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Introduction

By Gautam Bhatia

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

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

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

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

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

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

Gautam Bhatia is a legal academic, and practicing lawyer based in New Delhi, India. His book ‘Offend, Shock or Disturb: Free Speech under the Indian Constitution, will be published by OUP in August 2015.

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Constitutional Protection for the Right to Strike in Canada

By Judy Fudge | 6th February 2015

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



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

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

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

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

Following closely on the heels of *Mounted Police Association of Ontario v. Canada* 2015 SCC 1, in which the Supreme Court of Canada made it clear that the test of whether or not the constitutionally protected right to bargain collectively had been violated was substantial interference, the question the Court had to resolve in the Saskatchewan case was whether or not strike action was an essential part of collective bargaining. Deploying the approach adopted in *Health Services* 2007 SCC 27, which established that collective bargaining was protected under freedom of association in the Charter, the Court referred to the history of labour relations and collective bargaining law in Canada, canvassed the gamut of international and comparative law regarding the status of the right to strike and reviewed its own jurisprudence to conclude that the right to strike was a constitutionally protected component of collective bargaining. Recognising that protecting health and safety was a legitimate and pressing objective, Justice Abella nonetheless held that the provincial government had failed to establish that the means that it adopted to achieve this goal were 'minimally impairing' of the constitutional right.

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More remarkable than the actual result were Justice Abella's sources, which ranged from the European Court of Human Rights' path-breaking decision in *Demir and Baykara* [2008] ECHR 1345, through international human and labour rights, to Anatole France's 'aphoristic fallacy': 'The law, in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread' (Para. 56). Unlike *Fraser* 2011 SCC 20, where the majority responded point by point to the opinion of Justice Rothstein, on this occasion Justice Abella did not let his cantankerous dissent, which extolled the deferential approach taken in the *Alberta Reference* and alluded to the employer-led controversy over the status of the right to strike at the International Labour Organization, set the agenda.

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

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

A Human Rights Defence of Hong Kong's Occupy Central

By Mathias Cheung | 16th August 2014

With the Hong Kong Government set on introducing an undemocratic electoral reform in the coming months, Professor Benny Tai has proposed to organise a peaceful assembly, 'Occupy Central with Love and Peace.' It has been condemned and denounced as an affront to the rule of law.

The background to this saga is the Hong Kong Government's proposed electoral reforms. With the imprimatur of Beijing in 2007, the Government now plans to introduce universal suffrage for Chief Executive (head of government) elections, but candidates must be nominated by an unaccountable nominating committee. This carries the imminent risk that 'undesirable' candidates will be screened out, contrary to Article 26 of the Basic Law and Article 25 of the International Covenant on Civil and Political Rights ('ICCPR'). Occupy Central is a response to this undemocratic move, but is seen as an act of civil disobedience due to possible contravention of the Public Order Ordinance.

The Government has gone all out in undermining the legitimacy of Occupy Central. Chief Executive C. Y. Leung has threatened to crack down on the movement, condemning it as illegal. The Secretary for Security has claimed that the movement violates the 'rule of law,' as have officials in Beijing.

Simultaneously, a pro-Beijing Alliance has launched an anti-Occupy Central signature campaign in the name of rejecting 'violent' and 'unlawful' activities. With Government officials and police officers signing, it seeks to turn this into a game of numbers, claiming an overwhelming 1.1 million signatures in opposition to the 792,808 supporters of Occupy's earlier civil referendum.

The argument based on the rule of law is seriously under-assessed. The rule of law is *not* the sum total of the effective application of all enacted rules of law. If so, Nazi Germany would be a paradigm. There is a difference between the Government's 'rule by law' mentality and genuine 'rule of law.' A democratic society upholds 'the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens... basic human rights' (see Lord Griffiths in *R v Horseferry Road Magistrates Court, ex parte Bennett* [1993] UKHL 10).

In the case of Occupy Central, the rule of law entails the protection of the *constitutional freedom of expression and peaceful assembly enshrined in Article 27 of the Basic Law* from Government crackdown. Article 11 of the Basic Law provides that 'no law enacted by the legislature... shall contravene [the Basic Law].' If subordinate statutory law (like the Public Order Ordinance) poses an absolute bar on Occupy Central and prompts the arrest of participants, it disproportionately restricts the overriding constitutional right to peaceful assembly. The enforcement action may be unlawful and unconstitutional.

