largely unremarked, mostly unreported, and overwhelmingly ignored – around the world, every hour of every day.

Appalling violations of their most basic human rights both reflect and reinforce discriminatory laws and powerful social norms, which together tell women and girls they are less entitled to health and hope, education and autonomy, freedom from violence and fear, than their fathers, husbands, brothers, and sons.

This major breach of human rights also carries enormous costs for development. We have estimated that the costs of domestic violence – solely in terms of lost incomes and reduced productivity – amount to about as much as what most governments spend on primary education.

The World Bank Group this week launches a new report showing that systematic disparities in voice and agency persist, affecting hundreds of millions of girls and women around the world. *Voice and Agency: Empowering Women and Girls for Shared Prosperity* focuses on several key areas: freedom from violence, sexual and reproductive health and rights, ownership of land and housing, and voice and collective action. It explores the power of social norms in dictating how men and women can and cannot behave, and what works to achieve change.

Here we are talking about girls and women who have no say whether, when and how many children to have, who cannot buy or inherit land, who have no say in major decisions at home and in their community, who cannot leave when their husbands beat them, who cannot ensure that their daughters attend school rather than being married off as children.

Our report distills vast data and hundreds of studies to shed new light on constraints facing women and girls worldwide, from epidemic levels of gender-based violence to laws and norms that prevent them from owning property, working, and making decisions about their own lives. It argues that expanding women’s agency— their ability to make decisions and take advantage of opportunities—is vital to improving their lives as well as the world we all share.
We present powerful new sets of results showing the powerful links between women’s agency and their education. We also highlight the power of laws – for better or worse – to shape gender norms and the lives of women and girls locally and globally.

Among countries with the most child marriages, for example, girls with limited schooling are up to six times more likely to marry young than girls who finish high school. In all regions, better educated women tend to marry later and have fewer children. Better educated women are less likely to live in poverty and less likely to be subjected to domestic violence. Enhanced agency is a key reason why children of better educated women are less likely to be stunted: Educated mothers have greater autonomy in making decisions and more power to act for their children’s benefit.

Governments clearly have a powerful role in ending legal discrimination: Well into the 21st century, some 128 countries maintain legal barriers to women in such basic areas of life as obtaining official ID cards, owning property, and getting a job. In 28 countries, mainly in the Middle East and North Africa and South Asia, more than 10 such discriminatory laws are on the books. But change does happen. The number of countries recognizing domestic violence as a crime has risen from close to zero to 76 in less than four decades. We present new analysis that shows that the longer the legislation is in place, the lower the tolerance of violence.

Expanding opportunities and amplifying the voices of women and girls isn’t a zero-sum game. Leveling the playing field for women and girls brings broad development dividends for men and boys, families, communities, and societies. The data and evidence are clear.

Ensuring that women and men, boys and girls, all have the opportunity to fulfill their potential and author their own lives is vital if we are to create more resilient, more prosperous world.

And while there’s no magic formula for getting there, sending more girls to quality schools, keeping them there, and passing progressive laws go a long way.

Dr Jeni Klugman is director of the World Bank’s gender and development group.

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The Uneasy Decision in A and B v Secretary of State for Health

By Beth Grossman | 12th May 2014

Most women from Northern Ireland seeking an abortion will travel to England. This is expensive: in addition to travel costs, the woman will have to use a private provider rather than the NHS because she is not resident in an English Primary Care Trust. Thus, although citizens of the same country, women from Northern Ireland effectively face discrimination based upon where they live.

This formed one of the challenges brought by the claimants in A and B v Secretary of State for Health [2014] EWHC 1364 (Admin). At the time of her abortion, A was a 15 year old girl resident in Northern Ireland. The cost of her abortion came to £900 in provider fees and travel costs: it was born partially by her mother (claimant B) and partially by a Northern Irish charity. A and B argued that this amounted to discrimination under Article 14 of the European Convention on Human Rights (“ECHR”), in conjunction with her right to private and family life under Article 8.

The High Court dismissed A and B’s human rights challenge on three grounds. First, there is no right to abortion under the ECHR. Previous ECtHR jurisprudence only requires that, if a State does allow abortion, it must provide effective and accessible procedures; this is satisfied by the availability of fee-charging providers. Second, denial of services provided free elsewhere in the State due to place of residence did not amount to discrimination based upon status under Article 14. Third, any discrimination which did take place was objectively justifiable because it arose from a system of qualification for treatment based in residency, itself objectively justifiable.

The High Court’s conclusion – that the Secretary of State had fulfilled his obligation under Article 8 for ensuring effective and accessible procedures for abortion – can be criticised. If fees are prohibitive, and compounded by extensive travel costs, such procedures are not accessible. A’s case underlines this point. She relied upon family and charitable support, and possibly also the willingness of her private provider to reduce the fee in recognition of her travel costs. Insofar as the State assumed any responsibility for ensuring accessibility, it was abrogated in favour of private individuals and institutions, which by their nature will not provide a consistent means of support for the many women in A’s position.

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It is harder to criticise the Court’s reasoning in holding that there was no discrimination based upon status. Geographical location within a State is not an expressly protected ground under Article 14 ECHR. The European Court of Human Rights has proved reluctant to consider it falling within the broader meaning of “status” under this Article and has explicitly held that citizens in different areas can be subject to different legislative provisions without engaging Article 14 (see Magee v UK (2001) 31 EHRR 35). However, Magee’s situation was not directly analogous: his differential treatment took place while physically present in Northern Ireland and therefore subject to its legislative framework. By contrast, A’s differential treatment effectively took place while she was physically
present in England, a State whose legislative provisions allow for free abortions on the NHS.

The Court’s conclusion that any discrimination can be objectively justified is most difficult to counter. If A’s case proceeds to the Court of Appeal, this will be the most likely reason for her appeal to fail. NHS arrangements for funding and the provision of services are complex and largely fall outside judicial expertise. Making a residency exception for Northern Irish women would set a significant precedent for people to assert their right to access expensive or controversial treatments not provided in their State or Primary Care Trust.

The decision which the High Court reached does not rest easily. It seems fundamentally unfair that a reproductive right long established in and enjoyed by women in every other country of the United Kingdom be logistically and financially restricted for those in Northern Ireland on relatively technical legal grounds. The alternative, however, requires the Court to make decisions which go to the core of highly contentious political matters: abortion, devolution and the NHS. The risks and ramifications of such decisions could be extensive. In this context, it is unsurprising that the High Court has chosen to uphold the status quo.

Beth Grossman is a BPTC student at Kaplan Law School and a pro bono legal caseworker at Sense, a national charity supporting deafblind people. She completed her undergraduate studies at the University of Oxford.

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**Northern Ireland’s Human Rights Commission Granted Leave for Judicial Review to Challenge the Country’s Near-Blanket Ban on Abortion**

By Richard Martin | 9th February 2015

Unlike the rest of the UK, Northern Ireland is not covered by the Abortion Act 1967. If you are a woman living there who wishes to terminate a pregnancy, the law offers you almost no choice: you must give birth unless there is risk to your life or serious damage to your health. Against the backdrop of ongoing controversy, several high profile cases and a public consultation on the issue, the Northern Ireland Human Rights Commission (NIHRC) has just been granted leave by the High Court in Belfast to challenge the current law on abortion.

The NIHRC is tasked with reviewing the adequacy and effectiveness of law and practice relating to the protection of human rights under s.69(1) of the Northern Ireland Act 1998. Initiating proceedings “as a last resort” this week, the NIHRC challenged the legality of Northern Ireland’s abortion law on the basis that it fails to allow termination in circumstances of serious malformation of the foetus, rape and incest, making it incompatible with article 3 (prohibition on torture), article 8 (right to respect for private and family life) and article 14 (prohibition on discrimination) of the European Convention on Human Rights (ECHR).

As confirmed by Lord Justice Girvan in Society for the Protection of Unborn Children [2009] NIQB 92, the current legal position on abortion in Northern Ireland is governed by s.58 of the Offences Against the Person Act 1861, as interpreted in R v Bourne [1939] 3 All ER 615, and s.25 of the Criminal Justice Act (NI) 1945. It is unlawful to terminate a pregnancy unless it is necessary to preserve
the women’s life or there is a risk of real and serious adverse effect on her health.

This near-blanket ban has sparked heated, often bitter, debate amongst policy-makers and groups advocating the rights of women and of children. Last year the director of ‘Precious Life’ was convicted of harassing Dawn Purvis, director of the pro-choice Marie Stopes Clinic. Responding to the court’s grant of leave, the Social Democratic and Labour Party, Northern Ireland’s third largest party in the devolved parliament, has already boldly asserted that it is “unequivocally opposed” to changing the law, even in cases of rape or lethal foetal abnormalities.

The law was thrown into particularly sharp relief recently, though, by the high profile case of local women, Sarah Ewart, pregnant with a baby suffering from anencephaly, a lethal developmental condition that often results in a baby being born without the front part of the brain and skull. Having made the extremely difficult decision to abort the pregnancy, Sarah went public, appearing on local television to describe the trauma and stress caused by having to travel to England to have the procedure, leaving behind the support of her medical team, close family and friends when she needed them most.

Cases such as Sarah’s proved enough to encourage the Department of Justice to engage in a public consultation on reforming the criminal law on abortion in Northern Ireland, to consider allowing abortion in the “very narrow range of cases” where 1) there is a diagnosis during pregnancy of a fatal abnormality with the foetus and 2) where women have become pregnant as a result of rape.

In court, the Department of Justice was defensive of its consultation and critical of the “pre-emptive” legal challenge brought while the consultation process was still ongoing. The NIHRC, however, was not satisfied that the consultation was sufficient to protect the rights of women granted under the ECHR. It was argued that the consultation does not commit the Department of Justice to make the necessary changes to the law. Further still, it only seeks public opinion on cases of rape or incest, without setting forth legislative changes.

The NIHRC’s arguments found favour with Justice Treacy, who acknowledged that it raised issues of considerable public importance. The full hearing has been listed for June 2015. For now, women in Northern Ireland face the predicament of having to give birth to a child they might otherwise have terminated or, alternatively, to bear the considerable cost, stress and discomfort of travelling across the Irish Sea to exercise a right of choice protected elsewhere in the UK.

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

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Stereotyping as Direct Discrimination?
Tamas Szigeti  |  6th January 2014

The Hungarian Equal Treatment Authority (ETA) found that the entrance policy of a music club violated anti-discrimination legislation. The club in Budapest only charged men for entrance but not women. Whose equality was at stake?

The complaint to the ETA was submitted by a male consumer. The complainant argued the he had to bear a differential financial burden because of his sex. The club indeed only charged men with an entrance fee of 1000 forint (£2.5). As a secondary argument, the complainant also referred to the practice as discriminatory to women because the entrance policy relied on the sexist assumption that women are sexual objects that attract men to clubs.

Clubs in numerous European countries adopt this policy because it is profitable. However, profitability has no justificatory force for defending direct discrimination under the national anti-discrimination law (which is shaped by EU law). Nonetheless, a defendant-club can still prove that the directly discriminatory policy is inherently related to the service (e.g. a call for exclusively women for female roles in a theater production) or that it is part of a measure aimed at fostering equality (which a government regulation must permit first). Neither of these defences was available in the instant case, so the policy was doomed.

But doomed for what reasons?

The ETA found against the club solely on the ground of discrimination against men. But I would argue that there were two avenues for challenging the policy and, ultimately, one was superior due to its basis in the concept of ‘substantive equality.’

First, one must construct the aim of the policy in relation to the ground of discrimination. The idea behind the policy is that, the more women present at a club, the more men turn up, thereby leading to increased consumption (the underlying assumption is that men consume more than women in these clubs). If the policy has this economic justification, then it seems to render women sexual objects used to attract male clientele (this is why the complainant labeled the policy ‘passive prostitution of women’). Therefore, the policy enhances crude gender stereotypes and inflicts harm upon women’s self-respect.
Second, we must examine any harm resulting from the differential treatment. On the one hand, men have to pay a fee, unlike women. This is a financial harm. On the other hand, women are compelled to participate in sexual stereotyping tantamount to an attack upon their self-respect (harm in stereotypes).

Both claims against direct discrimination are grounded in equality. But they are different claims even though they may lead to the same result (i.e. banning the policy). The Hungarian authority only focused on the financial harm to men, and – probably against the will of the complainant – remained silent about the harm caused to women. The decision led to a sexist puzzle for the general public: one kind of sexist commentator vindicated victory of the 'oppressed' men while another deplored the fact that such a nice rule of courtesy was overruled.

I would argue that we ought to conceptualize this case as one involving direct discrimination against women, in spite of the financial harm caused to men. We are used to the two harms inflicting the same group; financial and self-respect harms are often bundled. Not here, though. The entrance policy was discriminatory against men in a weak, ‘flat equality’ sense. Yet, the other harm inflicted upon women was a competing and arguably stronger claim grounded in ‘substantive equality.’ Only charging men an entrance fee is best understood as a policy that seemingly places women at an advantage, but at a considerable price: subjecting them to a crude gender stereotype. The well-intentioned male complainant publicly stated that he intended to make a case for the equality of women, but because only he was harmed in a legal sense, he based his argument on ‘flat equality’ rather than on ‘substantive equality.’ This may have been a successful litigation strategy, but in principle, there should be no reason against construing stereotyping policies as harms to self-respect in obvious cases related to differential treatment, and to attack them as such. In the instant case, the harm to women’s self-respect should trump the financial harm to men as justification for overruling the policy.

Tamas Szigeti is a Weidenfeld scholar and a DPhil candidate in law at Oxford University.

What Has the European Union Ever Done for Women?
By Simonetta Manfredi | 27th March 2014

As the 2014 European elections are approaching this is an appropriate time to pause and reflect on what the European Union has ever done for women. The EU was established in 1958 with the Treaty of Rome (formerly European Economic Community) by the so called ‘founding fathers’. However, the EU also had a lot of mothers whose work and commitment was instrumental in developing EU social and employment policies which have directly impacted women’s lives.

The journey to gender equality for women in the EU started with the adoption of Article 119 of the Treaty of Rome, establishing the principle of equal treatment between men and women. Though this remained almost ‘dormant’ until the late 1960s, it was brought to life by the lawyer and academic Eliane Vogel-Pollsky. In a publication commemorating her work, she explained that “in 1967 I was still alone in believing in the direct application of this article”. She eventually had the opportunity to test her arguments in the landmark case of Gabrielle Defrenne, a female air attendant working for Sabena Airlines. Defrenne successfully claimed compensation for loss of earnings as a result, among other issues, of her employer rule which forced women to retire at 40, unlike their male colleagues who did identical work but could stay until 55.

Another woman who brought women’s participation in the labour market to the attention of EU policy-makers was the French sociologist Evelyne Sullerot. In her 1971 book on Women, Society and Change she highlighted that the average ‘working curve’ for women was becoming similar to that of men and that women, even when married with children, were increasingly spending more time in paid employment. Starting from the mid 1970s the EU began to adopt a series of Directives introducing legislation which established a floor of rights for working women in all of its Member States. These laws were designed to support women’s participation in the labour market and to advance gender equality in the workplace. Examples included the right to equal pay (1975); equal treatment between men and women in the workplace (1976 and reviewed in 2002); protection for pregnant workers (1992); and prevention of less favourable treatment for part-time (1998) and fixed term employees (1999).

More recently the EU has been focusing its 2010-2015 gender equality strategy on a series of goals, including that of increasing women’s participation in decision-making and tackling the existing democratic deficit. The latter has provided the context for a draft Directive promoted by Viviane Reding, Commissioner for Justice, Fundamental Rights and Citizenship, to achieve 40% women’s representation on the boards of listed companies across the EU.

There is no space here to examine the quality of the protection afforded by the EU to women and some may argue that EU equality legislation should be more far-reaching. However, in spite of its limitations the importance for women of EU equality policies and legislation in providing protection which may not exist at domestic level or in ensuring that protection at domestic level does not fall beyond a certain threshold, should not be underestimated. A recent report undertaken by the Business Task Force (2013), commissioned by the UK Prime Minister, has made a series of recommendations on the EU reforms, including a withdrawal of the EU Commission proposal to extend and improve provisions for maternity leave.
This example suggests that in spite of all the EU’s flaws women’s rights may after all be better protected by the European Commission and Parliament – which include respectively 33% and 36% female representation – than by large companies where women are barely represented at executive level.

Professor Simonetta Manfredi is Director of Centre for Diversity Policy Research and Practice, Oxford Brookes University.

Older Homeless Women in Australia
By Eileen Web | 27th April 2014

Australia is often cited as an economic success story. Decades of growth fuelled by the resources and agricultural industries enabled it to navigate the global financial crisis virtually unscathed. Indeed, Australians enjoy one of the highest standards of living in the world.

Unfortunately, not everyone has reaped these economic benefits and concern has been mounting for some time about a deteriorating wealth divide within Australian society. Central to these concerns is the lack of affordable housing. The price of housing, and private rentals, has soared. The supply of social housing is limited while waiting lists for such accommodation extend for years. More people are resorting to marginal forms of accommodation and homelessness has increased considerably.

This post examines one aspect of this troubling national trend – an increasing number of women at or nearing retirement age are experiencing difficulty in finding affordable and secure housing. This ‘new’ group of women, for the most part, do not fit with society’s ubiquitous image of homelessness. Indeed, last week the Older Women’s Pathways Out of Homelessness in Australia Report noted:

“The largest proportion of older women presenting with housing crisis in Australia have led conventional lives, and rented whilst working and raising a family. Few have had involvement with welfare and support systems.”

As with the general homeless population, homelessness amongst older women cannot be singularly explained. The group is diverse in age, education, location, cultural background and life circumstances. It can be triggered by a single, traumatic event or a lifetime of personal disadvantage and misfortune.

Beyond the prescient issue of domestic violence, if there is insufficient superannuation, a partner dies, a marriage breaks down later in life or something goes wrong from a health or financial perspective, many older women are finding themselves in difficult circumstances. McFerran argues that the entrenched social and economic disparity faced by women places them at risk of homelessness. Changes in the life expectancy of women, the lack of affordable housing, the rate of divorce and separation (and the subsequent number of women living alone) has created a wave of homeless, older working women. One particular driver is persistent wage inequality and the fact that women tend to move in and out of the workforce (as a result of childcare
responsibilities), whilst earning less than men. Another study points to the growing gap between pension incomes and rents as a primary reason behind the increasing number of aged people (in particular women) seeking assistance from homelessness services.

So what can be done? More services directed towards, and accommodation appropriate to, older women at risk of homelessness is required. Homelessness services throughout Australia have identified, and implement, a range of solutions and service models targeting homeless older women. Unfortunately, there is concern about the funding of these services: the National Partnership Agreement on Homelessness only funded until mid-2015, and funding for further capital works under this program have been diluted.

It is also imperative that innovative approaches to accommodation – and necessarily more, not less, capital funding – are made available. A range of appropriate and innovative housing models must be considered. Organisations such as St Bartholomew’s are constructing hostels for older homeless women, as traditional boarding houses, predominantly used to house men, are often inappropriate for women. Also, the supply of public housing must be increased with a view to constructing more transitional, staircase and permanent supported housing within the social housing sector. Nor is it the time to discourage innovative approaches to housing the homeless. As welcome and necessary as larger scale construction is, capital works funding need not be directed solely to new structures. Relatively minor renovations could cater for homeless older women, for example, by converting one public housing dwelling into several self-contained bedrooms with use of a common kitchen and lounge area. Such works are relatively inexpensive and provide the additional benefit of companionship and support.

Finally, it is worth noting that rising numbers of homeless older women is not a uniquely Australian problem. Worldwide, an ageing population, the virtual certainty of lifetimes of income inequality and a continuing lack of home affordability and availability will see numbers of homeless older women increase. Perhaps the Australian experience can act as a warning to others about this new ‘face’ of homelessness.

Dr Eileen Webb is a Professor and Co-Director of the Consumer Research Unit in the Faculty of Law, University of Western Australia.

(In)justice Served? Lori Douglas Case Leaves More Questions than Answers for Canadians
By Ravi Amarnath | 17th December 2014

Since 2010, Canadians have been divided on whether Associate Chief Justice Lori Douglas was a victim of revenge porn or complicit in the harassment of a former client. In late November, the beleaguered jurist agreed to retire four years after leaked photos of her sex life made her the subject of a judicial investigation.

Justice Douglas’ story mimics in some respect those of celebrities who have had intimate photographs released to the public without consent, but with the added dimension that she is a judge. Her decision to retire precludes an answer to a polarizing question – whether the existence of online sexual photographs, even if posted without a judge’s knowledge or consent, places them in a “position incompatible with the due execution of that office.”

Justice Douglas practiced family law with her late husband, Jack King, in the Canadian province of Manitoba. In 2009, Justice Douglas was appointed as the Associate Chief Justice of the family division of the Court of Queen’s Bench of Manitoba, making her the highest ranked family law judge in Manitoba.

In July 2010, Alex Chapman, a former client of Justice Douglas and Mr. King, filed a complaint against the couple with the Canadian Judicial Council (“CJC”). The CJC is an organization consisting of the chief justices, associate chief justices, and senior judges from federal and provincial courts across Canada.

Among other functions, the CJC handles complaints regarding the conduct of federally appointed judges. Mr. Chapman alleged that in 2003 Mr. King had provided him with sexually explicit photographs of Justice Douglas and had solicited him to have sex with the couple. Mr. King also posted these photographs online. In January 2011, the CJC appointed a five-person Inquiry Committee to determine whether to recommend to Canada’s Parliament to remove Justice Douglas from the bench.

The initial hearings focused on whether Justice Douglas had assisted Mr. King with soliciting Mr. Chapman to have sex with the couple. After numerous difficulties, these proceedings were stayed in July 2013 pending the resolution of various issues raised by Sheila Block, counsel for Justice Douglas.

In November 2013, the Inquiry Committee resigned en masse, stating in a joint letter: “In light of recent events, it has become apparent that this Committee as presently constituted will not be in a position to complete its inquiry and submit its report to the Council for a very extended period of time.”
A newly constituted Inquiry Committee ("Second Committee") was formed in March 2014. The Second Committee focused its proceedings on whether Justice Douglas was aware of the online photos prior to applying to become a judge, and whether the existence of the pictures could undermine the confidence in the Canadian justice system.