Therefore, it is by no means clear that the statutory restrictions are lawful, nor that a peaceful assembly in public space (without any trespass on private property) on the pivotal issue of democracy, is by definition unlawful. Indeed, the Human Rights Committee's Concluding Observations in 2013 expressed concerns over 'the application in practice of certain terms contained in the Public Order Ordinance, *inter alia*, 'disorder in public places' or 'unlawful assembly,' which may facilitate excessive restriction to Articles 19 and 21 of the ICCPR, and 'the increasing number of arrests of, and prosecutions against, demonstrators.'

General Comment No. 34 makes it clear that public order 'may never be invoked as a justification for the muzzling of any advocacy of multi-party democracy, democratic tenets and human rights.' As the ECtHR put it in *Kuznetov v Russia* Application no. 10877/04,

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'in a democratic society based on the rule of law, the ideas which challenge the existing order must be afforded a proper opportunity of expression through the exercise of the right of assembly.'

The signature campaign will not prevail, for it is precisely when a minority voice is being subdued that the law must step in to protect fundamental rights. The rule of law, properly understood, does not provide an argument against Occupy Central, but one in favour of protecting it to a proportionate extent. The current House of Commons Inquiry into the implementation of the Sino-British Joint Declaration ought to focus on the protection of rights and freedoms in Hong Kong as precipitated by Occupy Central.

Mathias Cheung is a recent BCL graduate. He is currently a research assistant at Oxford University and a BPTC student at City Law School.

The Violence Must Stop – Abuse of Police Power in Hong Kong's Democracy Protests

By Mathias Cheung | 30th September 2014

In ruling out genuine choice in all future Chief Executive elections in Hong Kong, the Government has done violence to democracy. Now, the Government is doing violence to peaceful protesters in dispersing them.



In defiance of the undemocratic decision by Beijing on 31 August, pan-democrats have vowed to launch the *Occupy Central with Love and Peace* movement. Students took to the frontlines last week by organising a classroom boycott that culminated in a peaceful assembly outside the Government Headquarters. Occupy Central officially began as the crowds surged and the police started cracking down on the protesters.

I have written earlier that the rule of law ought to protect such peaceful assemblies. Sadly, as tens of thousands assemble peacefully on the streets of various districts, riot police have been deployed to disperse the crowds violently. They have decided to fight peace with violence by unlawfully employing:

- pepper spray;
- tear gas;
- baton charges; and
- arrest and unreasonable detention without charge.

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Appalling scenes and footage of police violence have been spawned across social media. Even the elderly were not spared, being pepper-sprayed at point blank range. Have they forgotten that 'measures of crowd control should not be used by the national authorities directly or indirectly to stifle or discourage protest' (Austin v UK [2012] ECHR 459 [68])?

The police's conduct is a blatant violation of international human rights law. The peaceful protesters enjoy the fundamental right to life and right of peaceful assembly, protected by Articles 6 and 21 of the International Covenant of Civil and Political Rights as incorporated by the Basic Law. Article 2 of the UN Code of Conduct for Law Enforcement Officials requires the police to protect human rights, and under Article 3 they 'may use force only when strictly necessary.'

Unlike the riots of 1967, it is simply unnecessary, disproportionate and unlawful to repeatedly use pepper spray and tear gas to restrict the rights of peaceful, unarmed protesters. Principle 13 of the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that 'in the dispersal of assemblies that are unlawful but non-violent, law enforcement officials shall avoid the use of force.' Indeed, the State has a 'duty to facilitate peaceful assemblies,' with 'a presumption against limitations on assemblies' (*Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Christof Heyns* [119]).

As emphasised in Amnesty International's *Understanding Policing* at p.131, 'non-lethal' riot control devices 'can result in serious injury and even death.' The UN Special Rapporteur on the Situation of Human Rights Defenders, Margaret Sekaggya, has rightly criticised 'violent means to disperse peaceful protesters,' as 'this conduct violates the Government's responsibility to protect civil society actors.'

The violence must stop. The acquiescence of the international community must also stop. As the Director of Amnesty International Hong Kong rightly pointed out, we are looking at 'a violation of international law.' The UN Human Rights Committee must act. Meanwhile, let every police officer know this: '*obedience to superior orders shall be no defence*' (Principle 26 of the Basic Principles). The real law-breaker is the one who attacks peaceful citizens, and it is in times like these that the law must protect the people from abuse.

Mathias Cheung is a recent BCL graduate. He is currently a research assistant at Oxford University and a BPTC student at City Law School.

Why the U.S. Needs a Magnitsky Act for Venezuela

By Ezequiel Vázquez-Ger | 29th March 2014

It has been a month since the Venezuelan people took to the streets to protest against the precarious situation in which the country is currently living. According to the UN Human Development Index, the murder rate in the country is the fifth highest in the world; annual inflation rates are currently over 50 percent. Furthermore, Transparency International has ranked Venezuela as the most corrupt country in the region, and Freedom House ranked the country 168th (out of a total of 196) in its 2013 Global Press Freedom Rankings. In its 2014 Human Rights Report, Human Rights Watch asserted that the Venezuelan 'judiciary has largely ceased to function as an independent branch of government.'

What began as peaceful demonstrations led by young students turned into an unmanageable situation, marked by the deaths of at least twenty-four people, the arbitrary detention of hundreds of students, the arrest of one of the opposition leaders, Leopoldo López, and a series of human rights violations of a magnitude never before seen in the country.

The U.S. Government's response to this situation has been adequate, but it would be improved if the political willingness to implement human rights principle-based actions were in place. Both President Obama and the State Department have condemned what is happening and have urged the Venezuelan government to release every arrested student. But statements are not enough. What the Venezuelan people need from the international community, and especially from the U.S. (where wealthy Venezuelans often spend their time and money), are concrete sanctions. But instead of pursuing sanctions that would affect the whole country, such as oil sanctions, the U.S. should start by imposing individually-targeted sanctions against the specific individuals within the government who are responsible for the assassination of protesters, media censorship and human rights violations. The precedent for this kind of sanctions already exists in the form of the 'Sergei Magnitsky Rule of Law Accountability Act' (the 'Magnitsky Act').

Sergei Magnitsky was a Russian lawyer who was arrested by Russian authorities in 2008 while he was investigating a corruption case. Magnitsky died in prison after being detained and tortured for 358 days. However, his death did not go unpunished. In December 2012, the U.S. Congress passed the Magnitsky Act, a law that required the White House to revoke the visas and freeze the assets of the Russian public officials involved in his death. The premise of the law is that many of the human rights violations occurring in the world involve money, and that money often ends up in bank accounts, properties and businesses in the U.S.

During the last fourteen years, soaring oil prices and a lack of strong institutions in Venezuela led to shockingly high levels of corruption. Many of the Venezuelan officials who have benefited from this corruption are also frequent travellers to the U.S. and

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own properties on U.S. soil. Several of Venezuela's top rulers include people identified as 'drug kingpins' by the U.S. Treasury Department. Many other Venezuelan public officials are being investigated by the U.S. Justice Department for fraud, money laundering and corruption.

A thorough investigation of the murders and human rights violations that have occurred in Venezuela in recent weeks would likely reveal that many of the military and police officials with direct responsibility for what has happened probably also possess U.S. visas, bank accounts and properties. By targeting these individuals and blocking them from enjoying their illicitly-gained assets, the U.S. would be in a unique position to effectively combat human rights violations in Venezuela.

Fortunately, the U.S. Congress is already promoting these kinds of efforts. At some point over the next few days, the Senate will vote on a bill introduced by Senators Rubio and Menéndez, which, among other things, urges the President to immediately impose targeted sanctions, including visa bans and asset freezes, against individuals involved in planning, facilitating or perpetrating gross human rights violations in Venezuela.

Human rights concerns are universal and should not be limited to the internal affairs of any country. If the U.S. can take steps to prevent the violations in Venezuela from continuing, such as through a Magnitsky-style law, it has a responsibility to act.

Ezequiel Vázquez-Ger is an economist and political analyst based in Washington DC, with expertise in human rights and anti-corruption advocacy campaigns.

The Criminalization of Protests: Repression and Human Rights Abuses in Venezuela

By Manuel Casas | 15th April 2014

In Venezuela, anti-government protests are being brutally repressed; many demonstrators have been jailed, with some believed to have been tortured.



On February 12, 2014, university students opposed to the current government carried out a rally in Caracas. This date was purposely chosen for the rally because February 12th is Youth Day in Venezuela. Youth Day commemorates a battle in the struggle for independence where, due to lack of regular soldiers, university students were forced to join the fray. Even though they were outnumbered, they achieved victory.

The rally – set to finish at the Prosecutor General's office – sought, amongst other things, the freedom of several students who had

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been jailed for protesting in the western Venezuelan state of Táchira. The protesters who attended the rally were repressed with the usual mix of tear gas, rubber bullets and water cannons. This sort of reaction is common in Venezuela. However, what followed is not: members of Sebin, the Venezuelan Intelligence Service, opened fire and killed two people, Juan Montoya, a member of the government's paramilitary forces, known as colectivos, and Bassil Dacosta, a student.

Since the events of February 12th of this year, the government has *de facto* criminalized protesting – a right established in the Venezuelan Constitution. The following are the most alarming of the steps the government has taken to do so.