The scope of this inquiry drew sharp criticism from certain commentators, as Mr. King had denied Justice Douglas’ involvement in posting any photographs. Many also see Justice Douglas as a victim of actions which the federal government is attempting to criminalize.

The photos also became a contentious aspect of the proceedings; another Federal Court judge determined that they could not be used as evidence.

Among other factors, Justice Richard Moseley agreed with Ms. Block’s argument that an “emerging social consensus [exists] in Canada that intimate images should not be disclosed or disseminated against the will of the persons they depict unless it is absolutely necessary.”

The proceedings were set to commence without the photos, when Justice Douglas offered to retire as a judge in May 2015 in exchange for avoiding further hearings. The Second Committee accepted her offer.

Ms. Block released a statement to the CJC which stated: “To withstand more weeks of hearing into intensely private matters and risk the viewing of her intimate images by colleagues and others is more than [Justice Douglas] can bear. So she is voluntarily giving up her constitutionally secure tenure at her right to use this process to fight for that and for her vindication in the process.”

In 2011, Mr. King was reprimanded by The Law Society of Manitoba, the self-governing body for lawyers in Manitoba, but retained his licence to practice law. He passed away in April 2014.

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

‘GamerGate’ and Gendered Hate Speech
By Thiago Alves Pinto | 19th November 2014

What is ‘GamerGate’? Some say it is a movement demanding higher ethics in journalism, but this post will argue that it is yet another instance of sexism and hate speech online which remains unaddressed by States and online companies.

The whole GamerGate issue started when Zoe Quinn, a game developer in the United States, was unfairly accused by her ex-boyfriend of trading sex with journalists for positive reviews on her games. The ex-boyfriend posted on his blog a 9000 word document, which included intimate details, nude pictures, and supposed links between Zoe and journalists. This was rapidly spread on Twitter by gamers who argued that they were intending to promote ethics in journalism. However, GamerGate's first victim, Zoe Quinn, in an interview with the BBC provides a better categorisation of this conduct: “GamerGate will always be glorified revenge porn by my angry ex”. In her interview it is very easy to see how far the consequences of such attacks can go, as a previous
The main victims of the hate speech attacks were Zoe Quinn, Brianna Wu (game developer), and Anita Sarkeesian (a critic of sexism in video games). The three women mentioned above received about 100,000 tweets altogether since this controversy started. They all claim that they received several death threats and rape threats which were followed by the exposure of their home addresses online. Anita Sarkeesian was forced to cancel talks on sexism in the game industry at the University of Utah after threats that said: “This will be the deadliest school shooting in American history and I’m giving you a chance to stop it.” Game forums are riddled with vitriolic comments and most people can simply ignore them. However, #GamerGate threats are more than distasteful tweets; they are criminal acts.

From the outset it has been clear that the GamerGate movement is little more than a misogynistic group aiming at shaming women in new private online spaces. Victim blaming, stalking, and discrimination are taking a new shape in a space which allows for more anonymity, thus less accountability. Yet, online companies have a responsibility to respect human rights, which means that, according to principle 11 of the Guiding Principles on Business and Human Rights “they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved”. Twitter could, for example, develop better algorithms, not to curtail freedom of expression of individuals, but to curb mass attacks of hate groups online such as #GamerGate. If Internet Service Providers can use this technology to protect copyrights, they can do the same to prevent online social spaces to become a “megaphone for haters”.

States also have their share of responsibility, as there are several international treaties that impose positive obligations on them to address discrimination (see Articles 2, 26 and 27 of the ICCPR; Article 2 of ICERD and Article 2 of CEDAW). The Human Rights Committee makes it clear in General Comment 28, confirming that “States parties should report on any laws and public or private actions that interfere with the equal enjoyment by women of the rights under article 17 (right to privacy), and on the measures taken to eliminate such interference and to afford women protection from any such interference”. More can be done by online companies and States to prevent these issues, because once hate speech spreads online there is the potential for it to proliferate in an uncontrollable fashion. Sadly, right now there is nothing that the victims can do, as Zoe Quinn mentions in the end of her interview: “there is no ‘out’ for me, this isn’t just going to go away (…) being able to live somewhere would be a nice start”.

Thiago is a DPhil candidate in Law at the University of Oxford.

**Harassment Against Women Goes Online: The Problem of Revenge Porn**
By Ann Olivarius | 1st December 2014

As the internet takes a more significant place in our culture, its flaws become more evident. While social media, blogs and forums provide a space for minority groups to find community and discussion, the same platforms can also breed bigotry and hatred. While each group faces its own challenges in the online space, the problem seems to be particularly acute for women: barely a week goes by without a new story of a woman discussing the abuse and threats she has encountered on social media. The journalist Amanda Hess struck a chord when she called the internet the “next civil rights frontier”.

Perhaps the most concerning part of this trend is the phenomenon of non-consensual pornography, or “revenge porn”, in which ex-partners (or hackers) post explicit photos or videos online without the consent of the person depicted, frequently including personal
Revenge porn involves the distribution of explicit photos or videos of individuals without their consent. These images are usually enough to really see revenge porn for what it is: a sex crime? Shaming female sexuality is re-fashioned for the digital age. Legislative reforms are to be introduced in the UK, but are they a spotlight on a growing form of gender-based violence: revenge porn. Age-old misogynistic exploitation of women’s bodies and celebrities such as Jennifer Lawrence, Rihanna and Kate Upton and published them for the world to see. This intrusion shines international headlines were made in August when hackers stole from private devices and online accounts naked images of two generations ago. Now, according to the McAfee Love, Relationships and Technology Report, nearly 40 per cent of Americans send intimate content to their partner, and one in ten ex-partners have threatened to publish explicit photos or videos. It’s a strongly gendered form of abuse, with women making up 90 per cent of victims.

My law firm represents victims of revenge porn and other types of online harassment and abuse, so I know firsthand the damage that this can cause. Experiencing such a public violation of trust is traumatic, and often leads victims to depression and anxiety. Because the images or videos will often come up in a Google search of the victim’s name, they can lose their jobs or be shunned by judgemental friends and family. Most importantly, because of the tendency of the perpetrators to post personal details, it can put the victim in real danger: it is not uncommon for them to face threats or stalking after the publication of explicit material.

Existing laws are inadequate to regulate harmful behaviour on the internet, and revenge porn is no exception. Both civil and criminal causes of action in the UK, as they currently stand, are largely not fit for purpose. Defamation doesn’t apply, because unless the pictures are doctored, they are still substantially “true”. A prosecution under the Protection from Harassment Act can’t be pursued, because posting revenge porn doesn’t constitute a “continuing pattern”. A similar lack of recourse exists in the United States. As a result, the best option for many victims is copyright law, which they can use to help take the content down – but only if they took the pictures or video themselves and thus own the copyright. Otherwise, with few exceptions, they’re out of luck.

Thanks to the efforts of victim advocates and campaigners, things are slowly changing. Lawmakers around the world are realising that the laws must evolve to meet the needs of the internet age: thirteen US states have passed laws banning the practice, and federal legislation is in the works. The UK Government has recently committed to criminalise revenge porn with prison sentences of up to two years. Other countries, from Israel to Japan, have implemented or are considering criminal sanctions against the posters of offending content.

It’s encouraging to see that politicians are taking this issue seriously, but there is more to be done before we achieve justice for victims of revenge porn. For one, criminal sanctions focus on the perpetrator, but they do not address the damage done: the depression, the job loss, the humiliation. For this, we should be looking at civil remedies, so that victims can claim compensation for what has been taken away from them by the cruelty of the act.

We should also look beyond the individual perpetrator, to the structures that allow this content to flourish. There are a large number of dedicated revenge porn sites which actively solicit pictures and videos, and make a great deal of money, via advertising revenues, by hosting them. The revenge porn “mogul” Hunter Moore boasted that he was making as much as $30,000 per month from his revenge porn site isanyoneup.com. Moore was later indicted on federal charges – not for running the site itself, but for hacking and extortion. In addition to the specialist sites, there are general pornography websites that also host and make money from revenge porn videos. They are under no obligation to remove content even if the person depicted objects to its publication.

Right now these websites are protected by laws like the Communications Decency Act in the United States, which protects websites from liability for content posted by third parties. That makes sense for neutral websites like Twitter and Facebook, which have functioning complaints policies, and can’t be held responsible for the actions of hundreds of millions of users. But these laws don’t make sense for sites that brazenly promote the violation of women’s privacy and exist solely to make money off of it. Victims of revenge porn should be able to claim compensation from websites that profit from their humiliation.

The growing trend towards the criminalisation of revenge porn, then, is a positive one. It will demonstrate to potential perpetrators that our society takes the privacy of women seriously. I hope it will make some think twice before they put the photos and videos online. But from the victim’s perspective, criminal sanctions are not enough: sending the perpetrator to jail by itself doesn’t rebuild their lives. They deserve damages, even though those too cannot really make up for the harm caused. In the long run, the most important goal is to drain the swamp of a virtually lawless internet that permits this sad and vindictive subculture to fester.

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**UK Efforts to Criminalize Revenge Porn: Not a Scandal, but a Sex Crime**

**By Laura Hilly | 31st October 2014**

International headlines were made in August when hackers stole from private devices and online accounts naked images of celebrities such as Jennifer Lawrence, Rihanna and Kate Upton and published them for the world to see. This intrusion shines a spotlight on a growing form of gender-based violence: revenge porn. Age-old misogynistic exploitation of women’s bodies and shaming female sexuality is re-fashioned for the digital age. Legislative reforms are to be introduced in the UK, but are they enough to really see revenge porn for what it is: a sex crime?

Revenge porn involves the distribution of explicit photos or videos of individuals without their consent. These images are usually
consensually created and shared with a partner during the course of a relationship. However, when the relationship turns sour, disgruntled ex’s have taken to the internet in order to try and shame and embarrass their ex-lovers. This practice is frighteningly common. Recent statistics suggest that one in ten ex-partners threaten to post sexually explicit images of their former partner online, and 60% of these actually go through with it. The UK Safer Internet Centre has identified between 20 and 30 websites displaying revenge porn available in the UK. This is also a particularly gendered wrong – as many as 90% of all victims of revenge-porn are women.

Lawrence, in responding to the online publication of these images was clear on how this violation should be characterized: ‘[i]t is not a scandal. It is a sex crime…It is a sexual violation. It’s disgusting. The law needs to be changed, and we need to change.’ Up until now, victims in the UK have been able to seek limited redress for the harm caused through current laws, ranging from actions against perpetrators for harassment, communications offences, blackmail and voyeurism. However, expert practitioners note that ‘the law does not provide easy answers’ and ‘stronger legal tools are needed’.

Fortunately, for those in the England and Wales (and Scotland hopefully soon to follow), enhanced legal protection may be imminent. On 20 October 2014 the House of Lords debated a new offence, punishable with up to two years’ imprisonment, criminalizing the disclosure of photographs or films which show people engaged in sexual activity or depicted in a sexual way, where what is shown would not usually be seen in public. For the offence to be committed the disclosure must take place without the consent of at least one of those featured in the picture, and with the intention of causing that person distress.

However, there were suggestions that the new laws do not go far enough. Baroness Thornton highlighted that the requirement that the publication causes or intends to cause ‘distress’ is problematic. Will the new law provide a remedy for victims who are not distressed by the publication, but angry? Does the inclusion of the word ‘distress’ send a broader message, that the only valid response to such publication should be distress? Does this reinforce the shaming of female sexuality and stigmatize women who, as was the case for Lawrence, have no desire to apologise for their decision to take the private photographs in the first place? Furthermore, would the requirement of an intention to cause distress be capable of capturing situations where the images are motivated by purely by commercial gain?

Experts in the field contend that ‘the mental element of the offence should be the intentional act of posting private sexual images, without consent, including for the purpose of financial gain.’ ‘This formulation more closely mirrors that adopted by other jurisdictions. For instance, in Australia, Victorian legislation passed earlier this month criminalizes conduct where a person intentionally distributes, or threatens to distribute, an intimate image of another person and the distribution of the image is contrary to ‘community standards of acceptable conduct.’ This formulation has the potential to provide more comprehensive protection to those falling victim to these practices.

Finally, why won’t the new law be characterised as a sexual offences? Lord Faulks opined that ‘we do not think that it is appropriate to view it as a particular sexual offence in the same way as [an offence under the Sexual Offences Act 2003]. Research in previous cases has shown that “revenge” porn is perpetrated with the intention of making a victim feel humiliated and distressed rather than to obtain sexual gratification, which is what defines an offence as sexual.’ This characterisation is suspect, as feminist scholars have long emphasised that sexual offences often have more to do with power than sex, in the same way that those falling victim to these practices.

The draft provisions are generally a welcome development, but hopefully the devil in the detail will not prevent these new laws from being an effective tool to combat this new and noxious form of gender-based violence.

Dr Laura Hilly is a Postdoctoral Fellow and Deputy Director of the Oxford Human Rights Hub.

**CEDAW Issues a Historic Ruling in a Gender Violence Case**
By Gema Fernandez Rodriguez de Lievana | 28th August 2014

In its recent ruling on the case of Ángela González, a Spanish gender violence survivor who fought for years to protect herself and her daughter Andrea, the CEDAW Committee found the Spanish State responsible for violating the CEDAW Convention.

For 20 years, Ángela was in a violent relationship with her partner, the father of her daughter Andrea. In 1999, after three-year-old Andrea witnessed a violent attack on Ángela, she decided to flee the home with her daughter and break off the relationship. However, the abuser’s violence against her and her daughter continued after the separation.

Ángela reported each assault to the police and the courts, but the assailant was never convicted, and no measures were taken to prevent him from violating the no contact orders that were in place. She was also unable to obtain an order requiring that any visit be supervised by a social worker in order to protect Andrea, who did not want contact with her father, against physical or psychological harm. Over the course of proceedings marked by gender stereotypes, the court gave precedence to the father’s...
rights over Ángela’s rights and against the best interests of Andrea, whose right to be heard was also violated. In 2003, during an unsupervised visit, the abusive father murdered Andrea and then took his own life.

After this failure of the authorities to act on the multiple complaints and legal actions that she had initiated, Ángela went to the Spanish courts to seek justice. In 2012, seeing that her efforts had not borne fruit, she decided to take the case to the CEDAW Committee. Women’s Link Worldwide represented her in this action.

Women’s Link’s legal strategy focused on showing that the failures of the system to protect victims of gender violence occurred, and continue to occur, because of ineffective enforcement of existing laws by judicial and administrative authorities. Their communication to the Committee detailed the role prejudices and gender stereotypes played in the failure to protect Ángela as a victim of gender violence and Andrea as a child affected by the same pattern of violence.

In its ruling, the Committee found that Andrea’s murder did in fact occur against a backdrop of domestic violence and structural violence against women. It went on to indicate that the proceedings to set visits, which the abuser took advantage of in order to continue inflicting violence on Ángela and Andrea, reflected “a pattern of conduct that reveals a stereotyped concept of visitation rights based on formal equality and which […] granted clear advantages to the father, notwithstanding his abusive behavior, and which minimized the mother and daughter’s status as victims of violence, which placed them in a vulnerable situation.” (§ 9.4)

For the Committee, by ruling to allow unsupervised visits without giving sufficient consideration to the background of domestic violence, Spanish authorities failed to fulfill their due diligence obligations under the Convention. (§ 9.7)

A particularly important part of the Committee’s ruling for Ángela and her quest for justice was the recognition of the extreme hardship and irreparable harm that she has suffered as a result of the loss of her daughter, as well as the finding that the State’s failure to provide her with restitution constituted a violation of its obligations under the Convention.

The Committee issued recommendations to the State in its ruling, including adequate restitution for Ángela and an exhaustive, impartial investigation of state structures and practices to identify the flaws that led to this lack of protection.

The Committee established two particularly interesting structural measures that have great potential for the Spanish context. First, the need to consider any history of domestic violence when determining visitation schedules in order to ensure that they do not endanger women or children, and second, mandatory training for judges and administrative personnel on domestic violence, including training on gender stereotypes.
At Women’s Link, we are proud of Ángela for her persistence and courage over the course of this eleven-year quest for justice, and we are ready to continue working to ensure full implementation of the Committee’s ruling, the first of its kind issued against Spain for a gender violence case, in order to prevent more cases like that of Ángela and Andrea.

Gema Fernández Rodríguez de Liévana is a Senior Attorney at Women’s Link Worldwide. Gema has a law degree and a postgraduate degree from the Faculty of Political Science and Sociology from the University of Complutense, Madrid. She is author of the research project “Women in Morocco and their Contribution to Changing Dynamics”.

Mega Event Tactics: Brazil’s Sex Industry During the World Cup 2014
By Janine Ewen | 10th July 2014

On 23rd May 2014, police from the 76th Police Precinct in Niterói, near Rio de Janeiro, invaded (without judicial authorisation) a building occupied by 300 sex workers and other residents. Around 100 sex workers were taken for investigation at police stations.

It is believed to be a part of mass hygienisation (social cleansing) in the city centre of Niterói, aimed at enforcing a new “image of Brazil” for the FIFA World Cup 2014 which began on 12th June. Sex workers, those living in the apartment, and surrounding residents of the area faced displacement and closed businesses. Sex workers reported acts of rape, theft, and physical violence by the police officers, with further claims that the police planted evidence of false crimes in their belongings to purposely make matters worse.

On returning to the apartment complex, sex workers found little left or nothing at all. Windows were smashed, door locks destroyed, personal items and money were taken. The presumption was that illegally escorting sex workers to the police station allowed police to take everything and to shame sex workers and allies. Having the law on their side paves the way for countless acts of corrupt police action against the sex worker community. The laws on sex work in Brazil are conflicting and can cause confusion; sex work is not illegal, but the law criminalises any third party who profits from the sex industry, whether they are a brothel owner, or private bodyguard. This causes a huge problem as public authorities like the police have mechanisms of control over sex workers and take advantage of this.

A public hearing was held on 4th June at the Rio de Janeiro state legislature examining violations of the rights of prostitutes in Niterói. It was organized by the Human Rights Commission and the Commission for the Defence of Women’s Rights. Surrounding residents spoke of their attempts to make complaints against the police, however they were disregarded. Those present (sex workers, lawyers, the general public) highlighted the persecution of these women, the lack of information, illegal and violent actions of the police, and their incessant attempts to prevent the lawyers who support prostitutes from monitoring their cases. Clara Prazeres Bragança from the Women’s Rights Defence Nucleus of the Public Defender’s Office, stated: “Either the state no longer controls its police, or there is a deliberate policy of human rights violations”. Due to the absence of police representatives at the hearing, it was decided that another will be organised. The Head of the Civil Police, the Civil Defence, and the Public Ministry of the State and residents of Niteroi will be invited.

Research has found that sex workers are particularly vulnerable to police violence during international sporting events. This includes harassment; violence; displacement from areas of work and problems in meeting clients. Health risks, due to an inability to access medical services, also increase. Although these might occur in any case, mega sporting events have been found to cause countries to prioritise their international image; this brings issues such as sex work more readily to the surface. Further,
police forces often adopt a militaristic approach during mega events. Conflated claims of human trafficking and organised crime lead to major crackdowns on the sex industry, despite limited evidence to suggest these crimes take place.

I conducted primary research in Rio de Janeiro in 2013 demonstrating that sex workers were in already in fear of police violence before the World Cup 2014. The research also found that sex workers experienced discriminatory behaviour from healthcare professionals and questioned the health entitlements and rights of Brazil’s sex working community. Mega events are consistently demonstrating a global trend: the sex worker community will face adverse effects when its country hosts an international event. Social cleansing and exit routes out of the industry are enforced to reduce the rights of sex workers who want to work. Police brutality is experienced by sex workers across the world, but this is intensified further during mega event preparation. What is required is an immediate revision of policies on the health and safety of sex workers.


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**Male Rape in Armed Conflicts: Why We Should Talk About It**

*By Saipira Furstenberg | 1st July 2014*

Sexual violence represents one of the most serious forms of violation of an individual’s human rights. Although statistics for sexual violence against women are significantly higher than for men, it should not be forgotten that rape not only affects the female population, but is also a concern for many men and boys who have been exposed to it, particularly in warfare conflicts.

The issue of sexual assault of men and boys on the current global agenda is not raised nearly enough, and remains largely under-reported. The cultural barriers to recognising and addressing male sexual abuse are currently under-researched, and remain primarily a taboo topic. In addition, the lack of widespread institutional recognition of male rape, combined with feminist movements, defining sexual violence as exclusively a women’s issue, has resulted in the failure to include this section of the population in policy and research agendas of governments, donor agencies and academic institutions. This framework has created a lack of attention to male victims in sexual abuse scenarios. Most of the international and national institutions barely acknowledge sexual violence against men that occurs in armed conflicts.

Because the topic of male rape in our often male-dominated culture remains largely unaddressed, there is little understanding about the issue and hence it is considered for many to be an unmentionable subject. As a result, cases of reporting such abuse remain rarer than those for women, mainly because of shame and fear of stigmatisation.

Research focusing on male sexual violence also reveals that there is a lack of adequate services in place to respond to the victim’s needs. A study carried out in 2002 notes that out of 4076 non-governmental organizations that worked in the area of war rape and other forms of political and sexual violence, only 3% mentioned sexual violence against men and boys ‘in their programs and informational literature’. Similarly, there are reports that many international initiatives, while addressing the issue of war rape, lack clear understanding and consensus around the topic in general, and as such remain poorly designed for addressing war rape abuses against men and boys in particular. In the United Nations (UN) Declaration of Commitment to End Sexual Violence in Conflict (September, 2013), there is only one line mentioning that men and boys are also subject to sexual violence. In many of the UN’s key documents, sexual violence is considered solely as a gender issue involving only women and girls. This reflects the lack of mobilisation and understanding by the UN agencies, governments and NGOs on the topic of sexual violence perpetuated against men and boys in conflict zones.

There is a need to address causes of sexual violence and to create greater emergency responses. For our society to end sexual violence around the world, organisations such as the UN should first recognise that men can be as vulnerable as women. It should not be forgotten that although there is a higher prevalence of sexual violence against women in war zones, ultimately both form part of the gender dimension of conflict. The need to put more emphasis on men and boys as victims of sexual violence in the UN Declaration of Commitment to End Sexual Violence in Conflict can perhaps be the first starting point. It is insufficient simply to state that ‘men and boys are also subject to sexual violence’. There is indeed a need to create awareness not only about women’s rights, but more generally about human rights. Only then can we start to break down the wall of silence and adopt proper strategies to bring change in this field.

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Chapter 11

Rape and the Failure of the Criminal Justice System
Jayna Kothari | 19th June 2014

With the national outrage witnessed in India after the gruesome gang-rape of Nirbhaya in December 2012, one truly thought that the country was taking violence against women seriously.

The shocking incident led to the Justice Verma Committee being set up to review the criminal law relating to violence against women, the Verma Report and the passing of the Criminal Law Amendment Act 2013 which included many forms of sexual violence against women as criminal offences.

Now, less then a year after these amendments, we are witnessing shocking incidents of rapes and murder. The most violent incident was in Badaun, UP where two girls aged 14 and 15 were raped, murdered and their bodies were hung publicly in the village. Caste was a major factor in the crime. There have been several other incidents of rape in UP and other parts of the country and the situation is not improved with ministers making statements such as “rape is sometimes right and sometimes wrong”, “boys will be boys” among others.

Sexual violence against women in India is increasing with the National Crime Records Bureau showing that incidents of rape in India have gone up tenfold in the last 40 years. From 1971 to 2012 recorded cases shot up from just under 2,500 to almost 25,000, and activists believe only 10% of cases are actually reported to the police.

What is really chilling is that almost every story of rape is similar. When victims or their families complain, the police do not respond. This is what happened in the case of the Badaun rapes – the girls’ parents complained to the police when the girls had gone missing but the police refused to take any action. Had the police taken the complaint seriously, they may have found the girls and prevented their deaths. After the crime has taken place, there is continuing inaction on the part of the police and a First Information Report (“FIR”) is rarely filed immediately. If an FIR is filed, there is harassment of the survivors or their families, defective investigation and highly inadequate prosecution, leading to acquittals of the accused. No part of the criminal justice system signals to women and their families that sexual abuse, rape and any form of violence against women will be taken seriously. In fact, the signals are just the opposite – that sexual violence and rape will be tolerated and women just have to deal with it.

This is the reality that women are faced with when they approach the police with complaints of sexual harassment, rape, domestic violence, sexual assault or any other crime. The story is not very different in the courts with judges often protecting the accused instead of the victim. In a recent case of sexual harassment alleged by a legal intern against a former judge of the Supreme Court, the Delhi High Court passed a gag order on the media restraining it to report any of the proceedings, in order to protect the reputation of the accused judge.

While sexual violence against women is situated in India’s patriarchal, feudal society, it is clear that the criminal justice system is failing women. Unless there are strong police accountability measures to monitor and punish inaction on the part of the police and measures to monitor investigation and prosecution, it is unlikely that there will be any change in the mindset of the people who commit these crimes. The criminal law amendments would make no difference unless efforts are taken to implement them seriously and policing reforms are put in place to ensure accountability of the police.

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Sexual Violence in Modern Myanmar
By Myanmar Zoya Phan and Phyllis Ferguson | 5th June 2014

Ongoing Sexual Violence in Burma

For many decades, the Burmese Army has been using rape as a weapon of war against ethnic women and girls. Even though ‘reforms’ began 3 years ago, women continue to be subjected to rape and other forms of sexual violence committed by the Burmese Army. This continues to this day with impunity.

The United Nations Special Rapporteur on Burma has documented cases of rape and sexual violence by the Burmese Army for the past twenty years. Community-based women’s organisations have also been documenting rape and sexual violence for decades. The latest report of Women’s League of Burma, Same Impunity, Same Patterns, highlights more than 100 rape cases where the Burmese army’s soldiers have sexually abused ethnic women and girls.

The Burmese government has repeatedly denied sexual violence is taking place. Therefore, it is clear that it is unwilling to address this issue. This is why an international investigation into sexual crimes in Burma is important.
Despite these abuses clearly violating international law, the British government has yet to take any steps to tackle impunity, despite saying this is a priority for Preventing Sexual Violence Initiative, in which Burma is included. The international community cannot continue to ignore the abuses suffered by women in Burma.

**Sexual Violence in Transitional Settings**

Sexual violence by the military and the police with impunity in conflict situations against vulnerable citizens can be part of a concerted campaign to assert their absolute exercise of power. It can also include illegal detention and torture, as in the cases of Cambodia, in the Khmer Rouge period and in Timor-Leste during the Indonesian occupation.

Any ethos of protecting citizens may be disregarded, absent comprehensive adherence to a rights-based constitutional regime and the rule of law. Will the draft law on "religion" recently promulgated in Burma abrogate rights?

Post-conflict, the transition to peace-building, economic and social reconstruction is predicated on a strong rights-based constitution and respect for the rule of law – international and domestic – and equal justice. These are necessary preconditions.

Such transitions are fraught with often unrealistic expectations. If physical security is to be achieved in the domestic sphere, it requires civic education to alert children and adults that there is a human rights basis that can sustain them. Civic education can teach children, teachers and parents that beating, as a punishment, is unacceptable. If there are community specialist support centres for those who experience rape and sexual violence to have forensic testing, psychosocial and legal support, impunity can be foreclosed. Access to pregnancy termination in rape cases is required in law.

Often in post-conflict situations, sex- and gender-based violence leaves the public sphere and becomes entrenched in the less visible but unacceptable reality of domestic violence. Here, empowering women politically to serve their communities as councillors with listening ears, paralegal training and holistic connections for health, legal support and advice on call can improve the process of community knowledge and understanding. Grass roots organisations need to build support with men convicted of rape and SGBV during their time in prison and on return to their communities. Building gender equality, reversing arbitrary violence and patriarchal attitudes must start in the home, in schools and in communities. Achieving non-violence is very complex, it does take time. But it can be achieved.

Zoya Phan is a political activist, Campaigns Manager at Burma Campaign UK (BCUK) and author of the memoir ‘Little Daughter”. In 2010 she was recognised by the World Economic Forum as a Young Global Leader.

Dr Phyllis Ferguson works with Oxford Transitional Justice Research and is a founding member of the Oxford International Human Rights Law Group. She served on the Truth and Reconciliation Commission in East Timor, has conducted research in Nigeria, Ghana, Kenya, Tanzania and Zimbabwe.

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**Are Women’s Rights Really Human Rights?**

By Gertrude Fester | 13th May 2014

At the second World Conference on Human Rights in June 1993, the statement, ‘women’s rights are human rights’ was first coined and accepted due to vociferous lobbying on the part of women’s rights activists. It was at the African regional meetings in 1994.
and 1995, culminating in Dakar, Senegal, that African women, in preparation for the Beijing Fourth UN World Women’s Conference in August to September of 1995, reached consensus that the African region would strongly recommend a specific article on girl children. Hence, Chapter IV. L. of the Beijing Platform for Action unambiguously calls for the promotion and protection of girl children and provides for the appropriate education necessary to empower them.

The abduction and disappearance of about 230 schoolgirls on 14 April 2014 from Chibok, Nigeria, poignantly highlights the vulnerability of this group. Many unanswered questions remain, and Nigerian women have raised them to their government. These questions include: how is it that, following the murder of 59 children in the Federal Government College of Buni Yadi on 25 February 2014, security at schools had not been increased? How can it be explained that, in this era of digital technology, drones and sophisticated aerial surveillance, the girls have simply disappeared?

In addition, the Nigerian International Federation of Women Lawyers (FIDA) has asked how it is that in an area (Borno State) apparently under a state of emergency, this abduction could take place. There were four trucks together with many motorbikes that travelled in convoy, arrived at the school in Chibok, and traumatised and terrorised the pupils and staff. Where were the security officers or any other officials of authority when the abductors then fled with over 200 girls?

There is much speculation and snippets of information about what may have happened to the kidnapped girls. Allegedly, the militant Islamist group, Boko Haram, took them to Chad and Cameroon. It is purported that they were to be forcefully married to Islamist extremists. A local source, Halite Aliyu, of the Borno-Yobe People’s Forum, informed the Associated Press that the girls were being ‘sold’ for 200 naira ($12) each.

In Nigeria, millions have been mobilised as a result of the kidnapping. On 30 April, a million women assembled in the capital, Abuja, calling on the Nigerian government to leave no stone unturned in the effort to bring the girls back safely.

Nigeria has ratified all major international instruments. Many of these, like the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (Article 16), the African Charter on Human and People’s Rights (Article 18(3)) and the African Charter on the Rights and Welfare of the Child (Article 27) prohibit girl child marriages. In addition, Nigeria has instituted various legislative and institutional measures at all levels to address forms of violence against children. No fewer than eight recently-enacted pieces of legislation have been promulgated in order to incorporate the demands of international treaties into domestic law. Furthermore, institutions have been established to protect children, such as the National Agency for the Prohibiting of Traffic in Persons.

But there may be conflicting agendas in populous and multicultural Nigeria. On 5 August 2013, Azubike Onuora-Oguno argued that in failing to revoke section 29(4)(b) of the Nigerian Constitution, child marriages remained legal. Section 29(4)(b) contradicts Section 22 of Nigeria’s Child’s Rights Act of 2003 in stating that upon marriage, female children are considered adults. This section of the Constitution reflects interpretations of Sharia law that justify child marriage. However, according to interpretations of the Qur’an, child marriage is illegal. Yet, it is important to remember that Nigeria is a secular state. But could it be that there is a lack of political will to stop these abductions?

In the light of the above, what does it mean for women and girls’ human rights? Today it is Nigeria; tomorrow, who knows where? As long as these conflicting situations regarding women and girls’ rights continue to exist, powerful religions, patriarchal elite and governments will pay lip service to the noble principles to which they have pledged themselves. How is it that religions, which are supposed to enhance lives, can be so exploitative and harmful to women? ‘A luta continua.’ Like the women activists who advocated for women’s rights to be considered human rights, we must enter the next battle to ensure the praxis of this principle.

Gertrude has held various positions in post-apartheid South Africa, including being an MP for the African National Congress and a Commissioner on Gender Equality (a constitutional position). She currently lives in Kigali, Rwanda where she works with grassroots women’s structures and does consultancy in gender issues.

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**Omnipresent in the EU: Violence Against Women**

*By Amy Weatherburn | 16th March 2014*

The results of the world’s largest survey on women’s experiences of psychological, physical and sexual violence have shown that violence against women is a problem which exists at home, at work, in public and online.

Following 42,000 face-to-face interviews in all 28 EU Member States, the survey, conducted by the European Union Agency for Fundamental Rights (FRA) is the first of its kind. It provides comprehensive data which outlines the scale and nature of violence against women thus enabling policy makers to respond to the problem using a reliable evidence base.

The UK results show that 44% of the women interviewed had experienced physical and/or sexual violence by a partner and/or a
non-partner since the age of 15. Similarly, 46% of women interviewed had experienced psychological violence by a partner.

Despite the high prevalence of violence against women, the survey highlights that women are less likely to report the incident to the police, with only 16% contacting the police to report an incident – despite 36% of respondents indicating that the incident had a long term psychological impact.

The UK could be categorised alongside other European countries where gender equality is considered to be advocated by government and policy makers, however the survey results indicate that the prevalence of violence against women is nevertheless higher than in other European countries with more traditional cultural attitudes towards women. As such, the survey results show that the UK (44%) is one of the EU Member States with the highest prevalence of violence against women alongside Denmark (52%), Finland (47%) and Sweden (46%). The possible reasons for these somewhat surprising results were outlined by Joanna Goodey, Head of the Freedoms and Justice Department at the FRA:

“If you have higher gender equality, it could lead to higher rates of disclosure about violence, women saying it is not acceptable, you could also potentially have men, a backlash against women being in high positions, wanting equality, wanting lifestyles that are equal to men’s.”

The report outlines a number of key proposals that are essential to improving the situation. These include the need for member states to review their legislative and policy responses to violence against women, to implement training of frontline professionals who are required to understand and recognise the impact of abuse on victims and to direct campaigns to both men and women.

The launch of the EU survey results coincides with a number of significant policy developments from the current Coalition government which impact directly upon the response to violence against women in the UK. Following a successful pilot, Clare’s Law has now been rolled out nationally, which provides access to a Domestic Violence Disclosure Scheme where the police are able to disclose information about a partner’s previous history of domestic violence. In conjunction with this, the Domestic Violence Protection Order enables law enforcement agencies to provide protection to victims in the immediate aftermath of a domestic violence incident.

On 8 March 2014, to mark International Women’s Day, the UK’s A Call to End Violence Against Women and Girls Action Plan 2014 was announced reinforcing the government’s commitment to ensuring early intervention and risk reduction; developing partnerships working with other government departments; and engendering a victim focused approach by police, children’s and adult services, and health professionals.

The recent policy developments within the UK are vital to eradicating violence against women; however the EU survey results demonstrate that there is still more that needs to be done to ensure that women and girls are free from abuse in all aspects of their lives.

lives. Kerry Sullivan, Co-Manager of Equation, a domestic abuse charity, supports this view by commenting that:

“Violence against women, including domestic abuse, is tragically under-reported and often hidden from sight. Equation welcomes the publication of this survey, which provides clear evidence that violence against women in Europe persists on a massive scale and demands a co-ordinated and holistic response from member states.”

Amy Weatherburn is Research Assistant at the University of Nottingham Human Rights Law Centre (HRLC). HRLC is a member of FRANET, the FRA’s multidisciplinary research network.

The Women Empowerment and Gender Equality Bill: Can It Live Up to Its Name?
Olivia Bliss | 26th February 2014

The Women Empowerment and Gender Equality Bill (WEGE) is currently before Parliament in South Africa. One of its main aims is to ‘give effect to the letter and spirit of the Constitution’ by promoting gender equality. Such legislation might be considered a welcome step for a country infamously struggling to grant its women their constitutionally-guaranteed rights to equality, freedom from violence and security of the person. But instead, WEGE has provoked fierce and almost universal criticism from women’s rights organizations. At a workshop on WEGE last December, many participants regarded the Bill with outrage, declaring its provisions paltry and insignificant in the face of the huge injustices perpetrated against women on a daily basis. Some even called for civil society to refuse to engage with the government on the bill.

WEGE’s key provisions are found in Chapters 2 and 3. In summary, Chapter 2 deals with the ‘social development’ of women, via education and training aimed at eradicating gender-based discrimination and violence and increasing education around access to healthcare. Chapter 3 deals with equal representation and empowerment of women through the progressive realization of a minimum of 50% representation and ‘meaningful participation’ of women in public and private decision-making structures, including businesses and political parties. This chapter also addresses the socio-economic empowerment of rural women and women with disabilities.

All of these aims sound laudable. But on closer inspection, the legislation is far too vague. WEGE lacks real detail as to how it will realize its ambitions for South African women. Each section follows the same pattern: ‘designated’ public and private bodies must submit plans for realizing the bill’s goals to the Minister, followed by further plans for their implementation if the Minister so requests. But the bill is silent on the form that such plans and measures should take, and there is no detail offered on the selection process for the designated bodies or the capacity of the relevant government department to embark on such a wide-scale project.

More fundamentally, the mere creation of a plan is not a guarantee that it will be adhered to. The lack of enforcement mechanisms in the bill is one of the main reasons why it has been widely discredited. In its first draft, the bill envisaged the creation of a ‘super-ministry’ to enforce its provisions, but this was later removed for fear that it would usurp the powers of the Commission for Gender
Equality, an independent body created by the Constitution. The bill now lacks any enforcement features whatsoever, and many are concerned that this will result in its provisions being disregarded.

Amongst the other criticisms in the public submissions to the government on WEGE are its overly broad definition of gender equality, the lack of serious engagement with both patriarchal structures in society and the root causes of the very high rates of gender-based violence, and the lack of consultation carried out with women living in rural parts of the country, where roughly 80% of the population lives and works.

Another problem is the huge overlap between WEGE and existing legislation. A large proportion of the provisions in WEGE can be found elsewhere, most evidently in Chapter 5 of the Promotion of Equality and Prevention of Unfair Discrimination Act of 2000, which still has not been brought into force. As the submissions made by the Women’s Legal Centre note, should both pieces of legislation be brought into force, a lack of harmonization would ensue, which is undesirable from a policy point of view.

Recently, feminist critics have questioned why WEGE reiterates the ‘existing rights and protections [for] . . . some women’ whilst simultaneously ignoring the ‘equality rights of other groups of women,’ pointing out the 20-year delay on the government’s part in recognizing Muslim marriages or reforming the law on sex work. The answer is that those issues are simply not vote winners. WEGE, on the other hand, with its grand, albeit vague, goals to improve the lot of South African women, and due to be rushed through Parliament just before the national election in May, is far more politically palatable if ultimately toothless.

Olivia Bliss is a BPTC graduate from City Law School and co-authored the Women’s Legal Centre’s submissions on WEGE to the Portfolio Committee on Women, Children and People with Disabilities with Jennifer Williams.

RACE AND ETHNICITY

Concerns about Greece from the European Commission against Racism and Intolerance
By Menelaos Markakis | 6th March 2015

The European Commission against Racism and Intolerance (ECRI), a Council of Europe body monitoring problems of racism, xenophobia, intolerance and discrimination, has delivered its fifth report on Greece on 24 February 2015. The report paints a rather discouraging picture of these problems in Greece and contains a wealth of information and valuable recommendations.

The ECRI notes that “progress has been made in a number of fields” since its previous report on the country. The positive developments set out in the report primarily concern the introduction of special units within the police to tackle racist violence, the appointment of a Public Prosecutor for the prosecution of acts of racist violence, the establishment of local integration councils, and the adoption of a new anti-racism law. Hate crime legislation in Greece has previously formed the subject matter of a comparative hate crime research report prepared by Oxford Pro Bono Publico.

The ECRI further notes that “despite the progress achieved, some issues give rise to concern” and requests that the Greek authorities act in a number of areas. First, the ECRI recommends that Greece ratify Protocol No. 12 to the European Convention on Human Rights, which prohibits discrimination “in the enjoyment of any right set forth by law”, as well as discrimination “by any public authority”. Second, the ECRI highlights the need to create a Task Force to develop a “comprehensive” and “multisectoral” national strategy to address the root causes of racism and intolerance and to involve civil society partners in the fight against racism. Third, it is suggested that the Greek authorities offer more training to police officers, judges and prosecutors on the application of criminal legislation on hate motivated offences.

The ECRI report further makes a number of more detailed policy suggestions to the Greek authorities, most notably in relation to the vulnerable Roma community and LGBT persons. As regards the Roma population, the ECRI recommends that the authorities “develop an effective strategy to put an immediate end to racial segregation affecting Roma children in schools.” In this connection, it will be recalled that in the case of Sampanis and Others v Greece [2011] ECHR 1637 the European Court of Human Rights found a violation of Article 14 of the Convention (prohibition of discrimination) in conjunction with Article 2 of Protocol No. 1 (right to education), because the applicants’ children had been placed in special classes, in an annexe to the main school building, on grounds of their ethnic origin.

As regards the LGBT community, the ECRI report notes that “all educational staff should be encouraged and supported to assist victims of bullying”, and recommends that the authorities issue “a clear instruction to all police officers that transgender persons should not be fined for alleged prostitution offences merely due to their identity and appearance”. It is surprising that no specific recommendation is addressed to Greece in relation to the perceived need to extend the availability of civil unions to LGBT couples, following the Strasbourg Court’s judgment in Vallianatos and Others v Greece [2013] ECHR 1110, which has been previously reported on the OxHRH Blog.
Regrettably, most of the issues highlighted in the ECRI report are common knowledge in Greece. Both the previous and the newly-formed coalition government have stepped up the efforts to combat racism and intolerance, but important challenges remain in a number of areas. The ECRI report covers developments up to 18 June 2014. Latest developments include the appointment of a Deputy Minister for Migration Affairs, and the Deputy Minister of Home Affairs’ pledge to shut down the migrant detention centre in Amygdaleza. It remains to be seen whether these reforms will serve to ameliorate the situation experienced by “irregular migrants” in Greece, as well as by other vulnerable communities. It is almost definitely the case that the ongoing economic crisis, public and national security concerns, and the country’s geographical position as a gateway to Europe will continue to present unique challenges in this context.

Menelaos Markakis is reading for a DPhil at the University of Oxford and is an Academy of Athens scholar. He is a frequent contributor to the OxHRH Blog.

Recognising Travellers’ Needs: The Courts Begin to Move
By Helen Mountfield | 26th February 2015

Are courts beginning to recognize the duty of equality law to respect and protect the rights of minorities to be different? An important High Court decision in Moore & Coates v Secretary of State for Communities and Local Government (Equality & Human Rights Commission intervening) [2015] EWHC 44 (Admin), suggests that they may.

Research repeatedly shows that gypsies and travellers’ needs for culturally appropriate obligation are overlooked during the planning process, so in many areas there is a failure to allocate adequate land for travellers’ needs for regular stopping sites. The failure to include the needs of gypsies and travellers in local plans makes it easier for planning authorities to refuse planning permission, often under local pressure to do so. But planning inspectors, deciding whether to make exceptions to policies against permitting housing in the Green Belt, were sometimes prepared to take steps to mitigate this, by taking into account the absence of a supply of suitable land allocation for gypsy sites.

Eric Pickles, Secretary of State for Communities and Local Government, resolved to put an end to what he perceived as an over-emphasis on exceptionalism in the cases of gypsies and travellers. Ministerial Statements of July 2013 and January 2014 announced that he would consider for recovery all traveller site appeals in the Green Belt for the Minister to determine them himself. Those statements set out that the Secretary of State “wishes to give particular scrutiny to traveller site appeals in the green belt, so that he can consider the extent to which Planning Policy for traveller sites is meeting this government’s clear policy intentions”. The evidence was that at first 100% of gypsy and traveller applications were called in and then 75%.
This use of the policy creates particular, and disparate, disadvantage for gypsies and travellers. It results in serious delay in
determination of applications for planning permission (1-2 years), and the policy approach which the Secretary of State has taken in
determining these appeals means that fewer are succeeding.