First, protests have been repressed with live ammunition and excessive force, in general, both by official security forces and by paramilitary colectivos. This has resulted in a death toll of 39 and more than 600 injured. Tear gas and water cannons are now considered 'mild,' as beatings, seizures and detentions have become customary.

Second, over 2200 protestors have been detained, and there have been several cases of reported abuse and torture of detainees. One detainee claims to have been sodomized with a rifle barrel, and many state that they suffered electric shocks to their testicles or were beaten with batons wrapped in foam (in order to avoid visible bruising).

There are also political prisoners amongst those incarcerated, most notably, Leopoldo López, leader of the Venezuelan opposition party, Voluntad Popular, and democratically-elected mayors Enzo Scarano and Daniel Ceballos (the mayor of San Cristobal, the capital of Táchira State, where the protests began). Furthermore, Maria Corina Machado, a congresswoman, has been stripped of her seat in Congress and threatened with prosecution for 'partaking in and promoting the violent actions generated by fascist sectors.' The high politicization of the Venezuelan courts renders the prospects of obtaining justice dim.

Third, there have been severe violations of freedom of expression: NTN24, a Colombian cable channel, was swiftly forced off the air following its extensive coverage of the rally on February 12th (it was the only news outlet with programming available in Venezuela to do so). The government also threatened to expel CNN journalists, cancelling their license, only to reinstate it shortly afterwards. The Journalist's Union has reported more than 150 cases of attacks against journalists, including physical assaults, detention and theft of equipment, such as cameras, since the February 12th rally.

Fourth, high-ranking government officials have used hate speech. The President, Ministers and state Governors have continually used aggressive and hate-inducing language when referring to protestors, claiming that they are fascists, 'heirs of Hitler,' and that they have no love for the motherland. On March 5th, the President called for the colectivos to defend the country, inviting them to 'put out any flame that arises.' Previously, Carabobo State Governor Francisco Ameliach tweeted to the colectivos to await the order for the 'fulminating counter-attack.' Needless to say, these statements have resulted in the loss of life.

In sum, the high levels of violence used to repress generally peaceful protests, paired with the widespread detention of protestors, demonstrate that the Venezuelan government is attempting to criminalize the right to protest and is committing grave human rights violations in the process.

Manuel Casas is an Assistant Professor of Constitutional Law at Universidad Católica Andrés Bello and a practicing lawyer who has represented several of the students detained during the recent protests in Venezuela.

The right to peaceful protest in Ethiopia

By Solomon Tekie Abegaz | 25th May 2014

Ethiopia is currently witnessing a wave of peaceful demonstrations from political parties, student groups and others. One such set of demonstrations took place between the 25th and 29th of April. Oromo students at Ambo University of the Oromia Regional State were opposing the 'Integrated Master Plan of Addis Ababa' (a plan to expand the city to some parts of the Oromia Regional State).

The dark side of the story is the reaction towards this movement from the ruling party (EPRDF). More than 30 people have been killed during the protests, with several others wounded and incarcerated. It is unacceptable for life to be claimed in this way when people exercise their fundamental rights and freedoms. The demonstrations and the response from the government reveal the need to enforce domestic and international human rights norms applicable to Ethiopia.

Article 30(1) of the Constitution of the Federal Democratic Republic of Ethiopia (FDRE) guarantees to 'everyone the right to assemble and to demonstrate together with others peaceably and unarmed, and to petition.' The only limitation is that the right cannot be used for purposes of defamation or violation of laws prohibiting any propaganda for war and any public expression of opinions intended to injure human dignity. Furthermore, Ethiopia is a state party to numerous global and regional human rights conventions that guarantee freedom of assembly and expression.

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Regarding the accountability of law enforcement officials, the Human Rights Committee urged states to take all necessary measures to prevent any excessive use of force by the police, urging that rules and regulations governing the use of weapons by the police and security forces be in conformity with the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials; that any violations of these rules be systematically investigated in order to bring those found to have committed such acts before the courts; and that those found guilty be punished and the victims be compensated. On the other hand, article 74 of the Criminal Code of Ethiopia 2004 provides for a legal basis on which enforcement officials can be held liable for enforcement of superior orders when such orders constitute a crime 'such as in cases of homicide, arson or any other grave crime against persons, or national security or property, essential public interests or international law.'

In addition, there are judicial and quasi-judicial mechanisms to protect citizens from violation of human rights by enforcement officials. Article 37(1) of the FDRE Constitution guarantees to everyone 'the right to bring a justiciable matter to, and to obtain a decision or judgment by, a court of law or any other competent body with judicial power.' Furthermore, the Ethiopian Human Rights Commission Establishment Proclamation No. 210/2000 imposes a duty on the Ethiopian Human Rights Commission to undertake investigation, upon complaint or its own initiation, in respect of human rights violations.'