The policy was the subject of a judicial review in the case of Moore & Coates. The Claimants were gypsies whose appeals against
refusal of planning permission for small sites to pitch caravans in the Green Belt had been called in and refused. Mr Justice
Gilbart decided that the application of the Ministerial Policy to recover all travel pitch appeals, or an arbitrary percentage of them,
constituted unlawful indirect race discrimination in the performance of a public function, contrary to sections 19 Equality Act 2010,
and also involved a breach of the Public Sector Equality Duty. Although it was a matter for the Minister if he wished to recalculate
the policy approach to special circumstances and to encourage more effective provision for traveller sites in local plans, the means
he had chosen was disproportionate, given the extent of detriment it imposed and other means of achieving those objectives which
had been drawn to his attention by his own officials.

The judge quashed the decisions to recover the Claimants’ appeals, though he did not quash of the Ministerial Policy itself. This
judgment is an important landmark, countering the suggestion that singling out applications for planning permission by gypsies and
travellers for scrutiny is not discriminatory because they are asking for something different from the settled community rather than
symmetrical ‘equal treatment’. Although the judgment does not expressly rely on the Council of Europe Framework Convention
on Minority Rights, it chimes with its overarching policy purpose, that members of minorities should not have to choose between
respect for their differences and equal enjoyment of the social advantages enjoyed by the majority, and that proper reasons are
needed before a policy particularly affecting the lifestyle of a protected minority group is singled out for special attention.

Despite the determination that the application of Ministerial Policy was unlawful, there is no evidence that the Minister has changed
his approach to the recovery of traveller appeals. Unless and until he does so, we can expect further challenges to refusals of
planning permission, building on the logic of the Moore & Coates case.

Helen Mountfield QC is a barrister at Matrix Chambers.

A House Divided: Grappling with Affirmative Action in South Africa
By Andrew Wheelhouse | 3rd October 2014

It doesn’t require much imagination to see that affirmative action policies implemented for the good of society exact a toll on the
individuals who lose out. This is especially true in South Africa, which enshrines the use of such measures within section 9(2) of the
Constitution. But what is the standard of review to be applied when challenging the implementation of a measure that is otherwise
constitutionally compliant? On 2 September 2014 the Constitutional Court of South Africa handed down a fractured, frustrating
judgment on this topic in the case of South African Police Service v Solidarity obo Barnard [2014] ZACC 23, though perhaps for
understandable reasons.

Ms Barnard, then a captain in the SAPS, applied twice for a post carrying a promotion and, despite being by some measure the
best candidate, was unsuccessful. She challenged the second refusal which was made by the National Commissioner on the
basis that her appointment would not enhance racial representivity at that particular salary level, where white women were already
over-represented. The finding of the Labour Court for Ms Barnard was overturned by the Labour Appeal Court, who were in turn
overruled by the Supreme Court of Appeal.

Previously, Ms Barnard had argued that she had been subject to unfair discrimination. Then, before the Constitutional Court, she
changed tack, instead arguing that by declining to appoint her the National Commissioner had made an unlawful decision, shifting
the focus from constitutional compliance to the measure’s implementation in administrative law. An entirely new line of attack. A
more united court might have been able to navigate a path to a unanimous judgment. Instead, dismissing the appeal, the bench
produced four separate concurring judgments.

Jafta J considered that this shift in Ms Barnard’s argument was sufficiently radical that it should not be dealt with, as the question
of appropriate standard “was not canvassed at all on the papers”. Moseneke ACJ, writing for the majority, concurred but decided to
press on anyway.

His view was that reasonableness was the correct standard and that the reasons given for the refusal were not so scant as to justify
a finding of unreasonableness. He noted that the over-representation of white women at that salary level was “pronounced”. That
Ms Barnard had since received promotion to the rank of Lieutenant-Colonel. She knew the score and accepted and even supported
the SAPS’ employment equity plan.

The majority judgment is hard stuff and some may claim that when affirmative action is successfully invoked minorities will be
given short shrift unless the other side’s conduct has been outrageous. This would explain the tone of the joint concurring judgment
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of Cameron J, Froneman J and Majiedt AJ. Ms Barnard’s case was squarely before the Court because it raised the question of whether the implementation of the plan was “so rigid as to constitute the use of quotas” (which are prohibited).

Affirmative action is akin to “fighting fire with fire” and raises the prospect of infringing the right to human dignity under section 10 of the Constitution. This need for “heightened scrutiny” therefore justifies “fairness” as being the appropriate standard of review. An open-ended norm, but one which the minority argued was no less open-ended than “reasonableness”, “negligence”, “public policy” or other common concepts in law. Under their analysis the result is the same, but it is a much closer call.

Van der Westhuizen J’s judgment expressed scepticism of the fairness standard but gave further consideration to the question of human dignity as part of the rights-balancing exercise that the Court was engaged in. An individual must not be treated as “a mere means to achieve an end” to the extent that their “place in society and in the Constitution is denigrated”. However, he concluded that “the impact on [Ms Barnard’s] dignity is not excessively restrictive and indeed reasonably and justifiably outweighed by the goal of the affirmative measure.”

So a fragmented decision reflective of the controversy of the subject matter in South African society in general. The push for a heightened standard of review when scrutinising the implementation of affirmative action measures has been clearly defeated, but it will be interesting to see if the dignity analysis is taken up in subsequent cases.

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

Brazil’s Laws on Quotas and the Road to Racial Equality
By Isis Conceicao | 9th July 2014

On 9th June 2014, Brazil’s President signed a new bill establishing a race-based affirmative action program for federal civil servant positions countrywide. The bill reserves 20 percent of these positions for Brazilian ‘negros’ (blacks and pardos (mixed race individuals). It also applies to public companies controlled by Brazil’s federal government.
Unfortunately, however, it does not apply to the legislative and judicial branches, but only to the executive. In addition, the new law establishes that this percentage of seats must be reserved for Brazilian ‘negros’ only when more than three employment positions are open for public selection. The bill will expire in ten years with a possibility of renewal.

These legal changes were preceded by a Senate resolution passed on 13th May, which implemented a racial quota system for future selections of civil servants working for the Senate. Going a bit further than the presidential law, the resolution holds that private companies providing services to the Senate must also implement a 20 percent quota system in their employee selection process. This Senate resolution is one of the few regulations of its kind in Brazil, as it governs hiring policies of private companies. Now, private contractors must consider race in the hiring process if they want to keep their contracts with the Senate. Brazilian states, such as Mato Grosso, Paraná, Rio de Janeiro, and Rio Grande do Sul, and cities, including São Paulo, have enacted similar affirmative action policies for their civil servants. These developments are related to racial quota programs implemented at Brazilian universities since the 2000s. In spite of these programs, Brazil has not managed to overcome structural racism and as a result, unlike their white peers, many ‘negro’ students who graduated from the best universities have not found employment positions in their areas of expertise. In this case, it has become unreasonable to continue to justify the employment disparity between white and ‘negro’ graduates on the grounds that ‘negros’ have poor educational qualifications. The case of ‘negro’ graduates from top universities highlights the shortcomings of quota programs in public universities, which, if implemented alone, ignore the pervasive, structural nature of racism in Brazil, which is not limited to the educational context. Consequently, in order to end racism, institutional interventions for structural change should be mainstreamed throughout society.

Despite these laws and judicial recognition of affirmative action policies, the fear of ‘alibi’ legislation still remains. ‘Alibi’ legislation are laws declared by states to fulfill their international commitments, but deliberately improperly designed to guarantee their own inefficiency at the domestic level. The government and social movements in favor of race-based affirmative action often fail to monitor the implementation of these policies due to fear that such scrutiny would jeopardize their continued existence. Notably, these policies employ a self-identification approach with respect to race without a way to challenge individuals’ purported racial status. This leads to claims from a substantial number of whites that they are pardo in an attempt to increase their chances of gaining entry into universities and now, their access to public jobs. As a result of this new bill, the number of white applicants seeking benefits from quota programs is likely to increase significantly.

Another example of alibi legislation is the 2011 adoption of a quota system by the Ministry of Foreign Affairs in its selection of new diplomats. The system was rendered ineffective in June of 2013, when the criteria used to calculate candidates’ points for the diplomatic admission exam changed and, as a result, the quota candidates are at a disadvantage with respect to points in relation to the other candidates. The recently-approved law is also flawed. Most of the seats in the executive branch are positions of ‘trust’, which are filled by appointment rather than by public selection. The new law does not reach the number of public positions that are actually available because the quota system enshrined in the law does not apply to positions of trust.

The new quota law is a historic achievement in the long struggle for true inclusion of racial minorities in a post-slavery society. However, it is important that we do not repeat Brazil’s history by celebrating the enactment of laws as though they are the final outcome of a deeply-rooted, historic struggle. There is still a great deal of work to be done in order to truly achieve a racially equal society. Brazil must commit to the effective implementation of polices that combat racism and promote equality.

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Schuette v BAMN: a Need to Rethink Equal Protection
By Julie Suk | 22nd May 2014

While allowing Michigan to ban affirmative action, the majority in Schuette v Coalition to Defend Affirmative Action 572 U.S. ____ (2014) has preserved the political process theory of Equal Protection, which requires judicial scrutiny when political majorities attack antidiscrimination policies and which invalidated legislative efforts to dismantle existing antidiscrimination and integration policies in the past. Concurring in Schuette, Justices Scalia and Thomas expressed their willingness to discard the political process doctrine altogether. Dissenting Justices Sotomayor and Ginsburg framed Michigan’s affirmative action ban as functionally similar to historical efforts by democratic majorities to repeal fair housing and school integration policies.

The Schuette plurality refuses to acknowledge similarities between the antidiscrimination and integration policies that were protected over three decades ago, on the one hand, and affirmative action in university admissions in Michigan in the 21st century, on the other hand. If the Court relied on the political process doctrine to invalidate the Michigan affirmative action ban, it would be implicitly acknowledging affirmative action’s family resemblance to antidiscrimination law. Such a move would destabilize the Court’s Equal Protection jurisprudence, which has spent an entire generation declaring race-conscious affirmative action to be itself
discriminatory in most forms. Under this logic, banning affirmative action is an affirmation of antidiscrimination law, not an attack.

Six Justices still embrace the political process doctrine, but they disagree about what it prohibits. Justice Kennedy’s plurality is troubled by the suggestion that Equal Protection prevents democratic sovereigns from burdening minorities’ pursuit of policies that are primarily in their interest. Saying that a policy like affirmative action is primarily in the minorities’ interest can become racial stereotyping. After all, the Court has only permitted affirmative action to the extent that it’s narrowly tailored to achieve diversity, which benefits everyone. But if minorities don’t have a special interest in affirmative action, their burdens in pursuing it will be unproblematic, or at least no more problematic than everyone’s difficulties in changing the will of the democratic sovereign. Thus, Justice Kennedy concludes that the political process cases “were ones in which the political restriction in question was designed to be used, or was likely to be used, to encourage infliction of injury by reason of race.” If the absence of affirmative action does not inflict injury by reason of race, the Michigan ban is consistent with the political process doctrine. In her dissenting opinion, Justice Sotomayor argues that the Michigan ban especially burdens minorities by requiring them to amend the state constitution in order to pursue a policy that is in their interest.

Everyone else can simply lobby a University board to pursue a university admissions policy in their interest, such as legacy admissions or preferences for athletes. But even Justice Sotomayor’s application of the political process theory to invalidate Michigan’s affirmative action ban would not lead to the conclusion that Equal Protection protects race-based affirmative action in public universities from the political process. Suppose that Michigan voters had passed a constitutional amendment requiring that university admissions be based solely on SAT scores. Now, everyone – not only minorities – would have to amend the constitution to pursue policies in their interest. Given the well-known black-white test score gap, this hypothetical SAT-only policy would produce a decline in black enrollment at public universities. But the political process theory of Equal Protection would not prohibit it. Under the approach embraced by Justice Sotomayor, a ban on affirmative action that banned other purported privileges simultaneously would be consistent with Equal Protection, even if it had the effect of reducing minority enrollment at elite universities.

The Schuette decision is a reminder of the battles that are not being waged. No litigant or Justice argued that the Equal Protection Clause requires public universities to achieve integration through race-conscious affirmative action. Such arguments are not made seriously in the United States. Yet, Justice Scalia is correct in observing that the political process doctrine, even in the limited formulation preserved by the plurality, “leaves ajar an effects-test escape hatch” that would permit an “equal protection violation where there is no discriminatory intent.” If Justice Kennedy’s plurality opinion unwittingly creates an escape hatch from the shackles of established Equal Protection precedents, Justice Sotomayor’s dissent demonstrates the jurisprudential gymnastics required to navigate one’s way through it. What is as necessary as it is implausible is a more straightforward reconsideration of the Court’s four decades of restricting affirmative action and disparate impact liability in the name of Equal Protection.

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Chapter 11

The New Barbarians: Bulgarians and Romanians at the Gate!

Galina Kostadinova | 3rd February 2014

Joseph Goebbels, Reich Minister of Propaganda in Nazi Germany, is reputed to have said: ‘If you tell a lie big enough and keep repeating it, people will eventually come to believe it.’

His words echo the current hostile campaign waged against Romanians and Bulgarians. During 2013 the British government repeated ad nauseam that come 1 January 2014 the country would be flooded by Bulgarian and Romanian hordes intent on living off the British taxpayer.

Cameron and his ministers enacted measures that would prevent EU arrivals from claiming unemployment benefits within the first three months. The problem is that these ‘new’ measures bring nothing new. Throughout the EU, Britain included, migrants cannot possibly claim unemployment benefits from their host country within their first three months. The EU’s very own free-movement rules are rather explicit. They do not allow for what the tabloids call “benefit tourism”. Eligibility for welfare throughout the Union is linked either to (1) past social security contributions; or (2) residency. In the UK one can obtain contributory benefits only after having paid social security contributions over two years: new arrivals are thus automatically disqualified during their first three months in the country. Non-contributory benefits are linked to a requirement for long-term residency, available only to those who work, are students, or are self-sufficient.

It is true that a jobless person from Romania or Bulgaria is in fact entitled to seek employment in Britain and even register at a JobCentre. But the benefits they receive come from the Romanian or Bulgarian budgets. Under Article 64 of Regulation 883/20 EU citizens can export their unemployment benefits from one country to another for a period of three months.

A Neo-Colonial Approach

Why all the political fervour then? Some have argued that the cabinet used East European migration to divert attention away from its failure to handle the economic crisis, joblessness and social disadvantage. Rules on intra-EU migration are decided outside Westminster and criticising Brussels can win Tories votes from the likes of UKIP. The British Prime Minister wants to have the cake and eat it. He does not mind East European markets remaining open for UK goods and capital, despite competitive pressure on local small and medium enterprises there. But freedom of movement of people is treated differently from free movement of goods and capitals.

Indeed Mr Cameron does not mind Romanians and Bulgarians working hard to earn a livelihood the UK. But if they happen to become sick or have children they should leave the country or stay out of benefits. The coalition government is happy to abolish a long European tradition of labour protection.

East Europeans are Soft Targets for Racist Attacks

The systematic rhetorical attacks against East Europeans in the public sphere are easy to explain. They are European, white, and predominantly Christian. Denigrating them is not a big concern, nor are blanket characterisations as beggars and criminals.

Such statements vilify these communities and violate the dignity of all their members. The campaign has resulted in a ‘intimidating’, ‘hostile’, ‘degrading’, ‘humiliating’ and ‘offensive’ environment for Bulgarians and Romanians in the UK within the meaning of racial harassment, as defined by Article 2 (3) of the EU Equality Directive. A study this week revealed that many Bulgarian and Romanian medics, who had lived and worked at the NHS for years, have experienced an upturn in hostility.

Last autumn, student loans were frozen only for Romanian and Bulgarian recipients, including those who had habitually lived in the UK for years. This was as part of an investigation into a “suspicious” number of beneficiaries from those two countries. In other words, the authorities deemed it was sufficient to be a Bulgarian or a Romanian to be considered “suspicious.” As a result these two student communities were stigmatised as cheaters because of wrongs committed by individuals who happened to be their compatriots.

Further, politicians and journalists rarely avoid prejudicial or pejorative references. They refer to ethnicity or nationality any time they report an offence committed by Romanian or Bulgarian individuals.

Double Standards

Yet, most disappointingly, the vilifying campaign never brought the outcry it could have triggered, had it targeted any other migrant community, especially those linked to Britain’s colonial past. Britain perceives itself as a tolerant nation with a rich tradition of diversity and multi-culturalism. This certainly cannot be denied. But the recent wave of discrimination against East Europeans reveals that tyranny, as well as tolerance, can be conveniently selective.

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Mainstreaming Disability in Development: The need for a Disability-Inclusive Post-2015 Development Agenda  
By Rahul Bajaj | 4th March 2015

As a report by the World Health Organization indicates, around 15% of the world’s population, roughly 1 billion people, live with some form of disability, making them the world’s largest minority. That people with disabilities remain culturally fragmented, economically confounded, and socially isolated in large parts of the world is a platitude. The three transformative human rights instruments, which constitute the International Bill of Human Rights, belie the values of social justice and equality that they espouse by not making any explicit reference to the disabled.

However, in 1994, the Committee on Economic, Social and Cultural Rights in General Comment No.5, noted that any denial to provide reasonable accommodation to the disabled that results in the impairment of their rights runs counter to the Covenant on Economic, Social and Cultural Rights and delineated concrete steps that countries must take for the welfare of the disabled. Further, the declaration of the period from 1983 to 1992 as the UN Decade of Disabled Persons helped galvanize global efforts to create an enabling legal architecture for facilitating the societal integration of persons with disabilities. As a result, many general human rights instruments such as the Convention on the Rights of the Child (Art. 23), the African Charter on Human and Peoples’ Rights (Art. 18 (4)) as well as special instruments such as the Standard Rules on the Equalization of Opportunities for Persons with Disabilities (1993) and Biwako Millennium Framework for Action (2002) unequivocally recognize the importance of protecting the human rights of the disabled.

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) is the most comprehensive human rights convention to date on disability. It calls upon all member countries to take substantive steps to ensure full and effective inclusion of persons with disabilities by viewing disability not as an individual pathology but as a social construct. The raison d’être of this Convention can only be achieved if the hopes and aspirations of persons with disabilities are regarded as an integral component of the consultative processes and deliberations that result in the formulation and institutionalization of international development programmes and are not merely included as an afterthought. To this end, the UN Post-2015 Development Agenda can play a pivotal role in concretizing the principles that the UNCRPD espouses. The Development Agenda can put an end to the invisibilization and ostracization of the disabled that the Millennium Development Goals have helped perpetuate by completely ignoring the needs of 1 billion people.

There are two principal reasons why the Post-2015 Development Agenda must focus on the empowerment of the disabled. First, Article 32(1)(a) of the UNCRPD imposes an obligation on all States Parties to ensure that international development programmes are inclusive of persons with disabilities. Further, Article 4(1)(c) calls upon States Parties to promote the human rights of the disabled in all their programmes. Therefore, a failure to address disability-based discrimination would eviscerate one of the most important strands of all the aforementioned human rights instruments. Second, that disability is inextricably intertwined with poverty, unemployment and countless other social malaise is a fact which is founded on irrefutable empirical data. It has been clearly established that 1 in every 5 impoverished people has a disability. The Development Agenda cannot truly herald an era of inclusive growth unless it focuses on breaking this mutually-reinforcing cycle by putting in place a framework that unequivocally and vehemently promotes the progress of this historically deprived minority.

In sum, a disability-inclusive Development Agenda can act as the ideal starting point to bring about the paradigmatic shift in the societal conception of disability that the UNCRPD envisages and to build international consensus on the need to tackle disability-based discrimination. More important, it can provide a moral and legal foundation to efforts that are aimed at prioritizing disability issues in development discourse and can go a long way in validating the rhetoric of diversity and inclusion.

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Indian Lip Service to the UNCRPD: Examining the Persons with Disabilities Bill 2014
By Devarshi Mukhopadhyay | 11th August 2014

Having ratified the United Nations Convention on the Rights of Persons with Disabilities in 2007, India was legally as well as constitutionally obligated to bring its domestic laws in line with the spirit and purpose of the same.

Although draft legislation was formulated and deliberated upon in 2011 as well as 2012, the latest parliamentary proposition concerning disability rights in the country was introduced earlier this year. It is disappointing however, to see the high degree of insensitivity and political haste which characterizes the new Bill. This has resulted in the absolute lack of engagement with the
purpose and spirit of the Convention. From the parochial conceptualization of "disability" and "discrimination", to the shabby drafting of the legislation, there are multiple issues which have caused widespread dissent amongst the disability sector in the country.

At a very fundamental level, Article 1 of the Convention seeks to ensure the guarantee of the complete enjoyment of human rights to persons with disabilities, paving way for their introduction into the social mainstream. The formulation of this article also signifies a completely different paradigm for the conceptualization of disability, as being the inability to equally participate in society, rather than being a medical issue. The proposed Bill, however, fails to recognize the need to adopt a social conceptualization of disability, to allow for this inability to equally participate in society to be overcome. Rather, it focuses entirely on the impairment of the person, and not existent social barriers. The definition of a “person with disability” contained in Section 2(q) of the Bill also restricts the respect for differences and shifts the model of approach from what the Convention seeks to achieve.

Further, in direct contravention of the purposes of Article 5 of the Convention, which prohibits all discrimination on the basis of disability, Section 3(3) of the proposed Bill allows discrimination against persons with disabilities “if it can be shown that it was appropriate to achieve a legitimate claim”. This inherent right to equality under the Convention is further denied by the statutory provisions relating to accessibility (contained in Article 9 of the Convention) in Section 40(1) of the proposed Bill. According to the proposed regime, accessibility is sought to be increased through public transport designed specifically for persons with disabilities. However, this too, is subject to these designs being “economically viable” and “technically feasible”, automatically allowing for subsequent justification in the event of non-fulfillment.