Despite the protection of the right to peaceful demonstration and accountability mechanisms for violations, Ethiopian students, members of opposition groups, journalists and others seeking to express their rights to freedom of assembly, expression or association are frequently killed, mistreated or detained arbitrarily. Credible human rights activists and independent human rights reports underscore that Ethiopian security forces used excessive force to disperse peaceful and unarmed demonstrators. This potentially constitutes a blatant violation of human rights laws and norms, which the country is obliged to respect and protect.

A culture of tolerance of different opinions is necessary to prevent such violations of human rights. Security forces should use only non-lethal equipment, rather than firearms, during peaceful protests. The Ethiopian government should assume responsibility for the unlawful conduct of security officers. To strengthen accountability mechanisms, the country should review its legislation in the light of international standards on the use of force by enforcement officers, in particular, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, 1990. It is important that prosecutions be initiated each time security forces kill peaceful demonstrators. Courts, in turn, must play their role in penalising those responsible and awarding damages to victims or their families.

Solomon Tekle Abegaz, LLB (Addis Ababa), LL.M (Addis Ababa), is currently an LL.D candidate in the Public Law Department at the University of Pretoria. His research interests are human rights and international law.

Right to Protest: Developments at the Inter-American and UN Systems

By Juana Kweitel | 7th May 2014

On Friday, 28 March 2014, there was a thematic hearing about the repression of social protests in Brazil at the Organization of American States (OAS)'s Inter-American Commission on Human Rights (IACHR), and the UN Human Rights Council (HRC) adopted a resolution on the same issue. The IACHR is a non-political body, whereas the HRC is a political one. However, both processes left the impression that human rights mechanisms need to be reinvented.



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During the hearing, two hundred cases of police abuse, perpetrated since June 2013 in Brazil, were presented to the IACHR in Washington D.C., including cases of aggression, illegal detention, beatings, mutilations and other rights violations at public protests. Brazilian NGOs decided to approach the IACHR because the Brazilian government refused to engage with them on the issue. These organizations also decided to hold a thematic hearing rather than present an individual case to the IACHR because cases take much longer than is acceptable (e.g. the Brazilian NGO, Conectas, submitted a case in 2009, but it still has not received a response).

Representatives of the Brazilian government focused their statements on three points of little relevance to the topic, namely: the existence of a torture prevention mechanism, new rules for police handling of fatalities and the provisions of the Brazilian Constitution that recognize, in theory, the right to protest. Despite the severity of the violations NGOs presented, the IACHR did not push the Brazilian government to give concrete answers directly related to the issues at hand nor to answer all questions asked.

A few minutes after the hearing, the HRC in Geneva voted on the adoption of a resolution on social protests put forth by Switzerland, Costa Rica and Turkey. The resulting text fell short of NGOs' expectations in terms of human rights protections. The resolution made no progress on a number of requests from civil society, such as a ban on state agents' use of lethal weapons during demonstrations. Moreover, the text does not explicitly recognize that an act of violence during a protest does not exempt the state from guaranteeing full respect of the demonstrators' rights. A group of countries led by South Africa and joined by India, China and Russia presented a series of amendments to the resolution that would have further weakened it. These amendments would have permitted, for example, that protests be considered a threat to national security. Thankfully, however, the amendments were not included in the final resolution.

At the moment, the repression of social protests in several countries is resulting in serious human rights violations. A progressive norm coming from the highest international human rights body, the UN Human Rights Council, is desperately needed. But yet again, the results have generated great frustration among civil society.

At the end of the day, several questions remain unanswered: How should we go about making these mechanisms more effective? How do we bring them closer to the people who are going to be affected by their operation? How can we use these mechanisms and, at the same time, be able to criticize them without being perceived as 'against human rights?' What are the main improvements that are needed?

A debate on these issues is desperately needed and should not be postponed. The prevailing feeling is that innovation will come from greater citizen participation, both virtually and physically, to make human rights an issue of major concern for all people, not just for human rights defenders.

Juana Kweitel is Program Director of Conectas Human Rights. She has an LLM in International Human Rights Law from the University of Essex and in Political Science from the University of São Paulo. She is a lawyer with a law degree from the University of Buenos Aires (Argentina).

Egyptian Human Rights Groups Face Difficult Choices After Al-Sisi's Ultimatum

By Heather McRobie | 21st January 2015

A Mubarak-era law stating that human rights groups must register with the government has been utilised by President al-Sisi's administration to encourage compliance with the administration by human rights organisations based in Egypt. Issued with an ultimatum by the government in November 2014 to either re-register or face a crackdown, Egyptian human rights organisations are facing difficult questions about their future under the al-Sisi government.