Further, the proposed regime completely ignores the issue of “punishment”. Article 15 of the Convention prohibits “torture” and “cruel, inhuman or degrading treatment or punishment”. Section 5 of the Bill makes references to “torture” or “degrading treatment”, but does not explicitly prohibit “punishment”. This fails to provide the same coverage as the Convention because the purpose of Article 15 of the Convention is to ensure that persons with disabilities are not made the subject of any form of torture, cruelty or punishment, in any manner whatsoever. The police force in India is notoriously known for its third degree methods of punishment (which can be both cruel as well as degrading). Therefore, an explicit prohibition would be necessary to ensure that such acts against persons with disabilities are not condoned. Further, by virtue of the fact that Section 13 empowers legal guardians to take all decisions on behalf of persons with disabilities, the right to be protected against experimentation or testing without consent is also heavily compromised.

Taking into account all these considerations, it becomes evident that the proposed legislation contains lacunae which are inherently dangerous to the rights of persons with disabilities, and may provide institutionalized avenues of discrimination, torture and degrading treatment. Although the Convention proposes a regime that seeks to foster respect for differences, the conceptualization of Indian parliamentarians falls far short of what it is bound to do, under its international legal obligations. The lack of sustained engagement coupled with expediency has defeated the very purpose of bringing in national laws in consonance with the spirit of the U.N.C.R.P.D.

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Jamaica boasts of being the first country in the world to both sign and ratify the United Nations Convention on the Rights of Persons With Disabilities, on March 30, 2007. Seven years later, the Disabilities Act has been tabled in Parliament. This is an important step, but there are questions about whether the proposed statute’s actual impact may fall short of expectations, especially when it comes to implementation in a small, developing country.

One example is public transport, which is currently insufficient for the disabled. The announcement that four of 73 new public passenger buses were equipped to carry the disabled was noted as inadequate by a disabilities advocate. Jamaicans living outside of the capital Kingston have even less access to disabled-friendly public transport.

The Disabilities Act deals shortly with the issue of public transport stating only at s. 40 that:
"The Minister with responsibility for public passenger vehicles shall ensure as far as is practicable, the provision of public passenger vehicles that are accessible to and useable by persons with a disability.”

The Act uses the “progressive realization” language familiar to economic, social and cultural rights, so it will be important to see how it is interpreted. What will "as far as is practicable” mean in a country where, as of March 2014, the national debt stood at 140 percent of GDP, growth for the past 20 years has averaged 0.6%, and where GDP per capita for 2012 was US$5294?

The UN Convention also provides for progressive realization of the rights of the disabled, stating at Article 4 (2):
"With regard to economic, social and cultural rights, each State Party undertakes to take measures to the maximum of its available resources and, where needed, within the framework of international cooperation, with a view to achieving progressively the full realization of these rights…”

Creating space in tight budgets to realize economic, social and cultural rights is a problem faced by all developing countries, as exemplified by the South African case Government of the Republic of South Africa and Others v Grootboom [2000] ZACC 19, where the issue before the courts was how the constitutional right of access to adequate housing should be interpreted in the context of limited government resources.

The proposed legislation provides in s. 25 that “a person with a disability shall not by reason of such disability be subject to any form of discrimination.” When s. 25 and s. 40 are taken together, it appears that the Minister responsible for transport will be able to rely on the proviso “as far as is practicable” in countering any claim of discrimination. This will be especially important as Jamaica’s Charter of Fundamental Rights and Freedoms 2011 does not cite disability as a ground on which one can claim a constitutional right to freedom from discrimination, confining itself to the grounds of being male or female, race, place of origin, social class, colour, religion or political opinion. There is therefore no clear textual basis on which the Jamaican court may read in additional grounds of protection.
However, there is dicta to suggest that the wider provisions of the Charter may be invoked in discrimination cases even if the litigant’s status is not among the grounds protected. In Tomlinson v Television Jamaica, CVM and Public Broadcasting Corporation of Jamaica [2013] JMFC Full 5, a gay man claimed his right to freedom of expression had been infringed due to the refusal of three television stations to air a commercial promoting tolerance.

Supreme Court Justice Williams noted that Tomlinson could not seek redress for allegations of discrimination on the ground of sexual orientation, as that specific protection was not provided. “This may be viewed as a significant deficiency in this Charter but it is to be noted that the first paragraph of the Charter is comprehensive enough to point to a view that it be interpreted to embrace all the rights and responsibilities of all Jamaicans,” she stated.

Her dicta therefore suggest that the disabled community may have a constitutional leg to stand on. However, the absence of express constitutional protection for disability discrimination remains a major obstacle and renders the proposed statute all the more significant. It remains to be seen how rigorously the courts will interpret the state’s obligation of progressive realization in the face of limited economic resources.

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**A Successful First Instance Challenge to Bedroom Tax**

*By Sarah Smith | 3rd June 2014*

The Liverpool first tier tribunal ("FTT") has overturned the decision of a Local Authority to reduce the housing benefit of Mr Carmichael, the husband of one of the claimants bringing judicial review proceedings against the UK "bedroom tax". The "bedroom tax" came into force on 1 April 2013 following amendments to the Housing Benefit Regulations 2006 (the "regulations"). The regulations are designed to reduce payments of housing benefit to tenants with more bedrooms than are deemed appropriate for their needs, encouraging tenants to move to smaller properties.

In this particular case, Mrs Carmichael suffers from spina bifida, with the result that she requires her own bed. There is no room for a second bed in her bedroom, so Mr Carmichael has to sleep in a second bedroom. As the calculation of housing benefit only allows for one bedroom per “couple”, Mr Carmichael was considered by the local authority to be under-occupying his property, and his housing benefit was therefore reduced by 14% from May 2013.

The regulations have been widely criticised on many grounds, including for their impact on disabled people. An estimated two-thirds of those affected by the bedroom tax are disabled, according to the equality impact assessment undertaken by the Government before the regulations came into force. The FTT decision is particularly interesting as Mrs Carmichael and other claimants lost their judicial review proceedings against the regulations in the Court of Appeal in February (R. (on the application of MA) v Secretary of State for Work and Pensions [2014] EWCA Civ 13). The Court of Appeal found that that the regulations were discriminatory, given their disproportionate impact on disabled people, but that this discrimination was justified. Its decision was partly influenced by the fact that disabled people subject to the bedroom tax could apply to their Local Authorities for “discretionary housing payments” to alleviate the impact of the bedroom tax. The Government had previously announced that additional funds would be made available to Local Authorities to make these payments. These payments are however temporary, and, as the name suggests, made at the discretion of the Local Authority, leaving disabled tenants in a comparatively precarious position as they are forced to apply for payments made from a limited pool of resources.

Mrs Carmichael had argued in the Court of Appeal that her case could not be distinguished from that of Burnip v Birmingham City Council [[2012] EWCA Civ 629, in which the Court of Appeal found that the Housing Benefit Regulations 2006 discriminated against certain classes of disabled people (including disabled children forced to share a bedroom with a sibling) with no reasonable justification. The regulations were subsequently amended to provide exemptions for these groups. The Court of Appeal rejected Mrs Carmichael’s comparison, however, finding that there was objective and reasonable justification for affording children greater protection than adults. The claimants in the judicial review proceedings are currently waiting to hear from the Supreme Court whether they have permission to appeal.

There has been no public statement of reasons from the Liverpool Tribunal, with the result that we are to some extent left guessing as to how it came to such a different conclusion to that of the Court of Appeal. However, Giles Peaker, writing in Nearly Legal, has reported that counsel for the Carmichaels argued for a different approach to be taken to the justification of the discrimination. As the first tier tribunal case was a statutory appeal, rather than a judicial review, the tribunal could focus on the discrimination suffered by the Carmichaels in particular as opposed to that suffered by disabled people in general.

An obstacle to this approach was the fact that the Court of Appeal had specifically addressed Mrs Carmichael’s situation, finding that treating a disabled adult differently from a disabled child was justified, so distinguishing her case from that of Burnip. However,
the Court of Appeal had not directly considered whether Mrs Carmichael had been discriminated against in comparison with someone without her disability, leaving room for the FTT to decide this point.

The FTT’s decision is only a first-instance decision, and may be appealed. In the meantime, we await the Supreme Court’s decision on permission in the judicial review proceedings.

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Schuette: The Latest in the Affirmative Action Saga
By Christina Lee  | 15th May 2014

On April 22, 2014, in Schuette v. Coalition to Defend Affirmative Action U.S. ___ (2014), the Supreme Court of the United States held that Michigan’s amendment to the State constitution, prohibiting the use of race-based preferences as a part of the admissions process for State universities, did not violate the Equal Protection Clause of the Fourteenth Amendment of the US Constitution.

The case arose in the wake of two key Supreme Court cases on this issue. In those cases, Gratz v. Bollinger 539 U.S. 244 (2003) and Grutter v. Bollinger 539 U. S. ____ (2003), the Supreme Court invalidated the explicit use of race and upheld the more limited use of race, respectively. In response to Gratz, Michigan voted to adopt an amendment to its State constitution prohibiting, inter alia, race-based preferences in State university admissions.

On appeal, the Sixth Circuit of the Court of Appeals had held that the amendment violated the principle in Washington v. Seattle 102 S.Ct. 3187, that the Equal Protection Clause guarantees more than just equal treatment under existing law but a meaningful opportunity to participate in the political process.

The majority of the Supreme Court found the Court of Appeals’ reasoning to be overly broad, particularly in its interpretation of past precedent and Washington v. Seattle. In particular, it rejected the argument that Seattle required it to determine which political policies serve the interests of racial groups. The Court cautioned that such an expansive mandate would take the power to choose policies ranging from tax policy to highways out of the hands of voters. It held that it would not disempower voters to choose a particular policy simply because that policy avoided race, and it noted similar policies which had been upheld in California.

From the very beginning of the opinion, Justice Kennedy, writing for the Court, explicitly stated that this case was not about the constitutionality of using race in affirmative action policies in higher education. Indeed, Justice Kennedy ended the opinion emphasizing that this case was “not about how the debate about racial preferences should be resolved,” but “about who may resolve it.” The majority resoundingly held that the voters would resolve the debate. However, in a fifty-eight paged dissent, Justice Sotomayor took the ban on racial preference head-on.

Fundamentally, Justice Sotomayor disagreed with Justice Kennedy and believed that the case was about how the debate on the use of race could be resolved. According to her, the Constitution forbids the majority from rigging the political process against minority groups. Sotomayor compared this case to other instances in the equal protection context where minority groups were protected from majoritarian policies, such as Romer v. Evans 517 U.S. 620 (1996), where the Supreme Court struck down a Colorado ordinance that precluded any government action protecting gays or lesbians. Moreover, for Sotomayor, the discussion of the amendment cannot be separated from the affirmative action doctrine, discussions of equality.

Affirmative action was undoubtedly the elephant in the room throughout the majority’s opinion. Justice Kennedy sought to distance this opinion from the recent case of Fisher v. University of Texas at Austin 133 S.Ct. 2411 (2013) in which the Court did not significantly change Supreme Court jurisprudence on affirmative action. In doing so, Justice Kennedy in fact did reveal much about the delicate existence of affirmative action in the Supreme Court’s equal protection jurisprudence. The first observation is the extent to which Justice Kennedy took pains to frame this case as a case about the power of voters to choose policy, not one about the use of race in government decisions. By not touching on affirmative action jurisprudence, affirmative action as it currently stands – allowing race-based preferences in certain forms – lives to see another day.

While this kind of avoidance may indicate that the Court is not yet ready to speak definitively about affirmative action, the Justices undoubtedly know that these opinions will be immediately dissected in the affirmative action lens. By advancing this very small move of leaving such decision to the voters and States, the Court may be laying the stepping stones for the next major chapter regarding affirmative action and the Equal Protection Doctrine.

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The Nigeria popular art space came to life about a decade ago with the coming of Nollywood. Standup comedy followed closely with various shows in Abuja, Lagos, Port Harcourt and other major cities.

The impact of the industry on the corporate image of Nigeria is not one that can be underestimated. The success stories of Nigerian standup comedy have been taken beyond the shores of Nigeria via movies, YouTube, print media and even physically.

Despite the good nature of the industry, I reflect in this piece on the impact that it has had on a class of people. More often than not, a large chunk of the jokes during the shows depict the nature and lifestyle of differently abled persons. People who are hard of hearing or blind; who stammer; who are polio victims/crippled and albinos; have all suffered some form of jokes and caricature based on their abilities and circumstances of birth.

Disability simply put is inability of an individual to perform certain tasks or relate with people because of some form of impairment. It is widely accepted that no one is to be subjected to any form of torture based on any grounds whatsoever. The frequent recourse to disabled people by stand-up comedians in Nigeria amounts to discrimination, mental torture and a deprivation of their dignity.

The question therefore is, to what extent are the Nigeria Standup comedians violating the rights of disabled people? What respite exists nationally or internationally for the disabled in these circumstances? The Constitution of the Federal Republic of Nigeria provides for the dignity of the human person. In addition, it prohibits all forms of inhuman and degrading treatment. In my view, this section prohibits any form of attitude and comment that is capable of being considered derogatory of an individual’s perception in the public view. Section 42(2) prohibits mistreating any Nigerian on the basis of birth circumstances and subjection to any form of disability. The 1993 Disability Decree of Nigeria provides for legal aid services. It also provides that the National Commission on People with disabilities must ‘Work towards total elimination of all social and cultural practices tending to discriminate against and dehumanise the disabled’. Presently, the National Assembly is working towards securing disability rights legislation.

On the regional front, the African Charter on Human and Peoples’ Rights prohibits ‘all forms of exploitation and degradation of man’ (article 5). While disability is not specifically mentioned, the use of the words ‘all forms’ is sufficient to cover the exploitation that disabled people suffer at the hands of the comedians. As a signatory to the Convention on the Rights of Persons with Disabilities, Nigeria has an obligation under article 8: ‘States Parties undertake to adopt immediate, effective and appropriate measures: To raise awareness throughout society, including at the family level, regarding persons with disabilities, and to foster respect for the rights and dignity of persons with disabilities; To combat stereotypes, prejudices and harmful practices relating to persons with disabilities, including those based on sex and age, in all areas of life’. Furthermore, all forms of degrading treatment (article 15) and exploitation and abuse (article 16) are expressly prohibited. Consequently, expressly outlawing the reference to disabled people in comedies for economic reasons will be a step in the right direction towards the fulfillment of the obligations under the Convention.
The present indulgence of stand-up comedians constitutes a violation of the human rights of people with disabilities in Nigeria. The prohibition can be realised by civil society and NGOs working on disabled people’s rights by testing the judicial waters in Nigeria to pursue the development of jurisprudence in bringing an end to the acts of discrimination against people with disabilities. Aside from the courts, the Nigeria National Human Rights Institution can also be approached. Finally, artists should be encouraged to use their skills in fostering the integration of the differently abled in Nigerian society.

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POVERTY

First Lady of Rwanda – Women and Poverty: A Human Rights Approach
By Jeannette Kagame | 2nd May 2014

We celebrate the great strides made in advancing women’s roles and rights: I speak for Rwanda, when I say that the government has established an environment for women to thrive. At the same time, we are mindful of our responsibility to keep fighting for the rights of women and girls; the journey ahead is still long.

There is no more appropriate time to reflect on our experience before and during the 1994 genocide. We came from a society defined by alienation, oppression and separation. Women had no rights to inherit any property. A woman was prohibited from conducting business without permission from her husband. Our society was purely patriarchal: women were considered movable assets, with the primary purpose of bearing children.

As women were conveniently perceived to be helpless, it appeared to be the perfect excuse for men to make themselves stronger. In this process, poverty for women was perpetuated. They had no access to resources; their opportunities were extremely limited.

Today we live in more dynamic times. The level of ambition is much higher as individuals, families, communities and countries. There is competition to be better and in order to satisfy these demands, one must work extremely hard. Gone are the days when women stay home to cook, clean and have children.

With a population of 52% women, freeing the productive energies of women was fundamental to the much-needed transformation of Rwanda. There was no alternative; we had just emerged from genocide. And so women became a powerful force for change, from the smallest village council to the highest tiers of government. It became, and still is, a constitutional requirement to have 30% women in decision-making positions in the public sector.

With this in place, Rwanda managed to enjoy the highest female legislative representation worldwide. 40% of the cabinet and the judiciary are women. Discrimination or exclusion for any citizen is punishable by Rwandan law. Rwandan women have been given a chance to contribute to nation building.

Allow me to highlight some of the good progress we are experiencing.

Education
Not only has Rwanda achieved universal education; but girls’ enrolment rate at primary school is at 98%. Primary education is compulsory and free in public schools.

Between 1960 and 1990 only 2,500 students graduated from university; over the last 20 years around 84,000 students have graduated from tertiary institutions. Today’s Rwanda promotes education for every single child.

Employment
Article 37 of the constitution states that ‘persons with the same competence and ability have the right to equal pay for equal work without discrimination.’ In the late 90’s an inheritance law granted equal rights to sons and daughters.

Poverty Reduction
Between 2008 and 2012 Rwanda was able to lift 1 million people out of poverty.

Healthcare
HIV+ pregnant women and their children have access to PMTCT services in 85% of our health facilities. Because of the success of Prevention of Mother to Child Transmission of HIV, we have managed to take the next step and eliminate the transmission.
Rwandan women are now delivering their babies in health facilities, and this has contributed significantly to a reduction in maternal mortality; putting Rwanda on track for MDG4 (reducing child mortality) and MDG 5 (improving maternal health).

Rwanda has also instituted a system of maternal death audits, which investigates the circumstances surrounding a death and recommends solutions for preventing future fatalities.

These modest improvements make us optimistic. The positive contributions women have made to different aspects of society have won them the confidence of Rwandan men and society at large. However, I challenge each one of you here to think about what we are doing with this space and support? We still have work to do. Allow me to share some of my thoughts on this:

My 21-year-old daughter had had a tough week at school; she came home and complained that it was all too much to manage. Her younger brother responded: ‘You women asked to be empowered; do you want to get an education and work, or do you want to stay at home?’

This amusing exchange is a reminder that we should make the best of the opportunities. We have to choose either ‘to be looked after’ or ‘to be active partners’. We cannot have the best of both worlds.

This is an edited version of the opening address delivered by the First Lady of Rwanda, Her Excellency, Mrs Jeannette Kagame at ‘Women and Poverty: A Human Rights Approach’ on 28 April 2014.

Jeannette Kagame is the President of Imbuto Foundation and the First Lady of the Republic of Rwanda.

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**Equality Interrupted: The Rajasthan Panchayati Raj Act, 2nd Amendment, Ordinance, 2014 and the Selective Disqualification of Candidates**

By Jhuma Sen | 5th January 2015

The Rajasthan Panchayati Raj Act, Second Amendment, Ordinance, 2014 was approved by the Governor of Rajasthan, Kalyan Singh on 19th December 2014, only a few days before the election code of conduct was to be released. The amendment introduced sets minimum educational standard for contesting Panchayat (local government) polls. According to the newly introduced provision a contestant should have the prescribed minimum qualification of secondary education (varying between a qualifying Class 10 from the state board or any approved institution or board to having passed 5th Class, depending on the electoral post).
Article 243D(4) of the Constitution of India provides that not less than one third of the total number of offices of Chairpersons in Panchayats at each level shall be reserved for women. However, the actual number of offices reserved is determined by the provisions in the Panchayati Raj Act of each State. In 2009, the Union Cabinet also approved 50% reservation for women in PRIs (Panchayati Raj Institutions). Fifteen States have so far enacted legislation for 50% reservation of women in seats and offices of Chairpersons. In Rajasthan, 50% of seats are reserved for women. The measure to exclude candidates who do not meet the minimum qualification directly removes a majority of women and tribal candidates from the poll battle because the literacy rate of women in Rajasthan’s rural areas is only 45.8 percent, much lower than the national literacy rate of 57.93 per cent (Census 2010). In tribal areas, the literacy rate of women is 25.22 percent (ST Census 2001). In rural Rajasthan, the literacy rate stands at 76.16 percent for males and 45.8 percent for females.

With these numbers in hand, one wonders what the Rajasthan Government may want to achieve by introducing the minimum qualification for candidates. When there are no educational qualifications at the Union and the State Government level for Ministers of Legislative Assembly and Ministers of Parliament, then why such a rule for the most vulnerable sections at the rural level who have the least educational qualifications? Introduction of such inequitable disqualification criteria excludes the bulk of the non-literate women from the possibility of exercising their political right to contest elections. The very objective of the 50 percent reservation of seats for women in the Rajasthan Panchayati Raj Act therefore stands to be defeated. Literacy cannot be and should not be equated with the capacity to be effective elected representative of people.

Gender equality is embedded in constitutional provisions, including substantive equality where the states are also empowered to make special provisions for women in order to undo the historical disadvantageous position of women. The 73rd and 74th Amendments of the Constitution in 1993 provided for reservation of seats in the Local Bodies of Panchayats and Municipalities for women, laying a strong foundation for their participation in decision-making at the local levels. The 80s and 90s saw India ratifying a string of international conventions and human rights instruments which secure equal rights of women. The most notable amongst these is the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) in 1993. Article 7 of CEDAW calls upon State Parties to take all appropriate measures to eliminate discrimination against women in the political and public life of the country.

The 73rd Constitutional Amendment created space for women in political participation and decision making at the grass root level by providing that 1/3rd of the seats are reserved in all over the country. 73rd Constitutional Amendment Act 1992 provides reservations for women in PRIs set up in two ways; for the office of the members and for that of the chairpersons. As per the clause (2) and (3) of Article 243(d), not less than one third of the seats meant for direct election of members at each tier of the Panchayats are to be reserved for the women.

The amendments have notably increased the political participation of women in governance but overall women still continue to be under-represented in governance and decision making positions. An ordinance creating ineligibility on the basis of education takes away that space created for women in political participation by the 73rd Amendment. This affects women and the marginalized more because of the stark contrast in which women are positioned at the receiving ends of access to education and other basic needs. The measure excludes some women from the possibility of exercising their political right to contest elections thereby defeating the very purpose of the 50% reservation of seats for women in the Rajasthan Panchayati Raj Act.

P v Cheshire West and Chester Council: Shaping Deprivations of Liberty
By Beth Grossman | 9th April 2014

The case of P v Cheshire West and Chester Council [2014] UKSC 19 considered whether living arrangements for mentally incapacitated people necessarily constitute a deprivation of their liberty. Its significance lies in the fact that, where such a deprivation is found, deprivation of liberty safeguards (“DOLS”) must be put in place.

DOLS are intended to ensure that individuals are protected and that State actions conform with Article 5(4) of the European Convention on Human Rights.

The three individuals who were the subjects in this case are mentally incapacitated by virtue of Down’s Syndrome, moderate/severe and moderate/mild learning disabilities. They live in NHS and local authority facilities and a foster home respectively. These environments come as close to “normal life” as might be possible under the circumstances, but none of the individuals reside in a “family home”. All three are closely controlled and supervised (involving the occasional use of restraints for two of them) for their own safety; none can leave at will, although MIG and MEG go to college every day. In all three cases, placements were initially authorised by the court: a subsidiary consideration was therefore whether such authorisation, once given, could continue indefinitely. No decision involving mental capacity emanating from the European Court of Human Rights has involved a directly
The Supreme Court decided, by a majority of four to three, that these living arrangements constitute a deprivation of liberty.

In the leading judgement, Baroness Hale rejected the Court of Appeal’s finding that there was no deprivation of liberty because of the “relative normality” of the environments or their essential benevolence: “a gilded cage is still a cage”. She determined the main features of a deprivation of liberty to be:

- The objective extent of the individual’s liberty. P, MIG and MEG are confined within their placements and as such restricted. This has been for many years and will be ongoing: the period of time is “not negligible”.
- The subjective extent of the individual’s liberty. Lacking mental capacity, none of the three individuals could themselves consent to their placement or the restrictions placed upon them.
- The “concrete situation”. This followed the ECHR jurisprudence (Stanev v Bulgaria). P, MIG and MEG cannot go anywhere without close supervision.

Baroness Hale’s analysis was underpinned by the assertion that human rights are universal in their very nature. From this perspective, physical liberty must be given the same for everybody regardless of their mental or physical disabilities. The positive nature of P, MIG and MEG’s placements did not override the fundamental principle that no-one should be subject to a deprivation of their liberty without safeguards.

In supporting judgments, both Lord Neuberger and Lord Kerr considered the implications of comparing these placements to “normal” home life. Children who live with their parents may be subject to an equivalent degree of control and supervision. However, in Lord Neuberger’s opinion this was not directly analogous because this situation does not involve the state assuming control. Lord Kerr considered that for most children, control and supervision diminishes as they grow older. For these individuals, the restrictions upon them would be a “constant feature” of their lives and as such amounted to deprivation of liberty.

Lords Carnwath, Hodge and Clarke dissented. Lords Carnwath and Hodge rejected Baroness Hale’s position that there should be a “universal test” of deprivation of liberty. The case law emanating from the ECtHR has emphasised that deprivation of liberty is “a matter of degree” and that individual decisions must focus upon the “concrete situation”. It follows that there cannot be a universal test.

Moreover, cases in which the ECtHR has determined that there is no deprivation of liberty (such as Neilson v Denmark 11 EHRR 175 and HM v Switzerland [2002] ECHR 157) suggest that the comparison with a “normal home life” is an important consideration. P, MIG and MEG do leave their respective placements, for example to go to college during the day. This may restrict their liberty but it does not deprive them of it. Their lives are restricted through their “cognitive limitations” and not from arbitrary decisions by people in authority. Although two of the individuals are restrained, this does not create a deprivation of liberty because it is occasional and for therapeutic purposes only.

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Cheshire West and the Repugnant Conclusion
Simon Burrows | 31st March 2014

The Supreme Court’s judgment(s) in Cheshire West [2014] UKSC 19 stirred up the expected storm. By siding with the approach urged upon it by the Official Solicitor, the Court has inevitably increased the numbers who will fall within the category of persons “deprived of their liberty”.

Not only will this increase the numbers of people like P, MIG and MEG — those in independent supported living arrangements where the Court of Protection will need to authorise their detention – it will also increase the numbers in care homes and hospitals falling within the administrative detention procedure known as the DOLS. No one yet knows how great the numbers will be. It is also unclear how the legal procedures will be streamlined to reduce cost and delay. There is undoubtedly a lot of work to be done. In the week since the judgment there has been a great deal of discussion, debate and hurried training. The Government is expected to issue its response shortly. Whether what has resulted is panic, hysteria or plain fear, or perhaps only the sort of adjustment that always follows a significant legal development – whether it is a Supreme Court judgment, or a ground-breaking statute – remains to be seen.

As someone who watched this litigation develop at close quarters, it has taken me some days to reach a position on what has happened. The problem with this case (or these cases) is that they created a clash of instinctive reactions. Where a person is disabled, vulnerable and in need of support and supervision as P, it would be bizarre, would it not, to attach the label “deprived of liberty”? Borrowing the language of Mostyn, J in another similar case, the framers of the European Convention, designing a “bulwark against tyranny,” would never in their wildest dreams have anticipated Article 5 being used in the sorts of cases that came before the Supreme Court.

On the other hand, were a person with capacity to be kept under constant supervision and control, in a place which he could not leave without permission, the instinctive reaction would be equally indignant – that he is deprived of his liberty, and this is exactly what Article 5 is for.

In the final analysis, the case is about discrimination, about equality. As Munby, L.J, rightly observed in the Court of Appeal, the case is about whom one chooses to use as a comparator for the mentally incapable person. If one chooses as a comparator person of “sound mind” who finds himself subject to supervision, control and unable leave, we will rightly conclude there is a deprivation of his liberty. The only way to escape that conclusion is to modify the comparator to a person with similar disabilities and needs as the person concerned. That removes the counterintuitive conclusion that very disabled people are deprived of their liberty. But it is replaced with an uneasy feeling that by modifying the comparator something has been lost. The Convention does not protect the most vulnerable people any more. Worst of all, different levels of rights have been created for – dare I say – different levels of people. And that can’t be right.

It was that repugnant conclusion that seems to have led the Supreme Court to the profound judgment it reached.

Simon Burrows is a barrister who acted for P (by his litigation friend, the Official Solicitor) in the Cheshire West case from first instance to the Supreme Court. The views he expresses here are entirely personal.

LGBTIQa

Searching for the “T” in LGBT Advocacy
By Peter Dunne | 10th September 2014

On August 30, 2014, the prominent UK lesbian, gay and bisexual (LGB) rights group, Stonewall, held a workshop with representatives from Britain’s transgender community to consider whether that organization could, and should, incorporate gender identity advocacy within its current body of work.

For many people, the fact that Stonewall does not already address transgender concerns may come as somewhat of a surprise. Given the growing visibility of sexual orientation and gender identity issues, and the leading role which Stonewall has claimed in many recent policy and legislative debates, members of the public could perhaps be forgiven for assuming that Stonewall is the unofficial mouthpiece for all LGB and “T” matters in the United Kingdom.

Yet, reviewing the organization’s website today, Stonewall clearly self-identifies as “the lesbian, gay and bisexual charity.” Indeed, Stonewall’s often troubled relationship with the transgender community is symptomatic of wider difficulties which have historically undermined the creation of a cohesive and united movement for sexual orientation and gender identity rights. While well-publicised coalitions between “gay rights” and transgender activists have existed for more than forty years, the relationship has frequently not
been one of parity and good faith. On many occasions, transgender advocates have struggled to have their voice heard within the wider LGBT rights movement. The result has been successive agendas, driven by gay men, which, at best, have neglected the needs of the transgender community and, at worst, have expressly compromised gender identity rights to promote greater equality for gay men and lesbians.

Perhaps the most high profile example of the inter-LGBT schism arose in 2007 when the Human Rights Campaign (HRC), one of America’s most influential LGBT advocacy groups, decided to support Representative Barney Frank’s Employment Non-Discrimination Act (ENDA), even though the proposed bill omitted protections for transgender persons. The ENDA controversy has haunted the HRC ever since, and continues to be a major stumbling block in that organisation’s efforts to build a truly “rainbow coalition.”

In recent weeks, a number of events have recalled the fractious relationships which exist within LGBT coalitions. On August 19, 2014, the Guardian newspaper noted that Mariella Castro, daughter of Cuban President, Raul Castro, had cast a rare dissenting parliamentary vote, protesting the passage of employment non-discrimination legislation which, although protecting LGB individuals, made no provision for transgender persons. Similarly, on August 21, 2014, the Daily Mail reported on the first openly transgender serviceperson to see frontline action with the UK army. The article highlighted that the fact, while the 2011 repeal of “Don’t Ask, Don’t Tell” was hailed as an historic victory for the entire LGBT community, transgender persons are, in fact, still denied access to America’s armed forces.

In the recent case of Hämäläinen v Finland [2014] ECHR 787, the applicant, a married transgender woman, challenged Finland’s requirement that she dissolve her marriage before accessing legal gender recognition. Ms Hämäläinen had sought to distinguish her case from the wider same-gender marriage debate, arguing instead that, having contracted a valid marriage, she and her wife could not be made to divorce without a pressing justification. For some gay and lesbian commentators, Ms Hämäläinen’s strategy was tantamount to selling out sexual orientation equality. In trying to differentiate her case from same-gender marriage, Ms Hämäläinen was accused of relying upon her former “heterosexual privilege” in order to access a marital institution which is not available to any other same-gender couples. However, such criticisms ignore the cultural context in which many transgender activists have struggled to advocate for basic equality rights over the past half-century. They implicitly suggest that, even when transgender persons break free of the restrictive binds of “LGBT politics”, they must still prioritise the well-being of gay men and lesbians.

It goes without saying that there are many LGBT groups which have successfully married sexual orientation and gender identity advocacy, doing so without compromising the rights and integrity of transgender individuals. The committed participation of Transgender Equality Network Ireland (TENI) at the recent March for Marriage in Dublin illustrates the powerful impact of united, mutually respectful, LGBT coalitions. Moving forward, as sexual and gender rights activists achieve further successes, they must be careful to maintain a truly inclusive agenda and to not lose sight of “T” concerns within the complicated forest of LGBT politics.

Peter Dunne is an Ussher Fellow at Trinity College, Dublin. He has previously worked as a Harvard Law Fellow at the International Gay and Lesbian Human Rights Commission and as an ASIL Helton Fellow at Transgender Equality Network Ireland.
Gays: a Prohibited Class in CARICOM?
By Maurice Tomlinson  |  27th August 2014

In the western hemisphere, only 11 Caribbean states still criminalize private consensual adult same-gender intimacy. Among these countries, Belize and Trinidad and Tobago also ban the entry of homosexuals.

In a pending case before the Caribbean Court of Justice (CCJ), in which I am the applicant, AIDS-Free World (AFW) initially asked the Jamaican government to intervene on my behalf. I am required to work across the region, and was thus affected by the travel ban. Jamaica refused and special leave was sought to bring a private action before the CCJ, the region’s highest court. The claim was for violations of the rights to freedom of movement and national treatment found in the Revised Treaty of Chaguaramas (RTC), which established the Caribbean Community (CARICOM). On May 8, 2014 the CCJ granted leave and the matter is now set for trial.

The Immigration Act of Trinidad and Tobago was last revised in 1995. Section 8 of the statute lists groups of persons who are deemed “prohibited classes.” Included in this list are many individuals who UNAIDS has identified as being vulnerable to HIV and AIDS, including the disabled, homosexuals, and sex workers. The universal standard for designing and implementing anti-HIV interventions is the Greater Involvement of People with HIV/AIDS (GIPA). Yet, the UNAIDS Caribbean regional office is based in Trinidad, a country where many of the people the organization serves are barred from entering.

The Belize act, which was updated in 2000, is less discriminatory than its Trinidadian counterpart. However it similarly bars the groups of persons listed above.

Though rarely enforced, the travel ban on homosexuals has been invoked, particularly by Trinidad and Tobago. The most notable instance was in 2007 when church groups complained that Sir Elton John’s planned performance at a concert was illegal, and likely to convert impressionable youth.

Freedom of movement and national treatment are entrenched rights in the RTC. The CCJ has the exclusive jurisdiction to adjudicate on any breaches of the treaty, and in a 2013 decision, Myrie v Barbados, 2013] CCJ 3 (OJ) the court clarified the liberal interpretation of these rights.

The very political nature of CARICOM requires that citizens, like AFW’s Jamaican employee, must first ask their home state to bring a CCJ action on their behalf. Only if the state refuses can the national approach the court for special leave to pursue the matter themselves. As an international court, the CCJ is only empowered to act when actual harm has occurred.
An application for special leave was filed with the CCJ on May 31, 2013 (Tomlinson v Belize and Trinidad and Tobago [2014] CCJ 2(OJ)). Both Belize and Trinidad resisted the application, however, at the hearing on November 12, the court heard from both governments that there was no intention to enforce the laws. When the court then inquired as to the need for these unenforced statutes, the senior counsel representing the Republic of Trinidad and Tobago indicated that the law was necessary to keep out terrorists(!)

In a unanimous decision the 5-member panel found that the travel ban created an arguable case of prejudice. Specifically the court stated: “In relation to homosexuals, there is indeed international case law, in particular jurisprudence of the European Court of Human Rights and the UN Human Rights Committee which suggests that under certain circumstances the mere existence of legislation, even if not enforced, may justify a natural or legal person to be considered a victim of a violation of his or her rights under an international human rights instrument.”

On July 24 the CCJ gave the governments of Belize and Trinidad until September 16 to file their defences. The usual case management hearing will follow at which time a trial date will be set. This is not expected before 2015.

Although narrowly framed as a Caribbean case, the likelihood is that if successful, this action would strike down the anti-gay sections of the immigration laws. This would benefit citizens from every country in the world. The case also has implications for the decriminalisation debate across the Caribbean where several court challenges are seeking to repeal British colonially imposed anti-sodomy laws. The fact that the region’s highest court took judicial notice of the harmful impact of unenforced laws that discriminate against homosexuals will be significant in these cases.

Maurice Tomlinson is an Attorney-at-Law, law lecturer and facilitator with LGBTI Aware Caribbean, an organization providing LGBTI awareness training for Caribbean security forces. Maurice was the inaugural winner of the David Kato Vision and Voice Award.

Uganda’s Anti-Homosexuality Law and Our Cultural Wars
By Dimitrina Petrova | 12th August 2014

Future historians will reference the developments around Uganda’s anti-homosexuality law as a textbook example of a proxy battle fought within the ongoing cultural wars of our time: a legal and political confrontation, in a remote African theatre, between local actors connected, through charts of socio-political reflexology, to global stakeholders.

It was an interim victory for equal rights when, on 1 August 2014, the Constitutional Court of Uganda struck down the Anti-Homosexuality Act 2014 as void on the procedural ground that the Parliament had violated quorum rules during its passage. But the Ugandan battle is far from over.

Having begun in 2009, five years later the story of the Ugandan anti-homosexuality law has epitomised the ideological clash between the West and the Rest. External actors have been supporting the key players inside Uganda. Through seemingly confusing moves on the surface, such as the negative reaction from many local and international LGBT activists to outspoken support from mainstream Western liberals, one can distinguish two sides militating against each other over global cultural values. On one side, LGBT rights activists and human rights groups around the world, aligned with liberal and humanist movements. On the other, American evangelicals and other conservative religiousists, homophobic populists, assorted politicians from the global South, and China and Russia lurking behind the dust.

The infamous Bill envisaged the death penalty for “aggravated homosexuality” and severe punishments for broadly-defined activism in favour of sexual diversity. The global campaign against the Bill reached a volume that few local human rights scandals have achieved in the last decade: one more reminder that the ground shifts where law meets politics.

On the legal side, the Bill of course violated the Constitution of Uganda, as did the slightly milder law that entered into force in February 2014. As the Equal Rights Trust argued in a detailed legal brief in December 2009, it breached, inter alia, Articles 21 and 43 of the Ugandan Constitution, plus numerous provisions of international treaties binding on Uganda.

However, what mattered more was the dynamics of protest. Along with Ugandan campaigners, groups from around the world condemned the Bill, politicians and celebrities raised concerns, UN bodies put pressure on Uganda to change course, global leaders threatened aid conditionality and sanctions, and US rights activists filed a law suit against the evangelical missionary Scott Lively of Abiding Truth Ministries under the Alien Torts Act. While this did not stop the new law, it may have impressed the Constitutional Court judges in Kampala.

But the political impact on the judiciary is deniable, as the honourable judges did not address the substance of the legislation and its compatibility with the Constitution. They just did their job as impartial jurists: striking down a law voted in violation of legislative procedure. We still have an occasion to raise a glass: procedure is important in a constitutional democracy, and so we celebrate a
victory for the rule of law, with its side effect of reducing the risk for gay persons in Uganda exercising basic rights, for the moment.

But there are two dark clouds on the horizon. First, homosexuality remains illegal in Uganda, under Article 145 of the Penal Code, and this continues to have immediate consequences. On 23 June 2014, the High Court delivered a ruling in Jacqueline Kasha Nabagesera and others v. The Attorney General and Hon. Rev. Fr Simon Lokodo [2014] UGHCCD 85, in which the applicants, an LGBT group, lost on all grounds. They had tried to hold a training workshop on human rights, but the authorities ordered it cancelled. The applicants complained that this was a breach of a number of constitutional rights, but the High Court dismissed their complaint, apparently on the basis that the workshop would encourage people to engage in gay sex – an offence under Article 145 of the Penal code.

Second, there is a danger that the government will try to re-adopt the Anti-Homosexuality law, while in the meantime LGBT persons in Uganda continue to suffer profound discrimination and gross inequality. Uganda does not have an established legal framework protecting people from discrimination on any ground, including sexual orientation. Without such a framework, progress toward equality is not sustainable.

Even if these two clouds drift away from the Ugandan sky, the forecast for the global ideological climate remains unsettling for human rights, at least in the mid-term. In the cultural wars between the West and the Rest, the lack of clear-cut geo-political combatants cannot conceal the ground being gained by homophobic, anti-liberal, conservative religious movements.

*Dr Dimitrina Petrova is the Executive Director of the Equal Rights Trust.*
the offence of gross indecency was created in 1885. This turned intimacy and affection between two men, whether in public or private into a crime. Writing in 1898, Oscar Wilde presciently asserted, “I have no doubt that we shall win, but the road is long, and red with monstrous martyrdoms.”

In post-war Britain life was impossibly bad for gay men. In the 1950s, there were 1,069 gay men in prison in England and Wales, with an average age of 37 years. Home Secretary, Sir David Maxwell Fyfe promised to “rid England of this plague”. Speaking in the House of Commons in 1953, Maxwell Fyfe enthused, “Homosexuals in general are exhibitionists and proselytisers and are a danger to others, especially the young. So long as I hold the office of Home Secretary, I shall give no countenance to the view that they should not be prevented from being such a danger.”

Yet barely a lifetime later, the UK today is the best place to be gay in the world; although with deep and profound remorse and regret this liberation has not been extended to our Commonwealth cousins. How in less than a lifetime did the UK go from the worst to the best?

LGBT equality emerged from three sources: legislation, litigation and cultural expression, including popular culture and films and TV. This short note will only focus on the role played by legislation. A catalyst for the changes in law was the Church of England. In 1954 The Problem of Homosexuality, was published by the Church of England Moral Welfare Committee. It concluded:

“IT is the responsibility of society at large to see that those of its members who are handicapped by inversion are assisted to a constructive acceptance of their condition and are helped to lead useful and creative lives.”

his in turn led to the publication of the 1957 Wolfenden Report, which transformed the debate by, for the first time, permitting an evidence-based and objective debate on homosexuality, morality and the role of the state.

The crucial step towards actual equality began with Labour’s Roy Jenkins, who as Home Secretary permitted the Private Members Bill, sponsored by Lord Arran in the House of Lords and Leo Abse in the Commons, providing for the decriminalisation of homosexuality, to pass through both Houses of Parliament in 1967. Through the Sexual Offences Act 1967 Parliament granted partial decriminalisation: consenting men over the age of 21 who engaged in intimate sexual relations in private no longer committed an offence.

The 1967 legislation was consciously not promoting a gay identity. It was merely offering a refuge from the worst excesses of the criminal law. 1967 ushered in a new dawn, but it was one of toleration, not acceptance.

For the following quarter of a century the law remained silent. Prosecutions continued to blight the lives of gay men caught outside the scope of the ‘67 Act. In 1994 the age of consent for gay men was lowered to 18; but other than this, the lifting of the ban on gay men and lesbians working for the Foreign and Commonwealth Office, and a decision of the European Court of Human Rights, permitting gay men and lesbians to serve in the armed forces, nothing much happened for LGBT equality. In 1988 section 28 of the Local Government Act was introduced, banning promotion of homosexuality as a ‘pretend family relationship’. A community that had been subject to discrimination now found itself persecuted once more.

By 1988 the AIDS crisis, which was decimating lives and spreading fear and hostility was at its height. There was little or no prospect of escape from the ravages of AIDS and yet the community that was most affected by it became the target of opprobrium justified by state sanctions.

This post-1967 settlement was maintained until the status quo was unbalanced by the election of New Labour. Between 1997 and 2010 New Labour kept to its word to get rid of unjustified discrimination. Backed by EU regulations, the Equality Act 2010 sealed LGBT equality. Prior to this there had been cross-party support for civil partnerships and the odious crime of gross indecency has been banished from the statute book in 2003. Section 28 of the Local Government Act was also eventually repealed.

David Cameron’s coalition government completed the picture in 2013. By providing for equal marriage, life for the lesbian and gay community became everyday. People in the UK are now no longer treated differently simply because their sexual orientation differs from that of the majority. But as Wilde had pointed out, the path to liberation was littered with martyrs.

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Scotland’s Gay Rights Journey
By Andrew Tickell | 10th February 2014

On 4 February 2014, MSPs passed the SNP government’s Marriage and Civil Partnership (Scotland) Bill into law, 105 votes to 18. Exemplifying the disunities of contemporary UK politics, the Scottish equal marriage debate has been largely insulated from the wider UK discussion. But this debate, and the new legislation, differs in important respects from the more cautious proposals agreed by Westminster last year.