A Mubarak-era law from 2002 requiring non-governmental organisations to register with the government was invoked by al-Sisi during a public statement in November, which asserted that human rights groups and other civil society groups must re-register with the government or face a potential crackdown on their activities. For their part, Egyptian human rights groups, such as the prominent Egyptian Initiative for Personal Rights, have claimed that the law is 'restrictive' and an attempt by the government to prevent them from being able to undertake their research and advocacy work to their best ability.

On December 21st, 2014, the Egyptian Initiative for Personal Rights, a widely-respected advocacy and research human rights organisation founded in 2002, issued a statement outlining that its board of trustees had voted to register, after the government ultimatum warning that organisations that failed to do so would face prosecution. The statement explained that the organisation has chosen to attempt to continue working under the restrictive law and, according to the Associated Press, 'test what freedom the law allows.'

While the ultimatum deadline passed without arrests, after Egyptian officials claimed that nine foreign human rights organisations and eight Egyptian human rights organisations had opted to submit their applications to register, not all Egyptian human

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rights groups feel able to continue working in Egypt after the ultimatum. The Cairo Institute for Human Rights Studies, another prominent human rights organisation that was crucial in documenting human rights abuses under Mubarak, has opted to move its headquarters to Tunisia, rather than face the potential further scrutiny and hindrance to its work registering might entail.

There are concerns from human rights groups that new restrictions will, in reality, constrain their ability to function effectively, such as the 2014 revision to Article 78 of the penal code that imposes a life sentence on anyone who receives foreign funding with the aim of 'hurting national security,' a nebulous statement reminiscent of the charges against the three Al Jazeera journalists currently in jail in Egypt for the charge of 'threatening national security' through their work as journalists.

The recent ultimatum issued by the Egyptian government towards human rights organisations and other civil society organisations is part of the wider landscape of laws and decrees by the al-Sisi government aimed at restricting and closely monitoring the conduct of human rights organisations. In the summer of 2014, Human Rights Watch released a report, *All According to Plan*, which documented state and army involvement in the Rabaa al-Adawiya Square massacre in which, it estimated, between 800 and 1,100 people were killed on July 14th and July 15th 2013. Members of Human Rights Watch arriving in Egypt in order to present their findings shortly before the publication of the *All According to Plan* report were detained upon arrival for twelve hours and denied entry into Egypt.

Sarah Leah Whitson, the Middle East and North Africa director of Human Rights Watch, has claimed that under al-Sisi's government, it is now 'business as usual,' with Mubarak-era restrictions on human rights organisations revived. The al-Sisi government has been clamping down on both Islamist groups and secular organizations, such as the April 6th Youth Movement, who were crucial in organising the 2011 revolution that overthrew authoritarian President Hosni Mubarak. The 2014 anti-protest law, that curtailed freedom of assembly, was widely criticised by Egyptian human rights groups for impinging on Egyptian's human rights. Yet, as the new restrictive measures against human rights organisations indicate, while human rights may be being corroded under al-Sisi, human rights organisations themselves are also caught in the crossfire.

Heather McRobie is an Editor of the OxHRH Blog. She is a final year DPhil student in Socio-Legal Studies and a member of Wolfson College, University of Oxford.

Repression of Nonviolent Activism in Syria

By Malu Halasa | 9th June 2014

These days, nonviolent activists in Syria find themselves targeted on one side by the Syrian regime, and on the other, by extremist Islamic fronts. Their opposition to narrow interpretations of their country's future – as either a continuing dictatorship or an equally brutal Sharia-state – has given these supposed foes common cause in attacking them.



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On 9 December 2013, masked gunmen entered the office of the Violations Documentation Centre in the Damascus suburb of Douma. They kidnapped renowned Syrian human rights lawyer Razan Zaitouneh, one of the most credible voices of the Syrian revolution. Sought by the regime for her activities, she was forced into hiding. But that did not stop her from working. In a 2012 essay, she describes the process of verifying Syria's dead in *Culture in Defiance*, p. 22: 'Experts of death documentation...do not cry. ...We don't stop wondering whether we, who are documenting death through the screens of our devices, or those...documenting death with their fingers and eyes – will someday return to be "natural" creatures? Or has death already added us to its kingdom at the end?' Following her kidnapping, Syria's death toll rose from 150,000 to 162,000 in less than two months.