Scotland’s relationship with gay rights has been decidedly ambivalent. In the 1960s, before devolution, Scotland’s dourer Presbyterianism, conservatism in matters of sexual morality and the influence of Scottish Labour politicians spiked the extensions of the liberalising influence of the Wolfenden Report north of the Tweed. While the Sexual Offences Act of 1967 did away with homosexual offences in England and Wales, Westminster did not pass equivalent legislation for Scotland until 1980.

With devolution in 1999, the Section 28 debate in Scotland was bitter and protracted. Stagecoach millionaire, Brian Souter, funded a private postal referendum on the Lib-Lab Scottish Executive’s proposals to eliminate the clause banning the “promotion of homosexuality” in schools, attracting around a million responses, just under 87% of them against scrapping the provision. While section 2A was eliminated from the statute book by the Scottish parliament in 2000, the experience was unpleasant and divisive one for Scotland’s LGBTQ community.

Perhaps reflecting this, in 2004 Holyrood avoided reopening a distinctively Scottish debate on the introduction of civil partnerships. Although family law is not a reserved matter, Holyrood gave Westminster consent to legislate on its behalf, and a pan-UK law was adopted. The recent free vote, in which 85% of Scottish law-makers endorsed the reform, exemplifies a quiet revolution in our attitudes towards sexuality.

Opposition to the proposals was largely cast in religious terms. Early on, the Scottish Catholic Bishops’ Conference emerged as the key voice opposing same-sex marriage, though their advocacy was characterised by its intemperance. The government’s announcement of its firm intention to legislate coincided with the revelation that the Archbishop-Elect of Glasgow linked, in public remarks at Magdalen College, the early death of Scottish Labour MP David Cairns with his sexuality. The Bishops’ spokesmen struck similarly inflammatory notes in their media appearances, struggling to articulate a comprehensible, populist case rooted in the theology of natural law.

Cardinal Keith O’Brien’s shock resignation in February last year represented a serious setback for opponents of the legislation, who struggled to recover their voice. It was left to a few scattered Tory, Labour and SNP parliamentarians to make the case against the legislation. It was a half-hearted performance.

So what will the Scottish legislation do? At its most basic, it provides for civil same-sex marriage and for religious and belief bodies to conduct ceremonies on an “opt in basis”. It also rationalises the classification of organisations empowered to conduct marriages. Under the status quo, for example, the law classifies weddings conducted by the Humanist Society as ‘religious’ in character (accounting for 15% of Scottish weddings in 2010, second only to Church of Scotland weddings, which made up 43% of the total). The legislation puts these atheistic and agnostic bodies on the more appropriate ‘belief’ footing.

It also extends the capacity of religious and belief bodies to register civil partnerships – an area where Scots family law has lagged behind England – and relaxes restrictions on where civil ceremonies can be conducted. For those organisations so minded, yesterday’s legislation represents a substantial extension of religious freedom to conduct legally effective marriage and civil partnership ceremonies.

Most significantly, the legislation also eliminates the iniquity of making gender recognition contingent on divorce or dissolution of an existing civil partnership, obliging trans people to make a brutal and unnecessary choice between legal recognition of their gender, and continuing legal recognition of their relationships.

But yesterday’s parliamentary session was also marked by its unfinished business, particularly with respect to civil partnerships. With the gendered nature of marriage being eliminated, how can limiting civil partnerships only to same-sex couples be justified? The Cabinet Secretary, Alex Neil, made it clear that more change is coming speedily down the line before the Scottish parliamentary election of 2016.

Should the two parallel schemes be done away with altogether, folding civil partnerships into marriage, or is there something distinctive about civilly-recognised coupledom, distinct from marriage, which is worth preserving and extending? Another controversy, for another day.

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The term “counter-majoritarian” has, more often than not, been used in a derogatory fashion – especially when it is used to describe an institution like the Supreme Court. However, after the Supreme Court’s ruling on S.377 of the Indian Penal Code, whereby it re-criminalized homosexuality after four years of it being decriminalized in India, it may be time for the Supreme Court to actively engage with the idea of being a “counter majoritarian” institution when required.

Judicial review has primarily arisen from the idea that in a functioning democracy, there is a need for a balancing institution to keep the majoritarian view in check. According to Dworkin, a counter majoritarian institution, like the Supreme Court, is tasked with the responsibility of protecting the rights of minorities and shielding them from the majoritarian voices not in consonance with a nation’s constitution as well as universally accepted norms of human rights.

In this context, a few points stand out in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013 which overturned the Delhi High Court’s decision decriminalizing homosexual conduct. In para 43 of its judgment, the Supreme Court categorically stated that the Delhi High Court, while decriminalizing homosexual activities, ignored the fact that members of the LGBT community form a miniscule fraction of the country’s population and, therefore, the High Court’s reasoning was misplaced in striking down the law.

Furthermore, in para 32, the Court held that the will of the legislature was reflected by the fact that the law remained unamended even after the passing of the 2013 amendments to the Indian Penal Code. (However, at the same time it conveniently ignored the fact the Government per se did not prefer an appeal and, in fact, accepted the legal soundness of the High Court’s verdict [para 21]).

Additionally, in para 52, by stating that the Parliament would be the final arbiter as regards the “so called rights” of the lesbian, gay, bisexual and transgender community, the Supreme Court has pushed this issue, a political non-starter, into the political realm: one which is inherently majoritarian in nature.

These observations by the Supreme Court highlight its misplaced approach to the recognition and protection of the rights of minority groups in this country. By taking such a majoritarian stance, the Court has not only ignored history (i.e when the will of the majority was disregarded to bring about progressive social change by allowing widow remarriage and also criminalizing the accepted social practice of immolation of a widow on her husband’s funeral pyre, to name a few instances). It has also ignored constitutional values so eloquently enunciated as “constitutional morality” by the Delhi High Court. It has put the dignity that the LGBT population is most certainly entitled to in the hands of a hetero-normative populace with deep-seated notions of gender norms and stereotypes rooted in tradition and religion.
By following an isolationist approach based on majoritarian views, and ignoring the ever evolving global rights movement, as well as comparative constitutional jurisprudence, the Supreme Court runs the risk of being a *status quo-ist, and not a progressive* institution. This is simply not acceptable in a country which claims to be the largest democracy in the world.

The rule of law necessitates governance by law and not governance by the mere will of the majority. While this assertion may seem antithetical to the normative understanding of the “law”, especially in a democracy, it can safely be said that sometimes the rule of law and the “rule of the majority” can be mutually exclusive. As highlighted above, there are, and have been, certain instances that require institutions to disregard majoritarian sentiments and turn towards higher constitutional principles. The Court may have tried to be counter-majoritarian in the past, but cherry picking its approach depending on how it feels on a particular issue (as evidenced by its treatment of LGBT rights as “so called rights”), and its misplaced deference to a majoritarian institution like the Parliament, especially in matters of civil liberties, not only delegitimizes its existence as an institution, but also questions the very meaning of the rule of law.

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**Over to You, Parliament – The Significance of the Australian High Court’s Judgment on Same-Sex Marriage**

By Katie O’Byrne | 14th January 2014

A striking feature of Australian High Court jurisprudence in recent years is the Court’s use of orthodox judicial analysis to decide issues of deep political controversy and high significance for individual rights.

This can be seen in the recent case of The Commonwealth v Australian Capital Territory [2013] HCA 55. In that case, the High Court considered the validity of the ACT’s Marriage Equality (Same Sex) Act 2013, which purported to legalise same-sex marriage in the ACT. The High Court unanimously found the whole of the ACT Act to be inconsistent with the Commonwealth Marriage Act 1961 and of no effect.

The Court reasoned that the Marriage Act is to be read as providing that the only form of “marriage” permitted in Australian law is that recognised in the Act. Following reforms introduced by former Prime Minister John Howard in 2004, the Marriage Act defines marriage as “the union of a man and a woman to the exclusion of all others, voluntarily entered into for life”. That definition was taken from the English case of Hyde v Hyde and Woodmansee [L.R.] 1 P. & D. 130 (1886) (itself now superseded by legislative reform in the UK).

Despite the disappointment felt by many at this result, those who favour marriage equality should be heartened by the Court’s reasons. In order to determine whether there was inconsistency between the ACT and Commonwealth Acts, the Court examined the extent of the marriage power in s 51(xxi) of the Constitution. Through its orthodox treatment of well-established principles of constitutional law and statutory interpretation, the judgment has made several gains for marriage rights.

First, notwithstanding the definition of marriage currently in the Marriage Act, the High Court confirmed that the *constitutional* definition of marriage is not frozen in time and is not strictly confined to “the union of a man and a woman”. Rather, the constitutional term “marriage” is “a topic of juristic classification” that changes over time. The Court confronted cases from the nineteenth century including Hyde, explicitly debunking antiquarian definitions “which accord with a preconceived notion of what marriage ‘should’ be”. The effect of these findings is recognition by the High Court that there is no constitutional reason why same-sex marriage cannot be permitted in Australian federal law.

The Court’s clear finding that the Commonwealth has the power to enact same-sex marriage legislation dispels any doubts the Government might have had as to whether that power exists. It also discredits the deployment of any such ambiguity by the Government or lobby groups to justify political inaction or opposition.

Secondly, the High Court articulated the definition of “marriage” under s 51(xxi) of the Constitution as “a consensual union formed between natural persons in accordance with legally prescribed requirements”. Therefore, “[w]hen used in s 51(xxi), ‘marriage’ is a term which includes a marriage between persons of the same sex”.

This clear and unambiguous language, in a rare unanimous opinion on a constitutional question, carries the full weight of the Court’s authority and lends a particularly potent legitimacy to its decision.

Thirdly, the High Court referred to definitions of marriage in other jurisdictions, not to influence the content of Australian law, but simply to demonstrate that the social institution of marriage “differs from country to country” and is now more complex than the anachronistic conceptions of 150-year-old English jurisprudence. The High Court brings Australian constitutional law up to speed...
with legislation in countries that have permitted same-sex marriage, and now goes further than comparable jurisdictions in other parts of the world in relation to the legal understanding of marriage. The judgment may well come to influence courts in other jurisdictions when considering this issue in the future.

Having settled the constitutional principle, the judgment shifts the challenge to Parliament to decide whether to enact same-sex marriage legislation. It now remains for parliamentarians who support marriage equality to demonstrate the courage and expend the political capital necessary to effect legislative change. Only then will Australia achieve the measure of equality that the High Court has confirmed Parliament has power to create and that a healthy majority of the electorate supports.

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Reviewing Koushal: Counting Down the Errors Apparent on the Face of the Record
By Shreya Atrey | 27th January 2014

The seven review petitions filed in the case of Koushal v Naz Foundation Civil Appeal No. 0972 of 2013 (“Koushal”) are an exercise in drawing up the rather lengthy list of errors apparent on the face of the Supreme Court of India's record.

On 11.12.13 the Supreme Court in Koushal reversed the Delhi High Court decision in Naz Foundation v Government of NCT WP(C) No.7455/2001 (“Naz Foundation”) which had declared section 377 of the Indian Penal Code unconstitutional insofar as it criminalised consensual sexual acts of adults in private. Each of the petitions painstakingly reminds the Supreme Court of the arguments which although it had heard and read during the long drawn litigation, chose to forget while writing the Koushal decision.

Error Apparent on the Face of the Record
The Supreme Court can quash an order for error apparent on the face of the record. The error must be one of law not fact, and it must be manifest or patent and not mere error. Errors can only be traced in ‘Speaking Orders’ of the Court, that is, those which enunciate the reasons in law on which a decision is made. The Supreme Court’s order in Koushal enunciates its reasons quite clearly, though incorrectly, for reversing the decision in Naz Foundation. The errors apparent on a bare perusal of Koushal reasoning are now being challenged before the Supreme Court.

Review Petition by Mental Health Professionals
The review petition in Dr. Shekhar Seshadri & Others v Suresh Kumar Koushal & Others, recounts forty-one errors apparent on the face of the record. The ground for challenge is the material error on the face of the record ensuing from the failure to consider
their contentions as the only party before the Supreme Court with professional expertise in the medical and mental health issues of LGBT persons. The Supreme Court in Koushal had reversed the Delhi High Court decision citing the petitioners’ failure to establish a factual foundation for the challenge to the constitutionality of section 377. The justices found the challenge “singularly laconic” and “wholly insufficient”, which “miserably failed” at establishing the particulars of the discrimination claim. In this petition, and in six others, the effort has been to remind the Court of not just the formidable factual foundation established before the Koushal Court, but in turn demonstrate the amnesiac outlook of the Court towards the case of review petitioners.

Two grounds covered by the mental health professionals are noteworthy. First, they show that the Koushal Court’s ruling on the lack of a factual foundation violates the doctrine of res judicata which debars litigation on an issue that has already been settled. The Delhi High Court had previously rejected the constitutional challenge to section 377 for lack of cause of action; but on appeal, the Supreme Court order dated 03.02.2006 remitted the case for adjudication before the High Court. The lack of cause of action had since not been contended at any stage. The issue of ‘lack of factual foundation’ had thus attained finality through the order of a four-judge bench on 03.02.2006 and its subsequent restitution in the Koushal decision is contrary to the doctrine of res judicata.

Secondly, the petition reiterates earlier submissions in the Supreme Court and those considered before the Delhi High Court, that: i) homosexuality was not a mental disorder but a normal and natural variant of human sexuality; and ii) the criminalization of LGBT persons adversely affected their mental health. These contentions were considered and reaffirmed in the Naz Foundation judgement at paragraphs 67-70. They were further submitted in detailed written and oral arguments along with authoritative scientific literature and remained uncontroverted in the Koushal Court. The Supreme Court’s failure to deal with these submissions is a material error that has resulted in a serious miscarriage of justice.

Error and Failure
Although the legal boundaries of a review petition simply require the petitioners to reveal an error apparent on the face of the record, the review petitions do this and more. They remind the Court to not just avoid an error, but to fix a colossal case of non-performance. The review stands for a reminder of the Court’s essential judicial function—to not abdicate its primary task of reviewing materials and making a decision based on the actual case raised before it. The review then asks the Court to not just do its job well, but perhaps simply to first do its job at all.

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Surrogacy, Same-Sex Couples and the Privatisation of Regulation in Israel
By Jonathan Berman | 27th February 2014

On 30 January 2014, the Israeli Government published a draft bill on surrogacy. This proposed amendment to Israel’s 1996 surrogacy law, which was based on a deeply entrenched heteronormative vision of the family, will allow same-sex couples to take part in surrogacy procedures in Israel for the first time.
The 1996 law defines the “parents to be” as a “man and woman”, and therefore excludes same-sex couples and single persons. In the past few years, same-sex couples were often compelled to choose between giving up their hope to have children or entering surrogacy arrangements abroad. India and Thailand became popular countries for Israeli same-sex couples who looked for alternative locations where they could become parents through surrogacy procedures.

This option raised several concerns. The high financial costs involved in these extra-territorial surrogacy proceedings rendered this option impossible for most people. But perhaps more importantly, the lack of regulatory oversight of these proceedings induced many to raise questions about the potential human rights violations of the women involved. In the past few years the LGBTIQ community in Israel, as well the feminist community, engaged in vigorous debates on the moral questions involved in “overseas surrogacy” (and surrogacy in general). Some pointed at the concerns of exploitation of women either by commercial companies involved in surrogacy or by other men, such as family members who may have control over some women’s choices. However, others expressed the view that questioning the free will of impoverished women who are attempting to improve their financial situation through surrogacy is paternalistic. Some opponents also conceptualised these practices of overseas surrogacy in terms of neo-colonialism, portraying the image of the white male who comes from a relatively wealthy country and uses the non-white woman’s womb as commodity.

The proposed bill will end the discrimination between heterosexual and gay couples. It will not, however, end the more general debate concerning the morality of surrogacy. Additionally, it will not render the concerns raised in relation to “overseas surrogacy” obsolete. Under the assumption that the demand for surrogacy procedures by Israelis will exceed the number of Israeli women willing to enter surrogacy agreements, the bill envisions a continuing use of “overseas surrogacy”, and purports to regulate it.

The regulatory arrangements presented in the bill (both in relation to “home surrogacy” and “overseas surrogacy”) purport to adhere to the middle ground between opposing poles – the belief that surrogacy entails no moral or practical problem and should be left entirely to the free market, and the belief that it is an unacceptable form of commodification of the female body, which should be disallowed altogether.

Unfortunately, the proposed regulatory measures seem to reflect a clear neo-liberal profit-based vision. The regulatory model which the bill adopts is loosely based on state supervision, and delegates several functions to privately owned entities. “Overseas surrogacy” will be made available only to persons using the services of profit-based corporations based in Israel.

This model of regulation raises a number of concerns. The involvement of another commercial agent in the chain of mediation might result in either an increase of the cost of surrogacy or, more likely, in a decrease in the compensation the weakest link in this chain, the surrogate mother, will receive. But perhaps more importantly, once the challenging task of ensuring that basic principles such as appropriate medical conditions or guarantees against coercion and exploitation of women, is placed at the hands of institutions whose main consideration is profit, concerns should be raised about such entities’ inclinations to compromise over protection of basic rights in order to maximise their business potential.

Similar doubts should be voiced due to the fact that the bill confers the power to determine the competence and eligibility of potential parents upon these profit-based corporations. The privatisation and mercantilisation of a mechanism, which has a say in the realisation of a basic human right, the right to family life, raises serious concerns.

While state bureaucracies may not always be the ideal or most efficient agents for handling surrogacy agreements and procedures, it seems that privatised regulation of this delicate matter holds the potential of serious human rights violations. This model should therefore be reconsidered by the Israeli Government before the bill turns into binding legislation.

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What Next for LGBT Equality?

By Karl Laird | 11th June 2014

It has been almost a year since the Supreme Court of the United States delivered judgment in *Windsor v United States* 570 U.S. ___ (2013) and in the intervening twelve months there have been an increasing number of cases considering the constitutionality of prohibitions on same-sex marriage.

As of June 2014, same-sex couples can lawfully marry in nineteen states and in the District of Columbia. Thirty-one states, however, still prohibit same-sex marriage, either by law or constitutional amendment. While it is important to appreciate that the increasing prevalence of same-sex marriage is not due solely to success in court, it is in the courtroom where advocates for marriage equality are having the most success. There are currently 30 same-sex marriage cases pending before federal courts and another 10 before state courts. The Supreme Court’s decision in *Windsor* has acted as a catalyst, and perhaps explains why
advocates of same-sex marriage have had such extraordinary success in court since July 2013. It appears that lower courts, at both state and federal level, have interpreted Windsor as a decision in which the Justices have given their imprimatur to same-sex marriage.

When Windsor was decided I welcomed the outcome but lamented the judgment’s questionable analytical quality, in particular the failure to address squarely the issue of whether LGBT people ought to qualify for heightened protection under the Equal Protection Clause of the Fourteenth Amendment. Should LGBT people be recognized as a suspect or quasi-suspect class? It could be argued that the tsunami of successful same-sex marriage cases undermines the validity of my concerns. An analysis of some of these cases, however, demonstrates the prescience of these concerns and indicates what the next issue for the Supreme Court to consider in relation to LGBT equality will be.

In Kitchen v Herbert Case No. 13-4178 the court held that Utah’s prohibition on same-sex marriage was subject to heightened scrutiny on the basis that it constituted sex discrimination, but that it ultimately failed even the most deferential standard of review. The court was unable to consider whether LGBT people constitute a quasi-suspect class as it was bound by an earlier precedent holding that they do not.

Interestingly, in Bishop v US No. 04-CV-848-TCK-TLW the court rejected the argument that prohibitions on same-marriage constitute sex discrimination. In DeLeon v Perry Cause No. SA-13-CA-00982-OLG the District Court found the argument that LGBT people constitute a quasi-suspect class ‘compelling’ but invalidated Texas’ prohibition on same-sex marriage on the basis that it failed to satisfy even rational basis review. In contrast, in Windsor v US 12-2335-cv(L) and Massachusetts v Dept. of Health and Human Services Civil Action No. 1:09-11156-JLT, two different federal courts held that LGBT people constitute a quasi-suspect class and therefore ought to be accorded the protection provided by a heightened standard of scrutiny.

More recently, in a case concerning whether LGBT people could be excluded from juries because of their sexual orientation, the Ninth Circuit Court of Appeals held in SmithKline Beecham v Abbott Laboratories that the Supreme Court in Windsor in fact established a standard of review for classifications based on sexual orientation higher than rational basis review. The court held that, “there can no longer be any question that gays and lesbians are no longer a group or class of individuals normally subject to ‘rational basis’ review.”

In that case the court purported to look at the substance of Justice Kennedy’s opinion rather than on simply what he said. It is submitted that the next issue for the Supreme Court to grapple with in relation to LGBT equality will be whether sexual orientation is a suspect classification. Given the divergence amongst lower courts, resolution of this issue ought to be considered a matter of urgency. In wading into this controversy the Supreme Court will have to face the difficult truth that much of its equality jurisprudence concerning standards of review lacks coherence and analytical clarity.

Rather than simply alluding to the status of LGBT people as a quasi-suspect class, the uncertainty currently prevailing in the lower courts demonstrates that the Supreme Court must state this explicitly. Recognition of sexual orientation as a suspect class will be essential to remediing the discrimination that LGBT people continue to face in the United States. Whether the Supreme Court is ready to grapple with this intractable controversy remains to be seen.

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Hämäläinen v Finland: The Transgender Divorce Requirement in Strasbourg

Peter Dunne  | 31st July 2014

In the landmark 2002 decision, Goodwin v United Kingdom [2002] ECHR 588, the European Court of Human Rights (“ECHR”), citing an “unmistakable trend” among Council of Europe member states, established a general right for post-operative transgender persons (termed “transsexuals” in the judgment) to access legal gender recognition. In the absence of “concrete or substantial hardship or detriment to the public interest”, the UK’s failure to provide Ms. Goodwin with an amended birth certificate (which had also prevented her from entering into a valid marriage) was held to violate arts. 8 and 12 of the European Convention on Human Rights (“ECHR”).