Razan's husband Wael Hamida, former political detainee Samira al-Khalil and poet Nazem al-Hamadi were abducted along with Zaitouneh. Initially, it was thought that the gunmen were allied to the regime. However al-Khalil's husband, the Syrian dissident author Yassin al-Haj Saleh identified them as belonging to Jaysh al-Islam (Army of Islam), a Saudi-backed group. Neither Zaitouneh nor her colleagues have been heard from since. Kidnappings by the Islamic fronts of foreign journalists and Syrian media workers are not new. Among many others, the photographer Ziad Homsy was held by ISIS in al-Raqqa for over a month before his release. In Zaitouneh's last video blog before her disappearance, she describes the more than two-year imprisonment and torture in detention of Mazen Darwish, the director of the Syria Centre for Media and Free Expression. In a letter smuggled out of Damascus Central Prison, and using the word 'discipline' as a euphemism, Darwish writes with compassion: 'To the security personnel who carried out the responsibility for disciplining me for ten months, and especially for those who disciplined me in the first days of Eid al-Adha, I feel sorry for all of us.'

Both Darwish and Zaitouneh have been influential in the LCC, an activist-run network of Local Coordinating Committees operating in Syrian towns and cities, which organised Syrian citizen journalists. Since the beginning of the uprising, more than 300,000 films and documentary reports from Syria have been posted over the Internet. But many contributors were dispirited after the 2012 chemical attacks in East Ghouta and Douma failed to budge the international community into action. Their numbers decreased. The journalists, photographers and filmmakers who remain active inside and outside the country continue the work of Zaitouneh and Darwish. As they amass and verify evidence for a war crimes tribunal on Syria, it seems they are guaranteeing themselves future persecution – by both Baathists and Islamists.

Malu Halasa is an editor and writer in London. She is coauthor of "Syria Speaks: Art and Culture from the Frontline" and editor of "Culture in Defiance: Continuing Traditions of Satire, Art and the Struggle for Freedom in Syria."

Constitutional Court of South Africa: Blunting the Impact of Electoral Law on Freedom of Expression

By Andrew Wheelhouse | 24th February 2015

The Constitutional Court of South Africa has undertaken a robust defence of freedom of expression at the time of an election, following litigation between the governing party and the official opposition in *Democratic Alliance v African National Congress and Another* [2015] ZACC 1.



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The case arose out of the scandal surrounding the use of public funds to build 'improvements' around the homestead of President Jacob Zuma in Nkandla, KwaZulu-Natal. A report by the Public Protector (a constitutionally mandated public administration ombudsman) published in March 2014 was highly critical of the expenditure. The next day, with the general election only a few months away, the Democratic Alliance (DA) sent a text message to over 1.5 million voters in Gauteng province, which said:

'The Nkandla report shows how Zuma stole your money to build his R246m [around £15m] home. Vote DA on 7 May to beat corruption. Together for change.'

It was alleged by the African National Congress (ANC) that the DA had published false information with the intention of influencing an election contrary to s.89(2) of the Electoral Act or had published false or defamatory allegations contrary to Item 9(1) of the Electoral Code. The DA argued that the message was fair comment based on a genuinely and honestly held view of the Nkandla Report. The High Court found in favour of the DA, but the Electoral Court ruled for the ANC on the basis that the message was indeed false.

The Constitutional Court found for the DA by a majority of 7-3. The main confrontation concerned whether the allegations constituted fact or comment. Zondo J, writing for the minority, advocated an analysis founded in defamation law. The 'ordinary reasonable man' would understand the text as an allegation of fact that President Zuma has stolen taxpayers' money. This was false, as it was not what the Nkandla Report found.

This approach was unpalatable to the majority, though, for varying reasons. The main judgment rejected the importation of defamation law concepts in favour of a straightforward exercise in statutory interpretation. S.89(2) imposes criminal liability and so should be construed narrowly, especially given the limitations it imposes on freedom of expression (s.16 of the constitution), which are vital to the exercise of political rights (section 19). Accordingly, the provisions only prohibit the assertion of false statements of fact designed to subvert the electoral process (for example, that a particular candidate has died, etc.). They are not designed to criminalise comment, and the text message was clearly comment based on an interpretation of the Nkandla Report.

The joint concurring opinion argued that the fact/comment dichotomy is illusory, and rather, a spectrum exists. The closer the resemblance of a statement to fact rather than opinion, the more intense the court's scrutiny will be. The statutory prohibition is restricted to 'false information' of a factual nature. The text message had attributes of both fact and comment, but the appeal should be allowed because the President's conduct could fit into one of the meanings of the word 'stole.'