While Goodwin acknowledges a general right to recognition, the European judges were careful not to set down any particular procedures or rules which a state must follow in granting such recognition. The result has been significant variation in gender recognition regimes across Europe, ranging from Denmark’s recent move towards a self-identification model to the requirement for invasive and irreversible surgical intervention, which is still enforced in certain European countries, such as France. While many of these “conditions of recognition” have been subject to legal challenge before national courts, there have been comparatively few cases of this kind before the Strasbourg court.

On July 16, 2014, the Grand Chamber issued an important decision concerning one of the most common conditions of recognition
the requirement that an individual be single or divorced. In Hämäläinen v Finland [2014] ECHR 787, the applicant was a married transgender woman who sought to obtain legal recognition of her preferred gender in Finland. The Finnish authorities refused her request because the applicant was, contrary to national law, still married. The applicant and her wife, on the basis of their religious beliefs, were unwilling to automatically convert their marriage into a civil partnership, as provided for under Finnish law. The applicant argued that the conversion requirement set down in national law was a violation of her rights under arts. 8, 12 and 14 ECHR.

The Grand Chamber, affirming an earlier Fourth Section decision, rejected the applicant’s submissions. In its judgment, the majority noted that, although art. 8 ECHR does apply to a married post-operative transgender person in the applicant’s position, the current Finnish law does not violate her right to private and family life. While the applicant had not specifically argued her case through the lens of same-gender marriage, a positive decision for the applicant would have resulted in two persons of the same legal gender inhabiting a marital relationship. The applicant’s case could not, therefore, be divorced from the Court’s established jurisprudence on same-gender marriage, but rather had to be considered in the light of that case law. The majority, reaffirming earlier pronouncements in Schalk and Kopf v Austria [2010] ECHR 995 stated that art. 12 ECHR does not protect a right for two persons of the same gender to marry. Owing to the absence of a European-wide consensus, member states retain a wide margin of appreciation in regulating access to marriage and cannot be forced to accept same-gender marriage under the guise of legal gender recognition.

The Court concluded that there were a number of acceptable alternatives for the applicant and her wife, most particularly the possibility of automatically converting their marriage into a registered partnership. Under Finnish law, registered partners enjoy substantially the same rights as married couples. Similarly, the operation of the registered partnership would in no way effect the applicant’s legal relationship with her 12-year-old daughter.

There are numerous observations which can be made about the Hämäläinen decision (certainly many more than this short posting will allow). The dissenting minority (Judges Sajó, Keller and Lemmens) address a number of the most relevant critiques in their excellently-reasoned opinion. One such critique is that the majority should have given greater attention to the growing body of case law, epitomised by a 2008 judgment from the German Constitutional Court, which emphasises the unfairness of requiring individuals to choose between two fundamental rights – self-identification and marriage. Another critique is that the majority judgment has little regard for the extreme emotional hardship which marriage dissolution places upon many transgender persons, particularly when those persons, like Ms. Hämäläinen, have been lovingly supported through the difficult transition process by their spouse. Upon reflection, there may be much to support the minority’s conclusion that such marriage dissolution is not necessary or proportionate in a democratic society.

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Curing the Koushal Malady
By Danish Sheikh | 30th April 2014

“We are of the view that though Judges of the highest Court do their best, subject of course to the limitation of human fallibility, yet situations may arise, in the rarest of the rare cases, which would require reconsideration of a final judgment to set right miscarriage of justice complained of. In such case it would not only be proper but also obligatory both legally and morally to rectify the error.”

With these words in Rupa Ashok Hurra v. Ashok Hurra Writ Petition (civil) 509 of 1997, the Indian Supreme Court articulated the notion of the curative petition. The final level at which the Court's jurisdiction might be invoked, the curative is a limited remedy enshrining the principle of ex debito justitiae – that any technicality should not outweigh the course of justice, even if the technicality here be something as significant as the finality of a legal decision.

On 22nd April 2014, the Court took an important step towards realizing this doctrine’s potential by agreeing to hear the curative petition filed against its decision in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013 in open Court. This is the final stage in the story of the constitutional challenge to Section 377 of the Indian Penal Code. By way of criminalizing “carnal intercourse against the order of nature”, the provision has been used as a tool of persecution against the LGBT community in the country since its inception in 1860. After a landmark 2009 victory in the Delhi High Court that resulted in reading down the section to exclude consensual same-sex intercourse, the matter was appealed by various private groups before the Supreme Court. With its Koushal decision in December 2013, the Court reversed the former ruling, effectively recriminalizing homosexuality. That it did so with devastatingly poor legal reasoning fuelled the strong backlash against it – and will prove significant for the hearing of the curative.

As mentioned, a curative petition is a limited remedy, one which may be invoked in instances where the judgment in question causes the perpetuation of irremediable injustice, where it would be oppressive to judicial conscience or where it shakes public confidence in the judiciary. These grounds are clearly applicable to Koushal. Amongst the notable omissions on behalf of the Court include its failure to accurately apply the constitutional test of equality under the law in a coherent manner; its complete non-consideration of the constitutional test of non-discrimination that was articulated by the Delhi High Court to include sexual orientation as protected category; and its inability to appreciate the voluminous evidence of persecution of the LGBT community and appreciate the link between the penal provision and its direct and inevitable oppressive effects. This last stand is one that another bench of the Supreme Court recently contradicted in National Legal Services Authority (Nalsa) v. Union of India Writ Petition Civil No. No.400 of 2012. Amongst its other findings, the Nalsa court noted that “Section 377, though associated with specific sexual acts, highlighted certain identities, including Hijras [biological males who reject their “masculine” identity in due course of time to identify either as women, or “not-men”, or “in-between man and woman”, or “neither man nor woman”] and was used as an instrument of harassment and physical abuse against Hijras and transgender persons”.

The importance of the curative may also be attested to by the manner in which the Koushal judgment has perpetuated a continuing state of injustice. The curative petition testifies to an increase in police harassment, a sharpening of social prejudice, individual suffering of psychological trauma and reduced self-esteem, and employment being jeopardized amongst its other adverse effects. J. Banerjee notes in his Ashok Hurra concurrence:

“Can it be said that the justice delivery system of the country is such that in spite of noticing a breach of public interest with a corresponding social ramification, this Court would maintain a delightful silence with a blind eye and deaf ear to the cry of a society in general or even that of a litigant on the ground of finality of an Order as passed by this Court ?”

The Koushal court’s silence in the face of this kind of suffering was deafening, tarnishing the legacy of the Supreme Court. It now stands to the curative bench to set the judicial record straight.

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India’s Third Gender and The Kaushal Problem
By Vishwajith Sadananda | 25th April 2014

As December 2013 drew to a close, the Indian Supreme Court inflicted the LGBT movement with a severe body blow by re-criminalizing homosexuality in Suresh Kumar Kaushal v. Naz Foundation and Anr, Civil Appeal No.10972 of 2013.

However, on 15th April 2014, which will indeed be marked as a red letter day for human rights activists, and the transgender community in particular, the Supreme Court, in National Legal Service Authority v. Union of India (“NALSA”), has given legal recognition to the transgender community by mandating that they be treated as the third gender, thereby doing away with the binary understanding of gender.
The Supreme Court has primarily relied on Articles 14, 19 and 21 of the Indian Constitution to grant the transgender community recognition in the eyes of law. According to the Court, Article 14, dealing with the right to equality, uses the term “person,” which includes transgender individuals [para 54]. In other words, Article 14 does not restrict itself to binary terms like male and female and is applicable to all persons regardless of their gender identity. Furthermore, the Supreme Court went a step further to hold that under Articles 15 and 16 of the Constitution, which prohibit discrimination on the grounds of, \textit{inter alia}, ‘sex’, the term ‘sex’ includes gender identity [para 59]. Articles 15 and 16 have widely been used to provide affirmative action and actualize economic and social rights in India. Therefore, the Supreme Court has taken a progressive step by not only mandating that transgender individuals should not suffer discrimination, but also ensuring that the State takes a positive role in their social and economic advancement.

As far as Article 19 is concerned, the Court was of the opinion that:

“Gender identity, therefore, lies at the core of one’s personal identity, gender expression and presentation and, therefore, it will have to be protected under Article 19(1)(a) of the Constitution of India. A transgender’s personality could be expressed by the transgender’s behavior and presentation. [The] State cannot prohibit, restrict or interfere with a transgender’s expression of such personality, which reflects that inherent personality.” [para 66]

The Supreme Court also went on to hold that self-determination of gender is an integral part of personal autonomy and self-expression falling within the realm of Article 21, which guarantees the protection of life and personal liberty [para 69].

Relying on content-centric reasoning, the Court also used foreign judgments, as well as international instruments, to buttress its reasoning in recognizing the third gender. [paras 47 to 55]

However, even though the Court has issued directives to the Central and State Governments for the protection and advancement of the transgender community in line with the principles enunciated in the judgment [para 129], the effective implementation of the principles of the judgment does seem doubtful in the light of the decision in Kaushal.

It is axiomatic that sexual freedom falls within the ambit of actualization of one’s gender identity. At this juncture, it is interesting to note two observations of the Court in NALSA. Firstly, the Court observed that the transgender community in India was becoming more and more susceptible to AIDS as a consequence of lack of access to adequate health care due to rampant discrimination.
(attributable to draconian pre-colonial penal laws, as argued in Naz). Secondly, the Court highlighted how Section 377 of the Indian Penal Code has been historically used to “target certain identities” and as an “instrument of harassment and physical abuse” [para 18] (though it refrains from dealing with the constitutionality of that section).

However, as already stated, in Kaushal, the Supreme Court held that carnal sexual intercourse i.e., penile non-vaginal sex, is a criminal offence under Section 377. Under such circumstances, considering the fact that, regardless of its faulty reasoning, Kaushal is still the law of the land as far as the scope and applicability of Section 377 is concerned, the effective applicability and implementation of the Court’s Article 19 reasoning in NALSA – namely, the centrality of gender and identity expression and the State’s responsibility to refrain from infringing on this – is highly suspect.

It cannot be denied that NALSA is landmark judgment, with far reaching implications for gender justice in India, and possibly the world. However, for the effective realization of its principles, the “Kaushal Problem” has to be dealt with. Viewed in this context, the curative petition to be heard by the Supreme Court to reconsider Kaushal becomes all the more significant.

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INDIGENOUS RIGHTS AND HUMAN RIGHTS

The Right to Prior Consultation of Indigenous Peoples in the Americas (Part I)
By Ignacio de Casas and Lucas E Gomez | 21st June 2014

Neither the American Declaration of the Rights and Duties of Man nor the American Convention on Human Rights (ACHR) – the only treaties applied by the Inter-American Commission (IACHR) and the Inter-American Court – specifically enshrines the rights of indigenous peoples over their territories. Nonetheless, the interpretation given to these treaties by the Inter-American Human Rights System (IAHRS) organs is that these rights are protected by the right to property in article XXIII of the Declaration and article 21 of the Convention.

Thus, the IACHR has held, using an evolving interpretation, that “Article 21 of the American Convention recognizes the right to property of members of indigenous communities within the framework of communal property”; and that the right to property under article XXIII of the American Declaration “must be interpreted and applied in the context of indigenous communities with due consideration of principles relating to the protection of traditional forms of ownership and cultural survival and rights to land, territories and resources”.

The right to consultation is, possibly, the most important development in this subject. Although it has not been contemplated as
such by the ACHR, the jurisprudence of the organs of the system has highlighted its importance as a vital requirement for the
delimitation of the right to indigenous property, thus extracting it from the penumbra of articles 8 (which protects the judicial due
process), 13 (access to information) and 23 (political rights) of the Convention.

Consultation is, indeed, contemplated in article 6 of the ILO Convention No. 169, which requires that consultation shall be made
“through appropriate procedures”, “in a form appropriate to the circumstances”, and that it is necessary to “establish means by
which the people involved may freely participate (…) at all levels of decision-making in elective institutions and administrative and
other bodies responsible for policies and programs which concern them”.

Within the IAHRS, Convention No. 169 is not applied. However, it is used as an interpretative frame, in accordance with the rule set
in article 29 of the ACHR (as decided by the IACourtHR).

The main objective of the right to prior consultation consists in ensuring the effective participation of the communities possibly
affected – whether directly or indirectly – in the decision making process that concerns them. In this way, consultation ensures the
effective participation of the members of tribal or indigenous peoples or communities. It therefore requires that the State receive
and provide information, as well as constant communication between the parties. It needs to be undertaken in good faith and
should be carried out through culturally appropriate procedures, with the objective of achieving agreement or consent.

Therefore, it is the duty of the State to ensure the respect of the right to consultation, being in charge of ensuring its effective
operation.

One might wonder whether the requirement to consult may be fulfilled where consultation occurs through private parties, whether
the concessionaires of the exploitation/project themselves, or third parties. In principle, the answer may be no, since the duty of
consultation is non-transferable, and may not be delegated by the State. The IACHR has expressed this fact when it held that “the
making of consultation processes is a responsibility of the State, and not of other parties, such as the company that seeks to be
granted the concession or the contract of investment”.

However, there are no objective reasons for denying the possibility of delegating part of the consultation (for example, the initial
information process could be coordinated by the State and performed by companies, who are more familiar with the details of the
project). This may occur, as long as the process of supervision and control is not delegated. In this way, States may ensure that the
negotiation process takes into account a frame of respect to human rights and the particular needs of the communities.

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The Right to Prior Consultation of Indigenous Peoples in the Americas (Part II)
By Ignacio de Casas and Lucas E Gomez | 22nd June 2014

Contrary to what some would think, the fact that the right to consultation grants communities the possibility to veto any measures
taken against their wishes emerges neither from the ILO Convention No. 169 nor from the jurisprudence of the IAHRS authorities.

In this regard, as to the right of consultation in general, the ILO has stated explicitly that the Convention does not give indigenous
and tribal peoples the right to veto. Likewise, the ILO Manual on this subject states that “indigenous and tribal peoples do not have
the right under the Convention to veto exploitation”.

However, the IAHRS authorities have disagreed with this statement and have declared that certain matters “legally require states
to obtain indigenous peoples’ free and informed consent prior to the execution of plans or projects which can affect their property
rights over lands, territories and natural resources”. Therefore, if consent is not obtained, this would grant indigenous peoples the
power to actually veto any measure which does not meet their interests.

In this regard, the Inter-American Court emphasized that, in the context of large-scale development or investment projects that
would have a major impact on the lands and territories or the natural resources of the affected indigenous peoples, the State has a
duty, not only to consult, but also to obtain their free, prior, and informed consent, according to their customs and traditions. Yet, the
Court was rather unclear about this.

In an attempt to clarify the issue, it has been declared that indigenous peoples’ consent shall be required only in the following
cases:

Chapter 11

1. Where the development of investment plans implies a displacement or permanent relocation of the affected indigenous peoples.
2. Where the execution of development or investment plans or of concessions for the exploitation of natural resources would deprive indigenous peoples of the capacity to use and enjoy their lands and other natural resources necessary for their subsistence.
3. Where there will be storage or disposal of hazardous materials in indigenous lands or territories.

In principle, the State has the duty to strive to adapt to the demands and proposals expressed by the affected peoples or communities during the consultation.

However, even in cases where consent is not required and where the State does not take into account the concerns and opinions of the affected communities, the Inter-American Commission has stated that “States have the duty to give due regard to the results of the consultation or provide objective and reasonable motives for not having taken them into consideration”.

In this regard, the Commission has also declared that, "whenever accommodation is not possible for motives that are objective, reasonable and proportional to a legitimate interest in a democratic society, the administrative decision that approves the investment or development plan must argue, in a reasoned manner, which are those motives. That decision, and the reasons that justify failure to incorporate the results of the consultation to the final plan, must be formally communicated to the respective indigenous people”.

We can conclude that the jurisprudence on this matter has evolved fairly well in the matter of the State’s duties regarding the right of indigenous and tribal communities. On the other hand, there is room for further development of the countervailing duties of communities. If this were to happen, there would be more security for every party involved in these cases: States, communities and private companies.

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Establishing Aboriginal Title in Canada: Tsilhqot’in Nation v British Columbia
By Jonnette Watson Hamilton | 17th July 2014

The declaration of Aboriginal title by the Supreme Court of Canada on June 26, 2014 – a first in Canada – is a momentous decision that should have long-lasting significance for the Tsilhqot’in Nation, other Aboriginal groups, and the rest of Canada.

The decision made new law in the areas of the duty to consult and accommodate, governments’ justification of infringements of Aboriginal title, and federalism. On the law of Aboriginal title – the focus of this post – the decision is important for at least two reasons. First, as part of its return to the basic principles set out in the Court’s 1997 decision in Delgamuukw v British Columbia [1997] 3 SCR 1010, Tsilhqot’in includes a return to an equal role for Aboriginal perspectives that incorporates Aboriginal laws. Second, Tsilhqot’in Nation clarifies an understanding of occupation that accords with a territorial approach to Aboriginal title, an approach that does not piece together intensive use of well-defined tracts of land.

The test for Aboriginal title

Chief Justice McLachlin, who wrote the unanimous decision, begins by noting that the central issue of pre-sovereignty occupation must be looked at from both the common law and the Aboriginal perspective (para 34), with the latter including the “laws, practices, customs and traditions of the group” (para 35). The test is a highly contextual one, with intensity and frequency of use to vary with the characteristics of the Aboriginal claimants and the nature of the land (para 37). Those characteristics include the claimants’ “laws, practices, size, [and] technological ability” (para 41). The test for Aboriginal title, first set out in Delgamuukw, is a three-part test. In the Chief Justice’s words in Tsilhqot’in, occupation “must be sufficient; it must be continuous (where present occupation is relied on); and it must be exclusive” (para 25, emphasis in original). The sufficiency of the Tsilhqot’in peoples’ occupation was the main point of disagreement between the Tsilhqot’in Nation and governments and between the two lower courts.

The Chief Justice also spells out the standard for sufficient occupation as lying between the minimal occupation which would permit a person to sue a wrongdoer in trespass and the most onerous standard required to ground title by adverse possession as against a true owner (paras 38, 40).

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**The content of Aboriginal title**

As for the content of Aboriginal title, Delgamuukw established that it “encompasses the right to exclusive use and occupation of the land held pursuant to that title for a variety of purposes” (para 67). Tsilhqot’in confirms it is a beneficial interest in the land (para 70), conferring “the right to use and control the land and to reap the benefits flowing from it” (para 2). The incidents that attached to that title are analogized to those associated with fee simple titles (para 73). These aspects make up what the Chief Justice calls the “positive proposition” associated with the content of Aboriginal title (para 15).

There is also a “negative proposition,” namely, that the Aboriginal title holders’ use of the land “must not be irreconcilable with the nature of the group’s attachment to that land” (para 15). The Chief Justice ties this “important restriction” to the collective nature of Aboriginal title, which includes succeeding generations (para 74). As a result, Aboriginal title land can only be alienated to the Crown; cannot be encumbered in ways that would prevent future generations from using and enjoying it; and cannot be developed in ways that would substantially deprive future generations of the benefit of the land (para 74). The scope of this limitation is uncertain and possibly a deterrent to development.

**Conclusion**

As a result of the Tsilhqot’in decision, we will most likely see many more First Nations bringing forward to the courts claims for declarations of Aboriginal title. The Tahltan First Nation has already announced its plan to launch an Aboriginal rights and title claim. Hopefully the decision will also motivate more intensive and good faith negotiations in modern land claims and treaty processes.

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Chapter 11 Court for the South District of New York (“SDNY”). Texaco agreed to have the case heard before the Ecuadorian courts on the basis that they could contest any potential judgment in the United States.

The Ecuadorian proceedings began in 2004, by which time Texaco had merged with another American oil company, Chevron Corporation (“Chevron”). After seven years of litigation, on February 14, 2011, an Ecuadorian trial court found Chevron liable for US$8.6 billion in damages, with an additional US$8.6 billion in punitive damages if Chevron did not apologize within 14 days (the “Trial Judgment”). Chevron did not apologize, and was therefore liable for US$17.2 billion in damages.

After subsequent appeals within Ecuador, the country’s highest appellate court reduced Chevron’s liability to US$9.51 billion. Chevron subsequently initiated legal proceedings in the United States to contest its liability.

Meanwhile, the plaintiffs sought to have the Trial Judgment enforced against Chevron Canada, a subsidiary of Chevron, in the Canadian province of Ontario. A preliminary issue arose as to whether an Ontarian court has the ability, or jurisdiction, to hear the case.

On May 1, 2013, an Ontario judge ruled that while an Ontario court could adjudicate the case, the case had no hope of success because Chevron possessed no assets in Canada. Accordingly, the judge stayed the proceedings, thereby bringing the case to its end in Canada.

On appeal, the Ontario Court of Appeal determined that the trial judge overstepped his boundaries by staying the proceedings. The court held that the proceedings could continue in Ontario, stating: “After all these years, the Ecuadorian plaintiffs deserve to have the recognition and enforcement of the Ecuadorian judgment heard on the merits in an appropriate jurisdiction. At this juncture, Ontario is that jurisdiction.”

The outcome of the proceedings before the Supreme Court of Canada will conclusively determine whether the plaintiffs may seek to enforce the Ecuadorian judgment in Ontario.

However, any future proceedings in Canada may be all for naught. On March 4, 2014, a judge of the SDNY ruled in Chevron Corporation v Donziger et al 11 Civ. 0691 (LAK), a 497-page judgment, that the Trial Judgment was a product of fraud and racketeering activity and therefore was unenforceable in the United States.

Amongst other findings, Justice Lewis A. Kaplan held that the plaintiffs wrote the Trial Judgment in its entirety and that the trial judge was paid US$500,000 to sign the judgment in the plaintiffs’ favour. Justice Kaplan concluded: “The decision in the Lago Agrio
case was obtained by corrupt means. The [plaintiffs] may not be allowed to benefit from that in any way. The order entered today will prevent them from doing so.”

While the findings of the SDNY do not bind a Canadian court, they are likely to be taken into account if enforcement proceedings begin in Canada. The Supreme Court of Canada will hear the Chevron appeal on December 12, 2014.

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