Eschewing an analysis based on defamation law was sensible. Electoral law is designed to guarantee that elections are free and fair, not defend the reputations of candidates. The majority correctly found that whatever the intricacies of the fact/comment dichotomy/spectrum debate, the issues had to be resolved in favour of the defendant. All that was sought in this case was a retraction and an apology, but in other cases the result of an election may well hang in the balance. A court should hesitate to overturn or pre-empt the verdict of the electorate for what amounts to sharp practice, rather than an interference with the electoral process.

It is worth reflecting on this as we near the UK General Election in May. Following the 2010 election, the Divisional Court upheld the voiding of the result in Oldham East and Saddleworth in *R(Woolas) v Parliamentary Election Court* [2012] QB 1 under the equivalent English legislation, s.106 of the Representation of the People Act 1983. Phil Woolas' campaign was puerile stuff and his absence from the current parliament was no great loss, but we should be wary of permitting judges to rule on the substantive content of election campaigns.

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

Racial Discrimination Act and Free Speech – Carte Blanche or Fair and Reasonable – Where are Human Rights in all This?

By Liz Curran | 27th February 2015

Professor George Williams has noted 'the fact that freedom of speech receives no general protection in Australian law is not of itself an argument for introducing such protection.' Unlike in the United Kingdom, Canada, the United States and New Zealand, there is no such right at a national level in Australia. There is a limited right to freedom of political communication in the context of voting, which is circumscribed, but acknowledged by the High Court of Australia.

Anyone listening to recent debate and statements by political leaders and right wing commentators in Australia would think that, as in the United States, there is a right to free speech engrained in Australian laws. The Attorney General, George Brandis, has made recent moves to amend the Racial Discrimination Act (the 'RDA') because there is a claim that the current sections 18C and

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D of the RDA, which prohibit offensive behaviour (including speech) based on racial hatred, limit free speech. After public outcry and an overwhelming number of submissions raising concerns about the suggested changes in 2014, the proposed amendments were taken off the table. However, the recent terror attacks in Paris have been used as a vehicle to call for its resurrection by the conservative right.

I have long been an advocate for human rights. This includes free speech, but I, like Professor Williams, believe all human rights need protection, not one right in isolation and to the exclusion of other rights. Williams notes 'It would be preferable to protect the right (of free speech) as part of a more comprehensive scheme of rights protection.' In Victoria and the Australian Capital Territory, both with State and Territory human rights legislation, I have seen this framework open up participatory and more democratic dialogues between decision-makers and community members like never before with a consequent balancing and consideration of people's human rights. This has been especially the case for people I have assisted who have a disability or are in need of critical health services.

It is important to understand the context behind the current moves to reduce the protections against racially motivated hate speech protected by the RDA. Firstly, it is important to note that these provisions in the RDA are a critical measure in Australia in view of the ongoing disadvantage of and discrimination against Indigenous Australians. A recent report demonstrates how this part of the Australian community remains staggeringly disadvantaged in comparison to the non-indigenous population.

The Prime Minister in 2013 undertook to amend the RDA to repeal section 18C, after a controversial media commentator, Andrew Bolt, lost a case in the Federal Court of Australia for a publication in which he referred to 'fair skinned Aboriginal people.' Justice Bromberg found Bolt's articles would have offended a reasonable member of the Aboriginal community, that he had not written them in good faith and that there were factual errors. Mr Bolt railed against the court's finding. Attorney General Brandis, famous for his claim there is 'a right to be a bigot' announced proposals to amend the current section 18C, which makes it an offence to 'offend, insult, humiliate or intimidate' a person.

Under the Brandis proposals, almost any racist speech will be allowed. This is because the exposure Bill includes a wide exemption for comments 'made in the course of participating in the public discussion of any political, social, cultural, religious, artistic, academic or scientific matter.' Professor Simon Rice highlights that '[t]he proposed exception is not limited. It allows race-based conduct in public discussion (by, for example, columnists, bloggers and public officials) that is unreasonable, in bad faith, dishonest, inaccurate or irrational, *even if* it could intimidate or incite hatred. In public discussion, absolutely nothing is prohibited by the proposed law.'

Public outrage at proposed amendments led to a departmental inquiry, which took submissions in 2014. As a result of the overwhelming submissions, the amendment was taken off the table. However, in reaction to the 'Je suis Charlie campaign,' we have again seen the exponents of the amendments use the 'right to free speech in Australia' to clamour for the repeal of section 18C. As noted in an open letter I wrote as Co-Convenor of the Human Rights Working Group to the Prime Minister and the submission to the departmental Inquiry in 2014, 'The insensitivity to the impact of unwarranted racist attacks is troubling. People will hide away, people will cower, people will be afraid. Is this not also a threat to the free speech?'

Dr Liz Curran, Senior Lecturer, Australian National University College of Law.

